



**MATERNITY AND PARENTAL BENEFITS FOR
SELF-EMPLOYED WORKERS IN THE INFORMAL
ECONOMY**

**PROJECT 143:
DISCUSSION PAPER 153**

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INTRODUCTION

The South African Law Reform Commission (the Commission) was established by the South African Law Reform Commission Act 19 of 1973.

The members of the Commission are –

Judge Narandran (Jody) Kollapen (Chairperson)

Mr Irvin Lawrence (Vice-Chairperson)

Professor Mpfariseni Budeli-Nemakonde

Professor Karthigasen Govender

Professor Wesahl Domingo

Advocate Tshepo Sibeko SC

Advocate HJ de Waal SC

Advocate Anthea Platt SC

Advocate Hendrina Magaretha Meintjes SC

The members of the Commission's Advisory Committee for this Project are:

Professor Mpfariseni Budeli-Nemakonde (Chairperson)

Ms Janine Hicks: Academia (Project Leader)

Dr Meryl C du Plessis: Academia

Ms Phumzile Xulu: Self-employment

The Secretary of the SALRC is Mr Nelson Matibe. The SALRC official assigned to this investigation is Mr Linda Mngoma. The Commission's offices are situated at Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Pretoria.

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PREFACE

This Discussion Paper has been prepared to elicit responses and to serve as basis for the South African Law Reform Commission (Commission or SALRC)'s further deliberations. It contains the Commission's preliminary recommendations. The views, conclusions and recommendations which follow should not be regarded as the Commission's final views.

The Discussion Paper, which includes draft legislation, is published in full so as to provide all the stakeholders and members of the public wishing to comment with sufficient background information to enable them to place submissions before the Commission. A summary of the preliminary recommendations and questions for comment appear on pages xvi to xlviii. The proposed draft legislation, that is, Social Assistance, Employment and Labour Laws General Amendment Bill, is contained on page xlv of this Discussion Paper.

The Discussion Paper is the second document published during the course of this investigation. The Discussion Paper has taken into account the public response to the Research Proposal Paper (which assumes the status of an Issue Paper) which was published for general informal and comment on 6 June 2017. The closing date for submission of comments and input to the SALRC was 29 September 2017.

At its meeting held on 22 August 2017, the Advisory Committee for Project 143 noted that the Research Proposal Paper did not contain any draft definitions and resolved to develop a supplementary paper, called Briefing Document, which contains a set of operational definitions. The supplementary Briefing Document was published for public comment on 23 November 2017. The closing date for comment was 30 March 2018.

Public comments received as at 30 March 2018 in response to the Research Proposal Paper have been incorporated into this Discussion Paper. The list of respondents to the Research Proposal Paper is contained in Annexure A of this Discussion Paper.

The investigation is divided into two components or phases. The first phase aimed to determine the following:

- (a) Who should be included in the definition of “self-employed worker” (target group) in the informal sector of the economy? and
- (b) What is the nature and extent of the benefit, that is, state maternity and parental benefits that could be offered to self-employed workers in the informal sector of the economy?

The Research Proposal Paper outlined the terms of reference for two studies that the Commission had intended to farm out to independent research organisations subject to availability of funds and approval by the Director-General: Department of Justice and Constitutional Developments. These studies are:

- a) **Legal research study**; and
- b) **Social needs** (demographic and sociological) **study**

The objective of the **legal research study** is:

- a) To consider South Africa’s legal obligations to expand its current maternity and parental benefits regime to ensure compliance with relevant provisions within the South African Constitution, and in regional and international conventions ratified by South Africa and develop recommendations in relation to necessary legal reform.
- b) To assess the legal implications of South Africa’s possible ratification of ILO Maternity Protection Convention 183 and necessary law reform measures required for its full implementation.
- c) To consider from a comparative perspective, international best practice in the forms of provision of maternity and parental benefits to self-employed workers, particularly those within the informal economy.

The objective of the **social needs study** is-

- a) To define the target group for whom parental protection should be extended; and
- b) Define the content and nature of parental protection interventions to be implemented.

In July 2017, the Commission submitted a proposal to National Treasury through the DOJCD Chief Financial Officer for funding through the European Union General Budget Support (GBS) to cover the costs of commissioning the abovementioned two studies to independent research organizations. The Commission requested funding for a multi-term period covering the financial years 2018/2019 right through to 2020/2021. On 30 March 2018, in response to the invitation for research proposals, the Human Sciences Research Council (HSRC) submitted a proposal for the social needs study for consideration by the Commission. Since the Commission's application for funding to National Treasury was unsuccessful, no funding was available in the SALRC budget to undertake at least the social needs study.

On 3 May 2018, National Treasury again made a call to all national government departments to submit proposals that are aligned to government priorities for funding under the GBS component of the European Union funded National Development Policy Support Programme. The Commission again took the opportunity to submit an application for funding for the social needs study. This application was again not successful.

On 31 May 2018, the Commission submitted a memorandum to the Director-General: DOJCD for approval of a letter addressed to the World Bank Country Director requesting for non-lending technical assistance or financial assistance in respect of the social needs study. The letter to the World Bank was approved by the DG: DOJCD on 12 June 2018. Likewise, this application to the World Bank also did not materialize.

Attempts were made by the Advisory Committee and HSRC to split the R23 million composite budget in the HSRC's written proposal for the social needs study into three small parcels, that is, (1) social attitudes survey, (2) qualitative and (3) quantitative components, with a view to match each such small component with the interest of potential donors. However, these attempts could not bear any fruit.

On 1 December 2017, the NEDLAC National Task Team (NTT) took a resolution to integrate the work of the Commission on maternity and parental benefits for workers in the informal economy in its R204 process following a briefing made by Mr Mngoma and Ms Janine Hicks at the R204 meeting held on 1 December 2017 in Durban. The NTT resolved that Mr Mngoma should henceforth be a member of and attend the NTT meetings.

On 7 December 2017, the Advisory Committee endorsed the R204 NTT's decision to integrate the work of the Commission in the R204 process. The Advisory Committee also resolved to forward the name of Ms Janine Hicks to serve in the Legal Sub-Committee of the NTT. On 19 January 2018, the NTT approved of the inclusion of Ms Janine Hicks to serve in the NTT's Legal Sub-Committee.

On 26-28 March 2018, the Advisory Committee members took part at the National Dialogue on the transition from the informal to the formal economy held in Durban hosted by the Department of Employment and Labour (DEL) in conjunction with DEL's social partners. To date, the Advisory Committee has undertaken a broad range of consultations, with the following stakeholders:

- (a) Government departments responsible for implementation of related social security services have been drawn into the project and representatives of the following departments formally appointed to serve on the Advisory Committee as ad hoc members: Department of Social Development; Department of Health; DEL; Commission for Gender Equality and Department of Small Business Development. The intention behind this particular engagement was to ensure the development of a comprehensive and coherent strategic approach to social security in relation to childbirth and care. Further consultations will be undertaken with the Department of Cooperative Governance and Traditional Affairs, and the South African Local Government Association, as key stakeholders in the implementation of municipal informal economy policy and integrated development plans.
- (b) The International Labour Organization representative office in South Africa has been consulted to lend expertise and necessary resources to the research and policy formulation process. On 30 May 2018, the Advisory Committee met with ILO (Pretoria Office) at the behest of the DEL to request their assistance with undertaking a gap analysis on the Maternity Convention 183.
- (c) Representative structures of informal economy networks and stakeholders have been engaged in a workshop process, on the principle research questions confronting this project, and to strategize around further consultative workshops directly with potential beneficiaries. These workshops took place in Durban, on 6-7 December 2017, and Pretoria (LGBTI National Task Team) on 15 March 2018 in Pretoria.

As outlined in the Research Proposal Paper and Briefing Document, two distinct research components are required to inform the work of the Advisory Committee: a desktop legal study into relevant country obligations, relevant legal frameworks and international best practice to identify potential legal models; and a social needs study, to address sociological and statistical research components.

The Advisory Committee has engaged with social partners to assist in undertaking the envisaged desk top legal study into the following components, to generate submissions for the Committee's consideration, namely:

- (a) South Africa's obligations in relation to maternity and parental benefits, as informed by the Constitution, and relevant international conventions, particularly CEDAW, Beijing, ICESCR, UN Convention on the Rights of the Child, and ILO R204, and the consequential law reform that would need to be implemented to the relevant slate of labour legislation to give effect to same. The Legal Resource Centre ("LRC"), led by the Executive Director, Ms Sharita Samuel, undertook on a *pro bono* basis to prepare a submission for consideration by the Advisory Committee on this aspect. This submission was received and presented by Ms Samuel at an Advisory Committee meeting held on 28 January 2019.¹
- (b) The implications of South Africa's ratification of International Labour Organisation ("ILO") Convention No.183, and amendments that would be required to be effected to relevant labour legislation to give effect to same. Initially, this component was to be undertaken by the ILO South African country office, at the behest of the DEL. The gap analysis was subsequently done by the Advisory Committee.
- (c) Comparative legal studies on international and continental best practice in relation to the provision of maternity and parental benefits to self-employed workers in the informal economy, and legal systems implemented to this end. This study was undertaken by the Advisory Committee with assistance from Women in Informal Employment, Globalising and Organising (WIEGO), Dr Pamhidzai Bamu, and a research assistant at the University of KwaZulu-Natal, Ms Didem Demir.

¹ LRC "Maternity and Paternity Benefits for Self-Employed Workers in South Africa: A Survey of Relevant Law" (January 2019).

The Commission will consider responses to the Discussion Paper with a view to compiling a report which will contain the Commission's final recommendations, and draft legislation, if necessary. The report, with draft legislation if necessary, will be submitted to the Minister of Justice and Correctional Services for his consideration.

Respondents are requested to submit written comments, input, or representations to the Commission by **Not Later Than 29 October 2021** at the address appearing on the previous page. Comments can be sent by post or fax, but comments sent by e-mail in electronic format are preferable. This Discussion Paper is available on the Internet at <http://salawreform.justice.gov.za.www.doj.gov.za/salrc/index.htm>.

The Commission will assume that respondents agree to the Commission quoting from or referring to their comments, and to attributing comments to them, unless representations are marked "confidential". Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act, 2000 (Act No.2 of 2000).

Any request for information and administrative enquiries should be addressed for the attention of the Secretary of the Commission or the allocated researcher, Mr L. Mngoma. Contact particulars appear on the previous page.

ABBREVIATIONS AND ACRONYMS

Domestic legislation and international instruments	
ACHPR	African Charter on Human and Peoples' Rights
BCEA	Basic Conditions of Employment Act, 1997
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
COIDA	Compensation for Occupational Injuries and Deases Act, 1997
Constitution	Constitution of the Republic of South Africa, 1996
CRPD	Convention on the Rights of Persons with Disabilities
EEA	Employment Equity Act, 1998
ICESCR	International Covenant on Economic, Social and Cultural Rights
LRA	Labour Relations Act, 1995
OHS Act	Occupational Health and Safety Act, 1993
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 2000
R204	Recommendation 204 Concerning the Transition from the Informal to Formal Economy
SDA	Skills Development Act, 1998
UDHR	Universal Declaration of Human Rights
UIA	Unemployment Insurance Act, 2001

Other abbreviations and acronyms	
AC	Advisory Committee for Project 143
ANC	Antenatal care
ASEAN	Association of Southeast Asian Nations
AU	African Union
BIG	Basic Income Grant
CBHI	Community-Based Insurance Scheme
CCT	Conditional Cash Transfer
CESCR	Committee on Economic, Social and Cultural Rights

CHP	The Centre for Health Policy
CMS	Council for Medical Schemes
COSATU	Congress of South African Trade Unions
CSG	Child Support Grant
DEL	Department of Employment and Labour
DOH	Department of Health
DOW	Department of Women
DPME	Department of Planning, Monitoring and Evaluation
DSD	Department of Social Development
DSF	Demand-side Financing
ECD	Early Childhood Development
EU	European Union
HIV	Human Immunodeficiency Virus
ICPD	International Conference on Population and Development
IDB	Inter-American Development Bank
IDTT	Inter-departmental Task Team on Social Security and Retirement Reform
ILO	International Labour Organization
KZN	KwaZulu-Natal
LRC	Legal Resources Centre
MDG	Millennium Development Goals
NDP	National Development Plan
NEDLAC	National Economic Development and Labour Council
NIECDP	National Integrated Early Childhood Development Policy
NHI	National Health Insurance
NSSF	National Social Security Fund
OECD	Organization for Economic Co-operation and Development
PDG	Post Delivery Grant
PG	Pregnancy Grant
PMG	Parliamentary Monitoring Group
PNC	Postnatal care
R204 NTT	R204 National Task Team

SADC	Southern African Development Community
SAGE	South African Guild of Editors
SALRC	South African Law Reform Commission
SASSA	South African Social Security Agency
SDG	Sustainable Development Goals
SME	Small and Medium Enterprises
SCIS	Southern Centre for Inequality Studies
SPIREWORK	Social Protection Plan for the Informal Economy and Rural Workers
SRD	Social Relief of Distress
STATS SA	Statistics South Africa
SSF	Supply-side Financing
UHC	Universal Health Coverage
UIF	Unemployment Insurance Fund
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
WIEGO	Women in Informal Employment, Globalising and Organising
WLC	Women's Legal Centre

EXECUTIVE SUMMARY

A. Introduction

1. A gap currently exists in the State's social protection system, in that self-employed workers in the informal economy are excluded from receiving maternity and parental benefits when the mother enters confinement. This situation exacerbates the socioeconomic problems of poverty and inequality between women and men in South Africa, prevents women's full economic participation, and impacts on their reproductive choices. The purpose of this SALRC investigation is to investigate shortcomings in the current maternity and parental protection mechanisms, how this gap should be addressed, and by whom, in order to give effect to South Africa's obligations in terms of the Constitution, and applicable regional and international gender equality conventions.

2. Gender equality, women empowerment and the elimination of all forms of discrimination against women is a constitutional imperative. The Bill of Rights ensures the foundation for a non-racist, non-sexist and human rights-based society where equality, gender, sex, sexual orientation, class, and social security, among others, are primary considerations. The Bill of Rights guarantees the following rights and freedoms:

- (a) Right to equality (section 9);
- (b) Right to human dignity (section 10);
- (c) Right to life (section 11);
- (d) Freedom and security of the person (section 12);
- (e) Freedom of trade, occupation and profession (22);
- (f) Right to labour relations (section 23);
- (g) Right to an environment that is not harmful to one's health (section 24);
- (h) Right to health care, food, water and social security (section 27); and
- (i) Children's right to family, parental or alternative care; to basic nutrition, shelter, basic health care services and social services (section 28).

3. The above-mentioned sections of the Constitution detail the right of everyone to equal protection under the law and the States' obligation not to unfairly discriminate directly or indirectly against anyone on any of the grounds including sex, gender, pregnancy, or employment status. When read together with the directives of section 39 of the Constitution (interpretation of the Bill of Rights) and the Constitutional Court decision in the *Grootboom* case, among others, these provisions allow for, if not compel, the extension and implementation by government of a robust maternity and parental benefit scheme in South Africa to workers in the informal economy. A case is made on the basis of the analysis of Constitutional provisions, supplemented by relevant case law, that by failing to extend maternity benefits and protections to all categories of workers, the State is indirectly permitting unfair discrimination through its employment legislation, against specific categories of workers.

4. The Constitution is guided by a wide range of international, continental and regional human rights instruments to which South Africa is a signatory. The Republic of South Africa has signed and ratified a number of protocols and conventions which compel the Republic to provide State maternity and parental benefits to all workers regardless of their employment status. International instruments that have been approved and ratified by Parliament are legally binding on the Republic in terms of section 231(2) of the Constitution. The international, continental and regional human rights instruments that allow for the extension of State maternity and parental benefits to workers in the informal sector are the following:

- (a) Maternity Protection Convention, 2000 (No.183) (articles 6(5) and 6(6) [Not ratified by South Africa];
- (b) Recommendation Concerning the Transition from the informal to Formal Economy (No.204) (article 18);
- (c) Social Protection Floors Recommendation, 2012 (No.202) (article 5(a));
- (d) Convention on the Elimination of All Forms of Discrimination Against Women (article 12);
- (e) Universal Declaration of Human Rights (article 25);
- (f) International Covenant on Economic, Social, and Cultural Rights (articles 9 and 12);
- (g) Convention on the Rights of Persons with Disabilities (article 25);
- (h) African Charter on the Rights and Welfare of the Child (article 14);

- (i) Protocol to the African Charter on Human and People's Rights and the Rights of Women in Africa (Maputo Protocol) (article 14);
- (j) Charter of Fundamental Social Rights in the SADC (article 10);
- (k) SADC Protocol on Gender and Development (article 19).

5. In *Mahlangu and Another v Minister of Labour and Others*,² the Constitutional Court held that “when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism.” The court held that the State’s obligation under section 27(2) of the Constitution “to take reasonable legislative and other measures, within available resources, includes the obligation to extend COIDA to domestic workers.”³ Failure to do so is “a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution.”⁴ By implication, the court also held that “the international instruments alluded to above certainly demand that the type of benefits provided by COIDA (employment legislation) be considered a component of the right to social security”⁵ and therefore be extended to the category of workers who are currently excluded from the protection provided by the law.⁶ This judgement has significant implications for the state’s failure to extend maternity benefits to vulnerable workers currently excluded from the existing social security regime.

6. The subject of extending social protection cover to vulnerable workers in the informal and rural sectors of the economy has increasingly been gaining traction in many countries of the world as an effective mechanism to fight poverty, unemployment, inequality and illnesses. It has featured in policy debates, development plans and strategies of government and non-government organizations alike.

² 2020 ZACC 306/19.

³ *Ibid*, 66.

⁴ *Idem*.

⁵ *Ibid*, 58.

⁶ The international instruments alluded to by the Constitutional Court are the following: CEDAW; ICESCR; the Convention on the Elimination of All Forms of Racial Discrimination; Convention on Domestic Workers; African Charter on Human and Peoples’ Rights; and the Maputo Protocol.

7. A significant number of female self-employed and own-account workers in the informal economy are not eligible for social insurance (maternity and paternity cash benefits) because of the eligibility requirements that are tied to the formal employment status. In terms of the comparative study of best practices in the provision of maternity and parental benefits to workers in the informal economy, it is apparent that a total of 74.2% of women in wage employment in Sub-Saharan Africa, and 63.2% in Southern Asia are concentrated in informal employment and are currently not contributing to social protection.⁷

8. Women are indirectly eligible for child related social assistance “in their role as mothers and are often designated recipients of the cash transfer. Child grants, and particularly conditional cash transfers, have been criticized for not acknowledging the role of women as workers but rather reinforcing their gendered care responsibilities.”⁸ Article 4 of the Maternity Protection Recommendation, 2000 (No.191) explicitly states that the financing of maternity benefits should be made without any distinction on the grounds of sex or gender.

9. Other barriers to accessing social protection by informal sector workers include low-and unstable-income streams (low contributory capacity); lack of knowledge and awareness of the perceived value of maternity and parental benefits; administrative procedures; and socio-cultural norms and values.

10. Failure to register for maternity benefit schemes owing to lack of funds to pay the premiums is the biggest barrier affecting female informal sector workers’ access to social security, yet they are most likely to have the highest medical expenditure. In Uganda and Tanzania, the inability to pay premiums was found to be the major factor contributing to the low uptake of community health insurance schemes.⁹

⁷ Ulrichs M, *et al*, “Informality, women and social protection: identifying barriers to provide effective coverage” (April 2016) 16.

⁸ *Idem*.

⁹ *Ibid*, 21.

11. Most of the national maternity and early childhood support programmes in the selected jurisdictions in Annexure B of this Discussion Paper are grounded in legislation. For instance, the maternity allowance for self-employed women in United Kingdom is provided for in the Maternity and Parental Leave Law and Regulations. Likewise, the Swedish flexible parental leave system is provided for in the Försäkringskassan's rules and regulations. Brazil's Bolsa Família programme was established in 2003 by Provisional Measure 132 and converted into law in 2004. New Zealand's parental leave for self-employed persons is provided for in the Parental Leave and Employment Protection Act 1987. Section 71CB of the Act defines eligible self-employed person to mean-

“a self-employed person who is (a) the primary carer in respect of a child, and (b) meets the parental leave payment threshold test.”

13. In Namibia, the Social Security Commission established in terms of section 3(1) of the Social Security Act, 1994 (Act 34 of 1994) administers two social security schemes. These are the Maternity, Sick Leave and Death Benefit Fund (MSD) and the Employees Compensation Fund (ECF).¹⁰

Section 21 of the Social Security Act, 1994 (Namibia) provides that-

“(5) A self-employed person registered as an employee in terms of section 20 shall pay both the contributions payable by an employer and an employee as contemplated in subsection (2).”

14. It is not compulsory in Namibia for self-employed workers, like domestic employees, as well as employees of small medium enterprises, like shebeens, hair salons, panel beaters, construction workers etcetera, to affiliate to the Maternity, Sick Leave and Death Benefit Fund (MSD). Self-employed workers choose to register themselves with the MSD on a voluntary basis.¹¹ Employees and employers contribute an equal amount of 0.9% of the employee's basic wage, which amount to a total of 1.8% of the employee's basic wage.

¹⁰ Friedrich Ebert Stiftung “Social Protection in Namibia: A Civil Society Perspective” (September 2016) 20.

¹¹ Information from the Maternity Sick and Death Benefit Fund available at <http://namhr.com/pdf/Article-What-are-the-benefits-of-the-SSC-Maternity-Sick-and-Death-Benefit-Fund.pdf> (accessed on 8 September 2020).

The minimum amount of contribution is N\$ 2.70 regardless of the employee's income. Self-employed workers have to bear the full amount of the contribution. According to information available from the MSD-

"There is a six-month waiting period for newly registered members. As from 1 April 2009, maternity leave benefits to female members will equal 100% of basic wage up to a ceiling of N\$7000.00 for a maximum period of 12 weeks (3 months), with a minimum of N\$300.00 per month and maximum of N\$7000.00 per month. Birth certificates or death certificates, if the child was still-born or has died within two weeks, must be submitted within 7 days after actual date of confinement on the prescribed Form 14."

15. Registered members of the MSD are issued with social security cards. Claims for maternity leave cash benefit must be submitted on Form 14 to the MSD seven days prior to the expected date of birth of the child and eight weeks after birth of the child.

16. In India, the Unorganised Workers' Social Security Act, 2008 (India) makes provision for the establishment of a National Social Security Board for the unorganized sector workers.¹² Section 6 of the Act also empowers every state government to establish a State Social Security Board for the same workers. Section 2 of the Act defines a "self-employed worker" to mean

"any person who is not employed by an employer, but engages himself or herself in any occupation in the unorganized sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government from time to time or holds cultivable land subject to such ceiling as may be notified by the State Government."

17. Section 10 of the Act makes provision for the registration of unorganized sector workers and for their issuing with identity cards. Subsections (4) and (5) provides as follows:

- "(4) If a scheme requires a registered unorganized worker to make a contribution, he or she shall be eligible for social security benefits under the scheme only upon payment of such contribution.
- (5) Where a scheme requires the Central or State Government to make a contribution, the Central or State Government, as the case may be, shall make the contribution regularly in terms of the scheme."

¹² Section 5 of the Unorganised Workers' Social Security Act, 2008 (India).

B. Recommendations

18. The objective of this investigation is to determine the following:

- (a) Who should be included in the definition of “self-employed worker” in the informal economy? In other words, who should be the target group for whom parental protection should be extended? and
- (b) What is the nature and extent of the state maternity and parental benefits that could be offered to self-employed workers in the informal sector of the economy?

1 Who should be included in the definition of “self-employed worker” in the informal economy?

19. The Quarterly Labour Force Survey released by Statistics SA from time to time identifies 10 industries, sectors or subsectors that are found in the informal economy. Based upon these industries, sectors or subsectors identified by Statistics SA, a non-exhaustive list of trading activities, occupations and professions in the informal economy have been identified as follows:

[THIS IS NOT AN EXHAUSTIVE LIST OF ALL THE TRADES, OCCUPATIONS AND PROFESSIONS FOUND IN THE INFORMAL ECONOMY]

	Industry, sector, subsector	Trade, occupation or profession
1.	Agriculture, hunting, forestry and fishing	<ul style="list-style-type: none"> • Farm worker • Subsistence farmer • Livestock trader/ small scale farmer • Fisher
2.	Mining and Quarrying	
3.	Manufacturing	

- | | | |
|----|---------------------------------------|---|
| 4. | Electricity, Gas and Water | <ul style="list-style-type: none"> • Electrician • Plumber |
| 5. | Construction | <ul style="list-style-type: none"> • Builder • Carpenter |
| 6. | Wholesale and retail Trade | <ul style="list-style-type: none"> • Panel beater • Tuck shop operator • Restaurant / food outlets • Street or kerbside trader • Beach trader • Trader at Events • Pedestrian mall trader • Seasonal trader (seasonal/ once-off/ short term trader) • Road intersection trader (as permitted in terms of Regulation 322 of the National Road Traffic Regulations, 2000) • Public market trader (flea and craft markets) • Trader in public open spaces (including parks, cemeteries, etc.) • Mobile (vehicle-based) trader (fish, ice-cream, prepared food, soft drink, fruit and vegetables or other agricultural produce) |
| 7. | Transport, Storage and Communications | <ul style="list-style-type: none"> • Payphones operator • Taxi driver • Waste picker • Photographer • Tour guide • Car guide |

8. Financial intermediation,
insurance, real estate
and business services

9. Community, social and
personal services
including creative arts¹³
 - Freelance performer,¹⁴
 - Musician
 - Painter
 - Sculptor
 - Hairdressing and hair cut
 - Grass cutter
 - Car wash
 - Shoes and shoe repairer
 - Sewer
 - Traditional wear, décor and beadwork
 - Community health care worker
 - Informal child-care worker
 - Traditional medicine

10. Private households
 - Home renovator
 - Home-based vendor
 - Tuck shop operator

20. According to the Solidarity Centre, workers who on paper appear to be self-employed but in reality work under the control and supervision of their employers are vulnerable to exclusion from maternity protection.¹⁵ The Centre proposes that the definition of a “self-

¹³ WIEGO submits that creative arts make up a huge category of self-employed workers, input from Rachel Moussié following workshop held on 17 May 2021.

¹⁴ In its submission to the SALRC, the South African Guild of Actors states that Freelance workers are contracted from time to time to delivering their performance/ services at various locations, studios, theaters or corporate venues. Freelance workers are currently excluded from the mainstream economy as they are not employees and are self-employed. Due to this act, Freelancers cannot access any social benefits including maternity and paternity benefits and UIF.

¹⁵ The Solidarity Centre “Maternity Protection for Self-Employed Workers” (September 2016) 15.

employed worker,” which includes own account as well as wage workers, be integrated into the definition of “employee” in all the relevant provisions of employment and labour legislation.

21. **Recommendation 1:** It is recommended that a definition of “self-employed worker,” which includes own account as well as wage workers, be integrated into the definition of “employee” in the relevant provisions of the Unemployment Insurance Act, 2001 (Act No.63 of 2001); the Unemployment Insurance Contributions Act, 2002 (Act No.4 of 2002); and the Basic Conditions of Employment Act, 1997 (Act No.75 of 1997), as follows:

(a) Unemployment Insurance Act, 2001

22. That the Unemployment Insurance Act, 2001 (Act No.63 of 2001) be amended as follows:

- (a) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of Parts D (maternity benefits); DA (parental benefits); E (adoption benefits) and EA (commissioning parental benefits) of this Act, any natural person who receives remuneration or to whom any remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes any independent contractor]** including a self-employed worker.”

- (b) by the insertion after the definition of “remuneration” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

(c) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, save for **[other than]** employees employed for less than 24 hours a month with a particular employer **[, and their employers]**.”

(b) Unemployment Insurance Contributions Act, 2002

23. That the Unemployment Insurance Contributions Act, 2002 (Act No.4 of 2002) be amended as follows:

(a) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of this Act any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes an independent contractor]** including a self-employed worker;”

(b) by the insertion after the definition of “Tax Administration Act” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

(c) by the substitution for section 4(1) of the following section 4(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, other than-...”

(c) Basic Conditions of Employment Act, 1997

24. That the Basic Conditions of Employment Act, (Act 75 of 1997) be amended as follows:

- (a) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of sections 25 (maternity leave); 25A (parental leave); 25B (adoption leave); and 25C (commissioning parental leave) of this Act any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes any independent contractor]** including a self-employed worker;”

- (b) by the insertion after the definition of “sectoral determination” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

- (c) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employees, **[and]** employers, and self-employed workers, except-...”

2. What is the nature and extent of the State maternity and parental benefits that could be offered to self-employed workers in the informal economy?

(a) Maternity cash benefit for self-employed workers

25. WIEGO argues that the Commission needs to “recognise that (a) some informal workers are wage workers (that is, not self-employed), and (b) some informal self-employed workers employ others as wage workers. We recognise that informal wage workers do not benefit from maternity protection even though legal provisions exist. This is because their employers do not make contributions to the UIF.”¹⁶ Informal wage workers are indeed included in the ILO’s definition of “informal economy” in the sense that they are “not covered or are insufficiently covered by formal arrangements” and are thus included in the scope of this investigation.

26. The Women’s Legal Centre states that the majority of countries who have ratified the Maternity Protection Convention, 2000 (No.183) provide both cash benefit incentives as well as maternity leave which allows for an absence from work while earning a salary. We would submit that because South Africa’s current framework recognizes both benefits that this be extended so as to avoid extending current discriminatory practices into a new framework.

27. The current social insurance programme in South Africa covers wage and salaried workers in formal work arrangements, domestic and farm workers. The contribution to the scheme is compulsory in order to access the benefits. The Unemployment Insurance Act, 2001 provides for the payment from the Fund of unemployment benefits to workers and for the payment of illness, adoption, maternity, and dependent’s benefits related to the unemployment of a worker that is contributing to the Fund.

¹⁶ WIEGO “Comments to the SALRC Research Proposal Paper on Maternity and Paternity Benefits” 2.

28. The extension of social insurance coverage could be done on a mandatory or voluntary basis. One of the key social reform initiatives proposed by the IDTT is establishment of a NSSF. The NSSF will be financed from “mandatory” contributions from all workers earning income above a certain specified threshold to be determined by the mechanism.¹⁷ A simplified contribution arrangement for self-employed workers in the informal sector could be established. A number of social insurance branches, like unemployment; illness; maternity; parental; invalidity; workplace injury; death; health care and family responsibilities could all be rationalized and harmonized under the NSSF. The scheme could be run “as a pay-as-you-go defined benefit scheme, with every registered worker” making a contribution to the scheme for the selected defined benefit.¹⁸ The system should be one of complementarity, rather than one or the other, with the means test determining whether workers are in need of additional support.

29. In order to be successful, the proposed mechanism will have to be flexible enough so as to accommodate a number of contingencies pertaining to self-employed workers in the informal sector. The adaptations may include the following:

- (a) Modification of benefits, contributions and operations so as to fit the characteristics of informal sector workers;
- (b) Choice to be provided to beneficiaries whether they want to affiliate to some or all of the social security branches according to their needs and affordability;¹⁹
- (c) Flexible contribution payments to be informed by fluctuations in income or seasonal revenues (for workers in agriculture for example);
- (d) Punitive provisions like disqualifications for failure to make regular contributions or skipping of contributions to be avoided; Limited grace period ahead of stricter labour inspection for self-employed workers to register to the UIF;

¹⁷ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

¹⁸ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

¹⁹ The view expressed at the workshop held on 17 May 2021 is that providing a choice to self-employed workers to pick and choose the social security benefits they would like to contribute to would be problematic as it is likely that men would opt out of contributing to maternity protection. Self-employed workers can contribute to the scheme and benefit from a harmonised and rationalised set of benefits including unemployment; illness; maternity; parental; invalidity; workplace injury; death; health care and family responsibilities under the NSSF.

- (e) Direct representation of self-employed workers at NEDLAC;
- (f) Full subsidisation of self-employed workers if they are earning below the predetermined minimum contribution threshold;
- (g) Minimum and maximum contribution thresholds to be determined by the Minister;
- (h) Minimum and maximum cash benefit levels to be determined by the Minister;
- (i) Self-employed workers to contribute 1% and the State should subsidize the 1% “employer’s” portion, instead of the workers bearing the burden of both contributions;
- (j) Costs of registration to be reduced;²⁰
- (k) Gender equality and non-discrimination to be promoted; and
- (l) Raising awareness to self-employed workers as to why registering to the UIF gives them access to other work-related benefits beyond the maternity benefit. The UIF maternity benefit can act as a top up to the maternity cash transfer that they may also be eligible for from SASSA.

30. **Recommendation 2:** It is recommended that the existing Unemployment Insurance Fund system be extended by the Department of Employment and Labour to self-employed workers in the informal economy, so as to make provision for the extension of maternity and parental benefits outlined in the UIF Act and BCEA to all workers. This will bring informal economy self-employed workers into a social security system as envisaged in section 27(2) of the Constitution. Implementation of the proposed maternity and parental benefits contribution scheme for informal economy self-employed workers will promote fulfilment of the State’s obligation in terms of the international instruments that are binding upon the RSA as discussed in Chapter 5 of this Discussion Paper.

31. The informal economy workers’ contribution scheme must be designed taking into account the following factors:

- (a) that maternity cash benefits equal to the benefits as prescribed under section 12(3)(c) of the Unemployment Insurance Act, 2001 (that is, 66% fixed rate of the

²⁰ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

contributor's earnings as at the date of application, subject to the prescribed maximum income threshold) are extended to informal sector workers so as to avoid extending current discriminatory practices into the legislative framework;

(b) that the proposed maternity benefit scheme includes adaptation of benefits, contributions and operations to suit the characteristics of the intended categories of informal economy workers as follows-

- (i) that choice to be provided to beneficiaries whether they want to affiliate to some or all of the social security branches according to their needs and affordability;²¹
- (ii) that flexible contribution payments to be informed by fluctuations in income or seasonal revenues (for workers in agriculture for example);
- (iii) punitive provisions like disqualifications for failure to make regular contributions or skipping of contributions to be avoided;
- (iv) limited grace period be provided ahead of stricter labour inspection for self-employed workers to register to the UIF;
- (v) direct representation of self-employed workers be provided at NEDLAC;
- (vi) self-employed workers be accorded full subsidisation if they are earning below the predetermined minimum contribution threshold;
- (vii) minimum and maximum contribution thresholds be determined by the Minister;
- (viii) minimum and maximum cash benefit levels be determined by the Minister;
- (ix) self-employed workers to contribute 1% and the State should subsidize the 1% "employer's" portion, instead of the workers bearing the burden of both contributions;
- (x) costs of registration to be reduced;²²
- (xi) gender equality and non-discrimination to be promoted; and

²¹ The view expressed at the workshop held on 17 May 2021 is that providing a choice to self-employed workers to pick and choose the social security benefits they would like to contribute to would be problematic as it is likely that men would opt out of contributing to maternity protection. Self-employed workers can contribute to the scheme and benefit from a harmonised and rationalised set of benefits including unemployment; illness; maternity; parental; invalidity; workplace injury; death; health care and family responsibilities under the NSSF.

²² DPME "Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission" (undated) 19.

- (xii) raising awareness to self-employed workers as to why registering to the UIF gives them access to other work-related benefits beyond the maternity benefit. The UIF maternity benefit can act as a top up to the maternity cash transfer that they may also be eligible for from SASSA.

32. The question whether registration by self-employed workers for the UIF system should be voluntary or mandatory is a crucial issue. The concern is that if the registration is voluntary, self-employed workers can opt out of maternity benefits and this will undermine the solidarity of all workers and shared responsibility for the societal contribution of women's bearing of children. Since section 9(3) of the Constitution prohibits unfair discrimination by the State on any grounds including pregnancy, it follows that the same approach of making registration by employees in the formal economy mandatory will have to be adopted also in the context of self-employed workers in the informal economy.

33. It is to be noted that article 6(2) of Convention No.183 provides that cash benefits "shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living." It is common knowledge that the income of a majority of self-employed workers fluctuates for a number of reasons and therefore may not be the same amount throughout a given period. Equally, in many instances, such income is marginal. Extending the existing mechanism (66% of previous earnings) to self-employed workers may not serve the purpose if the amount of the benefit will not meet the standard set in article 6(2) of the Maternity Convention. In Namibia, maternity leave benefits are set at 100% of the basic wage up to a given ceiling, which is reviewed from time to time by the relevant authority. In some Latin American countries, the replacement amount is 70 % (Mongolia) or 80% (Laos) of the selected reference wage over a given period.

34. The first question is, whether the maternity cash benefit should be set at 100% of the reference wage for self-employed workers, if not for all workers generally. Secondly, in the event that the existing mechanism is lower than the "level which ensures that the woman can maintain herself and her child in proper conditions of health with a suitable standard of living," should the UIF not be obliged to subsidize the shortfall, regardless of the amount of the shortfall? The third question is, whether there should be an established minimum threshold for the maternity benefit? If so, should this threshold be determined nationally by

the Minister of Labour and Employment, or should it be negotiated sectorally by the relevant stakeholders?

35. At the AC virtual workshop held on 17 May 2021, participants were of the view that maternity cash benefits for self-employed workers be pegged at 100% of the reference wage in line with best practice. The cash benefit should be subsidised by the UIF if the reference wage does not allow a woman to maintain herself and her child in proper conditions of health and with a suitable standard of living.²³

36. **Recommendation 3: Alternatively**, it is recommended that maternity cash benefits for self-employed workers be set at 100% of the reference wage. The cash benefit should be subsidised by the UIF if the reference wage does not allow a woman to maintain herself and her child in proper conditions of health and with a suitable standard of living.

(b) Protection of employees before and after birth of a child

37. In *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd*,²⁴ the court noted that “the BCEA fell short of international standards in that Article 6(2) of the International Labour Organization’s Maternity Protection Recommendation states that where there is no suitable, alternative employment, the employee must be placed on paid maternity leave.”²⁵ It is submitted that “legislation should provide that women should be given paid maternity leave where there are no alternative positions as provided for by the International Labour Organization’s Maternity Protection Recommendation.”²⁶ In order to give effect to this proposal, it is recommended that section 26 of the BCEA be amended by the addition of the following subsection 3 as follows:

²³ See article 6(2) of the Maternity Protection Convention, 2000 (No.183).

²⁴ (JS706/14) [2017] ZALCJHB 404.

²⁵ See http://www.schindlers.co.za/2017/manyetsa_vs_newkleinfontein/ (accessed on 6 February 2020).

²⁶ *Idem*.

26. Protection of employees before and after birth of a child

- (1) *No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.*
- (2) *During an employee's pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if -*
 - (a) *the employee is required to perform night work, as defined in section 17 (1) or her work poses a danger to her health or safety or that of her child; and*
 - (b) *it is practicable for the employer to do so.*
- (3) In the event that no suitable, alternative employment may be offered to a pregnant employee who is required to perform night work, as defined in section 17 (1) or her work poses a danger to her health or safety or that of her child, the employer must offer a pregnant employee paid maternity leave for a period of six months after the birth of her child.

(c) Right to dependant's benefit

38. It is to be noted that article 6(2) of Convention No.183 provides that cash benefits "shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living." It is common knowledge that the income of a majority of self-employed workers fluctuates for a number of reasons and therefore may not be the same amount throughout a given period. Equally, in many instances, such income is marginal. Extending the existing mechanism (66% of previous earnings) to self-employed workers may not serve the purpose if the amount of the benefit will not meet the standard set in article 6(2) of the Maternity Convention. In Namibia, maternity leave benefits are set at 100% of the basic wage up to a given ceiling, which is reviewed from time to time by the relevant authority. In some Latin American countries, the replacement amount is 70 % (Mongolia) or 80% (Laos) of the selected reference wage over a given period.

39. The first question is, whether the maternity cash benefit should be set at 100% of the reference wage for self-employed workers, if not for all workers generally. Secondly, in the event that the existing mechanism is lower than the “level which ensures that the woman can maintain herself and her child in proper conditions of health with a suitable standard of living,” should the UIF not be obliged to subsidize the shortfall, regardless of the amount of the shortfall? The third question is, whether there be an established minimum threshold for the maternity benefit? If so, should this threshold be determined nationally by the Minister of Labour and Employment, or should it be negotiated sectorally by the relevant stakeholders?

40. Section 30(3) of the Unemployment Insurance Act, 2001 does not make provision for the devolution of maternity benefits to a surviving spouse or life partner upon the death of a contributor. The only benefit that devolves is the unemployment benefit. It is also recommended that in the event that the surviving spouse or life partner is not the primary caregiver, the benefits must devolve to the primary caregiver.

Recommendation 4: It is recommended that section 30(3) of the UIA be amended as follows:

(3) The benefit payable to the dependant is the unemployment benefit referred to in Part B of this Chapter and the maternity benefit referred to in Part D of this Chapter that would have been payable to the deceased contributor if the contributor had been alive.

(d) Maternity leave benefit for self-employed workers

41. The purpose of maternity leave is “not only to protect the health of the mother and baby before and after birth but also to allow a period for adjustment and bonding.”²⁷

42. According to Field, *et al*, the South African labour legislation fails to clearly recognize the rights of working fathers.²⁸ The authors ask whether the right to equality entrenched in

²⁷ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 33.

²⁸ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 30. This comment was made prior to the enacted of the Labour Laws

section 9 of the Constitution means that either parent “is entitled to claim maternity rights?”²⁹ The view is that “[i]f there is no equality in the provision of parental leave and benefits to fathers then this may constitute unfair discrimination.”³⁰

43. The authors argue that:

*While maternity leave was originally implemented for the physical healing of the mother, demands to increase maternity leave were rationalized on the basis of the importance of the mother and child relationship and childcare during this time. If childcare is a legitimate reason for maternity leave provision then what about leave provision for the father pursuing the same activity? The current exclusion of men from this entitlement establishes a gender division and highlights a failure to acknowledge fathers as dual-carers despite increasingly compelling evidence to the contrary.*³¹

44. **Recommendation 5:** It is recommended that maternity leave benefits equal to the maternity leave benefit as provided for under section 25 of the BCEA, (that is, at least four consecutive months’ maternity leave), which allows for absence from work while earning a salary, be extended to self-employed workers so as to avoid extending current discriminatory practices into the legislative framework.³²

(e) Parental cash benefit for self-employed workers

45. Section 26A of the Basic Conditions of Employment Act, 1997 makes provision for the right of fathers to parental benefits. Section 26A(1) of the Act provides that “a contributor who is the parent of a child is entitled to the parental benefits...if the contributor has been

Amendment Act 10 of 2018. Section 11 of the latter mentioned Act which makes provision for right to parental benefits came into operation on 1 November 2019.

²⁹ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 30.

³⁰ *Ibid*, 32.

³¹ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 35.

³² The AC noted that from a substantive equality perspective, maternity leave cannot be looked at in isolation of the working situation pertaining to self-employed workers. Thus, this benefit will be applicable to a certain category of self-employed workers, such as wage workers, but not others, such as own-account workers. Nonetheless, the recommendation will be couched in broad terms so as to give wide option to the workers to choose whether to make use of the benefit or not.

registered as the father of the child in terms of the Births and Deaths Registration Act, 1992 (Act No.51 of 1992).”

46. **Recommendation 6:** It is recommended that parental cash benefits equal to the parental cash benefits as provided for under section 12(3)(cA) of the Unemployment Insurance Act, 2001 (that is, 66% fixed rate of the contributor’s earnings as at the date of application, subject to the prescribed maximum income threshold) be extended to self-employed workers so as to avoid extending current discriminatory practices into the legislative framework.³³

(f) Parental leave benefit for self-employed workers

47. Sections 25A(1); 25(B)1 and 25(C)1 respectively of the Basic Conditions of Employment Act, 1997 provide that an employee, who is a parent; adoptive parent or a commissioning parent of a child, as the case may be, is entitled to parental leave (that is, 10 consecutive days parental leave); adoption leave (that is, ten consecutive weeks adoption leave) or commissioning parental leave (that is, ten consecutive weeks commissioning parental leave). These are gender-free provisions in the legislation which envisage that either parent will apply for the benefits. These provisions also accommodate parents, adoptive parents and commissioning parents in same-sex relationships.

48. In its submission to the Commission, WIEGO raises the question whether the objective of this investigation (be it primary or secondary objective) is to provide paternity leave on a more equal footing with maternity leave.³⁴ WIEGO recommends that “whatever form of legal reforms to extend protection to the self-employed workers will take, the reforms must be comprehensive enough to ensure that all men (both self-employed and employees) are entitled to “parental” leave.”³⁵

³³ Paragraph cA was added by section 8 of the Labour Laws Amendment Act, 2018 (Act 10 of 2018). The section will come into operation on a date to be fixed by President by notice in the *Gazette*.

³⁴ WIEGO “Comments to the SALRC Research Proposal Paper on Maternity and Paternity Benefits” 3.

³⁵ *Idem*.

49. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 applies to all people except those covered by the Employment Equality Act 55 of 1998. Apart from the biologically determined roles of pregnancy and childbirth, CEDAW recognizes the common responsibility of men and women in the upbringing and development of children. The view that maternity is a right to be enjoyed solely by female employees was held to be misplaced by the Durban Labour Court in the *MIA v State Information Technology* matter.³⁶

50. The court held that this approach ignores the fact the right to maternity leave created in the Basic Conditions of Employment Act in the current circumstances (of same sex union) is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to take into account the best interests of the child.

51. According to the Women's Legal Centre, the nature and extent of the benefit should be based on a clear approach that seeks to address gender discrimination and imbalance within the workforce as well as home life.³⁷ In order to address some of these challenges the Commission's approach should seek to change traditional social attitudes and behaviours by recognizing men's obligation to parenthood activities encouraging a shift towards a model in which men act as active co-parents rather than helpers in care work duties. The Centre cautions against providing men with benefits at the expense of existing benefits for women, and would advocate for a position that men have obligations equal to women and that benefits accruing to men should be based on their positive obligation to equally participate in what is perceived as women's work.³⁸

52. **Recommendation 7:** It is recommended that parental leave benefits equal to the parental leave benefit as provided for under section 25A of the BCEA, (that is, at least ten consecutive days parental leave); adoption leave equal to the adoption leave benefit as provided for under section 25B of the BCEA (that is, ten consecutive weeks adoption leave); and commissioning parental leave equal to the commissioning parental leave benefit as provided for under section 25C of the BCEA (that is, ten consecutive weeks commissioning

³⁶ *MIA v State Information Technology* (D312/2012) [2015] ZALCD.

³⁷ Women's Legal Centre "Submission on Maternity and Paternity Benefits for Self-Employed Workers."

³⁸ *Idem*.

parental leave) be extended to self-employed workers so as to avoid extending current discriminatory practices into the legislative framework.

(g) Extension of CSG (maternity support grant)

53. A maternity support grant is not specifically provided for in the Social Assistance Act, 2004. Hence it is not being implemented. In 2012, the Centre for Health Policy undertook a study on behalf of the DSD to, among others, “investigate the feasibility of expanding either the social assistance programme in cash, or in-kind through nutrition or vouchers for pregnant women, and to design a workable proposal.”³⁹ The study found that of about 1.2 million women who fall pregnant annually in South Africa, half of them are single women who live in female-headed households.⁴⁰ Due to the absence of State maternity benefits, “the earning potential of women in lower socio-economic groups is markedly curtailed.”⁴¹ Gender-based violence which occurs frequently during pregnancy, coupled with a lack of income and reliance on male partners for financial support could threaten the health and safety of the expectant mother and preparations for the birth of the baby.

54. According to the information obtained from Statistics SA, of the total of 1.07 million female workers in the informal sector in 2015, only 6.6% fell pregnant. This figure went down to 6.3% in 2018. The number of teenagers who fell pregnant during the same period was more than double that of adult women. According to the CHP, “evidence suggests that poor pregnant women are at risk of malnutrition, and by extension, their infants are vulnerable to nutritional and developmental deficiencies.”⁴² The CHP recommends the introduction of a maternity and early child support grant, for pregnant women to be implemented by the Department of Social Development on a phased approach basis.

55. A recent study conducted by the Southern Centre for Inequality Studies (SCIS), Wits, estimates the number of women in informal employment who may be eligible for the cash

³⁹ Centre for Health Policy, University of Witwatersrand “Investigating the Potential Impact of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 6.

⁴⁰ *Idem*. See also Mokomane Z “Work-family conflict and gender equality in South Africa” (September –October 2009) Human Sciences Research Council 9.

⁴¹ *Idem*.

⁴² The Centre for Health Policy “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 3.

transfer to be 96 234.⁴³ This study, which estimates the cost, health and economic benefits of a cash transfer program aimed at increasing breastfeeding among women in informal employment, found that if the cash transfer were pegged at R1 854 per month, it would cost government a total of R713, 671 344 million over 4 months (corresponding to the duration of legally mandated maternity leave in South Africa) and R1 070 507 016 billion over six months (the period of exclusive breastfeeding recommended by the World Health Organization) to implement the program, excluding the cost of administering the program.⁴⁴ The study concludes by asserting that “maternal and child health would be significantly improved by the introduction of a cash transfer. The economic benefits would be net-positive.”⁴⁵

56. The ILO points out that to achieve universal coverage in maternity protection will require a combination of contributory and non-contributory mechanisms, for instance, in the form of social insurance and social assistance. It advises that:

“An effective coordination of these mechanisms within the social protection system is essential to guarantee at least a basic level of income security for women workers in case of maternity, and to facilitate their access to maternal and child health care. These elements are key to building a social protection floor for all as part of each country’s national social security system and comprehensive continuum of care policies, and to contribute to the broader objectives of promoting the health and well-being of mothers and their children, to achieve gender equality at work and to advance decent work for both women and men.”⁴⁶

57. Non-contributory social assistance would be applicable in instances where workers do not meet the requirements to qualify for contributory social insurance cash benefits. Such self-employed workers would then be entitled to receive adequate benefits to replace their income and maintain their and their child’s health and a suitable standard of living, as stipulated in Convention 183.⁴⁷

⁴³ Espi G, *et al*, “Assessment of the viability of a cash transfer to support exclusive breastfeeding in the informal economy” 3 (2019).

⁴⁴ *Ibid*, 15.

⁴⁵ *Ibid*, 29.

⁴⁶ ILO “Maternity cash benefits for workers in the informal economy” 8.

⁴⁷ Articles 6(1) and (2) of ILO Convention 183.

58. The proposal to extend the CSG so as to introduce a maternity support grant raises a number of questions. The Commission invites comment and input on the following questions relating to the proposal for the extension of the CSG:

- **Cost implications for the proposed maternity support grant**

1. If approved, implementation of the proposed maternity support grant will require a corresponding increase in the budget allocation to SASSA. The question is whether the proposed maternity support grant will be affordable for government to implement?⁴⁸

- **Verification of pregnancy**

2. What would constitute valid proof of pregnancy?
3. In what format must such proof of pregnancy be presented?
4. What form of proof of pregnancy or ANC visits would cause the least administrative burden on the health sector and on SASSA?
5. Does the healthcare sector have standardized and effective records of antenatal visits?

- **Timing of support**

6. If a woman discovers that she is pregnant after the first trimester, will she qualify only for the remaining two trimesters?
7. How often must the maternity and early child support grant (or pregnancy grant (PG) be provided? Should it be monthly or per trimester?

⁴⁸ WIEGO is of the view that it will be cost-effective to link the proposed maternity and early child support to the existing CSG rather than creating another administrative structure that requires means-testing. The challenge will be in identifying women who are not yet benefiting from the CSG or are benefiting from the PG during maternity but are then not the primary caregivers under the CSG once the mother returns to work, workshop held on 17 May 2021.

- **Value of support**

8. Must the PG be designed as a standalone support, or an extension of the existing CSG?
9. Who should be the intended beneficiary of the proposed maternity and early child support?⁴⁹
10. Should the maternity cash benefit not be set at 100% of the reference wage for self-employed workers, if not for all workers generally?
11. In the event that the existing mechanism (66% of previous earnings) is lower than the level which ensures that the woman can maintain herself and her child in proper conditions of health with a suitable standard of living, should the UIF not be obliged to subsidize the shortfall, regardless of the amount of the shortfall?
12. Should there be an established minimum threshold for the maternity cash benefit? If so, should this threshold be determined nationally by the Minister of Labour and Employment, or should it be negotiated sectorally by the relevant stakeholders?
13. Should all pregnant women in the lower socio-economic groups be targeted for state support in respect of maternity benefits (this will include unemployed women)?⁵⁰
14. Should pregnant women workers in the informal economy only be the target for support?
15. What should the means test be?

⁴⁹ It is proposed that maternity and early child support grant be registered in the name of the pregnant woman, as is currently done with the CSG, where the grant is allocated to the child's primary caregiver.

⁵⁰ At the workshop held on 17 May 2021, WIEGO expressed the view that "maternity benefit should be available to all women, regardless of employment status, that is, unemployed; inactive; or self-employed. This will guarantee greater inclusion of women informal workers who may be harder to identify, such as home-based workers; dependent contractors; contributing family workers and others.

16. Should the means test for the PG be the same as the means test used for the CSG, or must it be different? If so, how?

17. If the intended beneficiaries of the PG are female workers in the informal economy, how will this target group be distinguished from the beneficiaries of the CSG as defined in section 6 read with section 5 of the Social Assistance Act, 2004?

- **Incentivizing health behaviour through support**

18. Should maternity and early child support be linked to ANC and PNC check-ups?
⁵¹ If so,

19. Would this be a fair condition if transport is not readily available or affordable to women who are in lower socioeconomic circumstances or living in remote areas?

20. Should there be a predetermined number of ANC visits attended before support is initiated?

59. There is a need to extend the maternity and parental protection system beyond its current framework so that it can recognize women and men in unpaid care work and women in subsistence wage earning. A scheme where women and men in these categories fall into a category of compulsory coverage under a social security-based scheme that is funded by government must be considered. This type of benefit would recognize women and men in the informal sector.⁵² The legal services of the Department of Social Development is of the view that funding arrangements for maternity and parental programmes is grossly lacking in South Africa and that this avenue should be deliberated and explored further in this investigation.

⁵¹ The view expressed at the workshop held on 17 May 2021 is that “conditionalities based on attendance on ANC appointments should be avoided as this is a barrier to access for many women informal workers who may not have access to these services near their workplaces. Conditionalities also place the onus on women to access services rather than on the State to make services more accessible. It reinforces gendered norms around women bearing the time and costs of childcare on their own, without recognition of their unpaid care work and paid work” email received from Rachel Moussié dated 24 May 2021.

⁵² Women’s Legal Centre “Submission on Maternity and Paternity Benefits for Self-Employed Workers” (26 September 2017) par 32 par 40.

60. The existing CSG could be extended to expectant informal sector women workers who qualify for this grant, instead of creating a new social grant. The extended CSG could be payable to qualifying women six months of their pregnancy, with the grant being registered in the name of the expectant mother. The maternity support will be converted into a CSG after the birth of the child in accordance with section 6(a) of the Social Assistance Act, 2004. This will bring informal sector self-employed women into a social security system as envisaged in section 27(2) of the Constitution.

61. It will be irrational to distinguish between unemployed poor and vulnerable pregnant women from self-employed informal economy women workers who are unable to contribute to social insurance (UIF). At the virtual workshop hosted by the AC on 17 May 2021, experts pointed out that the employment status of the woman is irrelevant. The CSG should be accorded to all eligible poor and vulnerable pregnant women without any discrimination. This concern raised the technical question of whether this recommendation falls outside of the Commission's mandate for Project 143. The experts are of the view that the best interests of the child should prevail and that the administrative burden to disprove eligibility is unnecessary. The AC resolved to split recommendation 7 into two components, that is, the one recommendation limits the proposal to extend the existing CSG to self-employed workers in the informal economy. The alternative recommendation extends the existing CSG to all eligible poor and vulnerable pregnant women including self-employed workers in the informal economy.

62. It will be relatively easy to extend the CSG to incorporate a PG since the Minister for Social Development is empowered by section 12A of the Social Assistance Act to prescribe additional requirements. This section provides as follows:

12A. Additional payments

- (1) *The Minister, with the concurrence of the Minister of Finance, may prescribe an additional payment linked to a social grant.*

- (2) *The Minister may, in prescribing an additional payment, differentiate on the basis of need between beneficiaries of social grants.*⁵³

63. **Recommendation 8:** It is recommended that the existing CSG be extended to all pregnant self-employed workers in the informal economy who fulfil the criteria for child support grant.⁵⁴ The maternity support should be provided for nine months of pregnancy and be registered in the name of the expectant mother.⁵⁵ The maternity support should be converted into a CSG after the birth of the child in accordance with section 6(a) of the Social Assistance Act, 2004.

64. **Recommendation 9:** Alternatively, it is recommended that the existing CSG be extended to all eligible poor and vulnerable pregnant women, including self-employed workers in the informal economy, who fulfil the criteria for child support grant.⁵⁶ The maternity support should be provided for nine months of pregnancy and be registered in the name of the expectant mother. The maternity support should be converted into a CSG after the birth of the child in accordance with section 6(a) of the Social Assistance Act, 2004.

65. Implementation of the proposed maternity support will entail legal implications.⁵⁷ This includes amendment of the Social Assistance Act, 2004. According to the CHP:

“To consider the maternity and early child support as simply an extension of the CSG rather than a new grant minimizes the need for changes to the legal framework for this support. It would also reduce the logistics of administering the grant and would simplify amendments to the Social Assistance Act. While possibly a strategic imperative, registering the grant in the name of the unborn child may not be legally possible. Instead, the grant could be registered in the name of the pregnant woman, as is

⁵³ Section 12A was inserted by section 4 of the Social Assistance Amendment Act, 2020 (Act 16 of 2020). It will come into operation on a date to be fixed by President by Proclamation in the *Gazette*.

⁵⁴ The eligibility criteria for the CSG, that is, section 5 of the Social Assistance Act, 2004) is discussed below.

⁵⁵ The view is that women should qualify across all three trimesters, and be entitled to the benefits in toto. They should get back-pay if they only register in the second or third trimester. Women should be entitled to the CSG even if the child is not subsequently born alive, as they bear particular costs and impact on their availability to work during pregnancy.

⁵⁶ The eligibility criteria for the CSG, that is, section 5 of the Social Assistance Act, 2004) is discussed below.

⁵⁷ CHP *op cit*, 14.

currently done with the CSG, where the grant is allocated to the child's primary caregiver."⁵⁸

66. **Recommendation 10:** To give effect to the Commission's proposal for the extension of the CSG to incorporate maternity support, the Social Assistance Act, 2004 could be amended by the insertion of the following section 6(c), as follows:

6. Child support grant

Subject to section 5,-

- (a) *a person who is the primary care giver of a child; or*
- (b) *a child who heads a child-headed household, as contemplated in section 137 of the Children's Act, 2005 (Act No.38 of 2005), or*
- (c) an expectant woman who complies with the requirements for social assistance as provided for in section 5(1)(a)-(e) of this Act.
is eligible for a child support grant.

67. Implementation of the proposed maternity support grant will promote fulfilment of the State's obligation in terms of the Constitution and international instruments that are binding upon the RSA.

(h) Early Childhood Development Centres

68. In terms of the Constitution, children have the right to family or parental care, or to appropriate alternative care when removed from the family environment.⁵⁹ Target 5.4 of the Sustainable Development Goals calls on all governments to recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies, and the promotion of shared responsibility within the household and the family as nationally appropriate.⁶⁰ Moussiè and Alfes argue that "child care by family members comes with cost and disadvantages for women workers and carers."⁶¹ It is

⁵⁸ *Ibid*, 15.

⁵⁹ Section 28(1)(b) of the Constitution.

⁶⁰ UN "The Sustainable Development Goals" (2015).

⁶¹ Moussiè R and Alfes L "Women informal workers demand childcare: Shifting narratives on women's economic empowerment in Africa" *Agenda* (2018)

evidently clear that female workers in the informal sector need support with child care. In the context of rapid urbanization and paradigm shifts in the traditional African notions of parenthood, the current socio-economic policies exacerbate gender inequalities as women struggle to “balance their unpaid care work with their paid employment.”⁶² The commentators recommend that in order to “promote women economic empowerment and gender equality, child care should not only be seen as a critical public service, but also as a component of income security, that is, as part of social security for all workers.”⁶³

69. According to the DSD, a national programme for the provision of centre and non-centre based support for pregnant women, mothers, fathers and infants in the first two years of life will be developed and implemented by 2024 with the following aims, among others:

- (a) to provide safe and affordable day care for children where parents are absent;
- (b) to facilitate the pre-registration of pregnant women in the third trimester of pregnancy for the CSG (verified through birth registration) to enable income-eligible mothers to have access to the grant from the first day of the child's life.⁶⁴

70. **Recommendation 11:** It is recommended that government must accelerate the roll-out of early childhood development centres in informal workplaces and spaces where informal workers reside, such as street trading; waste recycling; city markets; informal settlements and townships. It is also recommended that municipalities be urged to take up this recommendation in their industrial development plans as part of infrastructure provisioning.

C. Other questions for public comment

71. The Commission invites comment and input on the following additional questions:

⁶² *Ibid*, 5.

⁶³ *Ibid*, 2.

⁶⁴ DSD “National Integrated Early Childhood Development Policy” 23; 54.

21. In order to protect self-employed women workers who supply the informal market with their labour in huge numbers, should section 200A of the Labour Relations Act, 1995 be amended to read as follows:

“(d) the person has worked for that other person for an average of at least [40] 20 hours per month over the last three months”?
 22. Does the private health sector provide free health services to the poor and indigent members of the public?
 23. Should the role of the private health sector in the provision of free health services be regulated in the same manner that pro bono legal services are regulated by the Legal Practice Council?
 24. What maternity benefit products are offered by the private insurance industry?
 25. Are these benefits affordable to informal sector workers?
 26. How effective are those benefits?
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72. Stakeholders and members of the public are requested to assist the Commission in populating the list of trading activities, occupations and professions in the informal economy identified under paragraph 19 of the Executive Summary above.

DRAFT BILL

Social Assistance, Employment and Labour Laws General Amendment Bill

GENERAL EXPLANATORY NOTE:

[] Words in bold type and square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend certain laws of the Republic administered by the Departments of Social Development; Employment and Labour so as to make provision for the extension of maternity and parental benefits for self-employed workers in the informal economy.

PREAMBLE

WHEREAS section 27(1)(c) the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance;

AND WHEREAS section 28(1)(c) of the Constitution of the Republic of South Africa, 1996 provides that every child has the right to basic nutrition, shelter, basic health care services and social services;

AND BEARING IN MIND THAT a gap currently exists in the State's social security system, in that self-employed workers in the informal economy are excluded from receiving maternity and parental benefits when the mother enters confinement;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows:-

Amendment of section 1 of the Unemployment Insurance Act 63 of 2001

1. Section 1 of the Unemployment Insurance Act, 2001 (Act No.63 of 2001), is hereby amended-

- (a) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of Parts D (maternity benefits); DA (parental benefits); E (adoption benefits) and EA (commissioning parental benefits) of this Act, any natural person who receives remuneration or to whom any remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes any independent contractor]** including a self-employed worker.”

- (b) by the insertion after the definition of “remuneration” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

- (c) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, save for **[other than]** employees employed for less than 24 hours a month with a particular employer **[, and their employers].”**

Amendment of section 3 of the Unemployment Insurance Act 63 of 2001

2. Section 3 of the Unemployment Insurance Act, 2001 (Act No.63 of 2001), is hereby amended-

- (a) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, save for **[other than]** employees employed for less than 24 hours a month with a particular employer **[, and their employers]**.”

Amendment of section 30 of the Unemployment Insurance Act 63 of 2001

3. Section 30 of the Unemployment Insurance Act, 2001 (Act No.63 of 2001), is hereby amended by the substitution for subsection (3) of the following subsection (3)-

- (3) The benefit payable to the dependant is the unemployment benefit referred to in Part B of this Chapter and the maternity benefit referred to in Part D of this Chapter that would have been payable to the deceased contributor if the contributor had been alive.

Amendment of section 1 of the Unemployment Insurance Contributions Act 4 of 2002

4. Section 1 of the Unemployment Insurance Contributions Act, 2002 (Act No.4 of 2002) be amended-

- (a) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of this Act any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes an independent contractor]** including a self-employed worker;”

- (b) by the insertion after the definition of “Tax Administration Act” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

(c) by the substitution for section 4(1) of the following section 4(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, other than-...”

Amendment of section 4 of the Unemployment Insurance Contributions Act 4 of 2002

5. Section 4 of the Unemployment Insurance Contributions Act, 2002 (Act No.4 of 2002) is hereby amended-

(a) by the substitution for section 4(1) of the following section 4(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, other than-...”

Amendment of section 1 of the Basic Conditions of Employment Act 75 of 1997

6. Section 1 of the Basic Conditions of Employment Act, (Act 75 of 1997) is hereby amended-

(a) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of sections 25 (maternity leave); 25A (parental leave); 25B (adoption leave); and 25C (commissioning parental leave) of this Act, any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes any independent contractor]** including a self-employed worker;”

- (b) by the insertion after the definition of “sectoral determination” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

Amendment of section 3 of the Basic Conditions of Employment Act 75 of 1997

7. Section 3 of the Basic Conditions of Employment Act, (Act 75 of 1997) is hereby amended-

- (a) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employees, **[and]** employers, and self-employed workers, except-...”

Amendment of section 26 of the Basic Conditions of Employment Act 75 of 1997

8. Section 26 of the Basic Conditions of Employment Act, (Act 75 of 1997) is hereby amended by the insertion after subsection (2) of the following subsection (3)-

- (3) In the event that no suitable, alternative employment may be offered to a pregnant employee who is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child, the employer must offer a pregnant employee paid maternity leave for a period of six months after the birth of her child.

Amendment of section 1 of the Social Assistance Act 13 of 2004

9. The Social Assistance Act, 2004 (Act No.13 of 2004) is hereby by-

- (a) by the insertion after the definition of “regulation” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

Amendment of section 6 of the Social Assistance Act 13 of 2004

10. The Social Assistance Act, 2004 (Act 13 of 2004) is hereby amended by-

- (a) the insertion of the article “or” at the end of subparagraph 6(b); and
- (b) the insertion of the following subparagraph 6(c)
 - (c) an expectant woman who complies with the requirements for social assistance as provided for in section 5(1)(a)-(e) of this Act,

Short title

11. This Act is called the Social Assistance, Employment and Labour Laws General Amendment Act, 2021.

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CHAPTER 1: INTRODUCTION

A. Introduction

1. A gap currently exists in the State's social protection system, in that self-employed (own account and wage) workers are excluded from receiving maternity and parental benefits when the mother enters confinement. This situation exacerbates the socioeconomic problems of poverty and inequality between women and men in South Africa, prevents women's full economic participation, and impacts on their reproductive choices. The purpose of Project 143 is to investigate shortcomings in the current maternity and parental protection mechanisms, how this gap should be addressed, and by whom, in order to give effect to South Africa's obligations in terms of the Constitution, and applicable regional and international treaties and conventions.

2. The investigation aims to look at a number of possible legal mechanisms. These include:

- a) extension of the State's social assistance and/or welfare programme;
- b) extension of the statutory social insurance scheme that currently provides for maternity and parental benefits to workers employed formally (Unemployment Insurance Fund, hereinafter "UIF");
- c) creation of a new comprehensive social security system covering all employees including self-employed workers (National Social Security Fund (hereinafter "NSSF") and National Health Insurance (hereinafter "NHI"); or
- d) a combination of any of the above mechanisms.

3. The Programme of Action that arose from the International Conference on Population and Development (ICPD) organised by the United Nations ("UN") in 1994 set international targets for sustainable development. These were followed by the Millennium Development Goals ("MDG") and the Sustainable Development Goals ("SDG"). The targets include lowering maternal and child morbidity and mortality rates;¹ eliminating all forms of

¹ Stats SA "Mortality and causes of death in South Africa" (2012 PO309.3) 1 and 40. United Nations "The Sustainable Development Goals Report" (2016) 4.

discrimination,² be they cultural, social or religious; ensuring that women have better access to paid employment, sexual and reproductive health and reproductive rights;³ and recognizing and valuing unpaid care and household tasks such as cooking and cleaning through provision of public services, infrastructure and social protection policies and the promotion of shared responsibilities within the household and the family as nationally appropriate. Both the SDG and the National Development Plan (“NDP”) list the promotion of gender equality and the empowerment of women as critical goals.

B. Background

4. South Africa’s social protection system does not provide maternity and parental cover to the vast majority of self-employed workers who work in both the formal and informal sectors of the economy. The statutory UIF provides, among others, supplementary income benefits to short-term unemployed persons and maternity benefits to employed women who take maternity leave. However, the UIF provides benefits only to members who contribute to the Fund and only for limited time periods. Self-employed women and men cannot contribute to the Fund, because the Fund makes employment, but not self-employment, a condition for membership. The exclusion of self-employed workers from accessing social security benefits offered by the State exacerbates poverty and inequality, which are the central challenges facing the NDP. Many self-employed persons may not be able to afford private insurance to provide income maintenance should they be unable to work for reasons related to pregnancy or child-rearing.

5. South Africa’s Decent Work Country Programme Report of 2010 confirmed the fact that the social insurance system does not extend to South Africans outside the formal wage economy and to those in precarious work situations, including in the informal sector.⁴ The Report states that working in close partnership with Government and social partners, the International Labour Organization (“ILO”) will provide support to on-going initiatives to drive the development of a comprehensive policy dealing with social security reform. Drawing on international best practice, policy advisory support will be provided towards the extension of

² United Nations “Sustainable Development Goals Report” (2016) 20.

³ *Ibid.*

⁴ NEDLAC “Draft South Africa Decent Work Country Programme” (18 March 2010) 30.

social security to the informal sector and to non-standard forms of employment.⁵ The Report lists, among others, the following three key priorities of South Africa's Decent Work Country Programme, namely:

- (a) strengthening and broadening social protection coverage through better managed and more equitable access to social security and health benefits, occupational safety and health, and improved workplace responses to the HIV/AIDS epidemic;
- (b) more people have access to improved and more gender equitable social security and health benefits; and
- (c) workers and enterprises benefit from improved safety and health conditions at work.⁶

6. The Inter-departmental Task Team on Social Security and Retirement Reform ("IDTT") has proposed the establishment of a National Social Security Fund (NSSF) which will be financed through employer and employee contributions.⁷ It is proposed that the NSSF will pay pensions, disability and survivor benefits, and unemployment benefits.⁸ Although the IDTT proposes the strengthening of the links between social security and the UIF, on the one hand, and alignment of social security with the National Health Insurance (NHI), on the other hand, there is no mention of State maternity and parental benefits for workers in self-employment in the discussion document.

7. On 1-2 November 2017, the Advisory Committee attended the Friedrich Ebert Stiftung (FES) and Women in Informal Employment Globalizing and Organizing (WIEGO) International Meeting on Child Care and Social Protection for Informal Workers held in Durban. Following this international meeting, the Advisory Committee resolved to frame the maternity protection study within the broader context of child care as part of a comprehensive social security package, without losing sight of the importance for the project of securing for the informal economy workers the legal right to social protection, and the importance of extending the existing cash transfer system to them as a critical starting point,

⁵ *Idem.*

⁶ *Ibid* 23.

⁷ IDTT "Social Security Discussion Document" (March 2012) 4.

⁸ *Idem.*

while researching and developing a broader net of social protections, with child care as a critical component thereof.

8. The government's national integrated early childhood development policy recognizes early childhood development (ECD) as a fundamental and universal human right to which all young children are equally entitled without any discrimination.⁹ The policy states that the realization of the right to ECD is dependent upon the quality of the biological, social and economic environment in which the foetus, infant and child develops, particularly in the first two years after birth.¹⁰ The policy urges that the definition of ECD should be broadened, taking into account all the development needs of a child.¹¹ The extended definition of ECD should form the basis for all strategies geared towards enhancing child care protection as part of the comprehensive social security policy of the Republic of South Africa.

9. Following the adoption of Recommendation 204 Concerning the transition from the informal to formal economy by the International Labour Conference in June 2015, the R204 National Task Team (R204 NTT) was established under the NEDLAC Decent Work Country Programme led by the Department of Employment and Labour (DEL).¹² The R204 NTT was established as a vehicle to facilitate the implementation of R204 in the Republic. It is an inclusive body comprising of Government, Organized Business, Organized Labour and Community Constituency. The emphasis of R204 NTT is formalization of the informal economy.

10. The Legal Services of the Department of Social Development (DSD) believes that the option of the NSSF is the best option to follow, of course with the incorporation of the State maternity and parental benefits for workers in self-employment. The DSD is, however, mindful of the challenges regarding instability of the income of many self-employed workers

⁹ Department of Social Development "National Integrated Early Childhood Development Policy" (2015) 19.

¹⁰ *Ibid* 16.

¹¹ *Ibid* 20.

¹² NEDLAC Decent Work Country Programme Steering Committee "Accelerating the transition from the informal to formal economy" 7.

and the unfixed term of their employment amongst others, hence a thorough investigation into this option will have to be undertaken.¹³

11. The Department of Health (DOH)'s National Health Insurance (NHI) Policy Paper states that the NHI will provide statutory medical benefits and health protection to the whole population on an equitable and sustainable basis.¹⁴ The proposed NHI will be phased in over a period of 14 years and will have implications for both the private and the public-sector health services.¹⁵ One of the targets for Goal 5 of the SDGs is to ensure universal access to sexual and reproductive health and reproductive rights.¹⁶ Thus the successful rollout and implementation of the NHI by the DOH will ensure that women and girls have access to sexual and reproductive healthcare and medical services.

12. The African National Congress' Gender Discussion Document states that apart from the biologically determined roles of pregnancy and childbirth, "gender is a socially constructed understanding of what it is to be a man and what it is to be a woman."¹⁷ Moving from the premise that gender equality is a fundamental human right, the Discussion Document states that since the dawn of democracy "South Africa has taken a number of bold steps to institutionalize gender equality in order to empower women. Alongside gender mainstreaming has been an approach that emphasizes the engendering of all policies and practices."¹⁸

13. Tanzer states that "although CEDAW recognises the common responsibility of men and women in the upbringing and development of children, however, it is less vociferous in its discussion of parental leave and paternity leave."¹⁹ Unlike maternity and parental protection regimes for employed workers whose rights and benefits are protected by a wide

¹³ Department of Social Development "Comments on the Research Paper: Project 143: Maternity and Paternity Benefits for Self-Employed Workers" (22 August 2017) 4.

¹⁴ Department of Health "National Health Insurance in South Africa Policy Paper" (undated) 5.

¹⁵ *Ibid* 4.

¹⁶ United Nations "Sustainable Development Goals Report" (2016) 3.

¹⁷ African National Congress "Gender Paper to be presented to the ANC Policy Conference" (February 2012) 3.

¹⁸ *Ibid* 5.

¹⁹ Tanzer Z "Still searching for transformative equality: A comparative study of maternity work in South Africa and Ukraine" (2014) AFL-CIO 17.

range of international and domestic laws, there is lack of international norms and standards for self-employed men and women or non-standard workers. The commentator points out that-

[T]he ILO standards address only the rights of women who are employed or seeking employment. The most current ILO standard on maternity protection, laid out in Convention No.183, has extended protection to all employed women, including those in atypical forms of dependent work. Although it covers certain types of workers in the informal sector, it does not include those informal workers who do not have employers such as self-employed women, own account workers, or unpaid women doing domestic work.²⁰

14. COSATU's Position Paper states that the aim of the paper is to clarify the Federation's position on addressing the social imbalances created by "patriarchy, capitalism and racism", so as to build "a society that embraces equality and social justice."²¹ The Position Paper discusses not only maternity benefits but parental rights as well.²² It emphasizes the need to "challenge gender inequality and discrimination against women, promote substantive gender equality, and to acknowledge and recognize the important role of fathers."²³

15. Similarly, Tanner states that—

While women are differently situated from men in relation to pregnancy and special measures to accommodate them are necessary, the obligations to care for children after their birth should rest equally on both parents. This assumption underlies the gender neutral terminology adopted in the legislation dealing with family responsibility leave and the regulation of working hours of parents with children. This means that fathers could also insist on these benefits and thus fulfil their parenting roles.²⁴

16. The Women's Legal Centre states that by enshrining a right to child care leave for men and women a clear message will be sent that both share equal responsibilities in both the

²⁰ *Ibid* 7.

²¹ COSATU "Position Paper on maternity protection" 1.

²² The Position Paper proposes a comprehensive package of parental rights provisions including paid maternity leave; paid and unpaid parental leave; childcare leave and flexible working time.

²³ *Ibid* 1.

²⁴ Tanner B "Social Justice and Equal Treatment for Pregnant Women in the Workplace" University of Johannesburg (2012) 303.

care economy and the financial economy.²⁵ A combination approach to provision of benefits will be a useful consideration: compulsory leave period that are paid for through social security benefit; flexible and compensated maternity health care and post-delivery leave; individual non-transferrable leave for fathers to compel participation in care responsibilities.

17. Men should play the following role in the upbringing and development of children: taking children to the hospital; helping children with homework; reducing the rate of ill-treatment of children; disciplining children appropriately and encouraging children on aspects of life.²⁶ The International Conference on Population and Development (ICPD 1994) states that in order to promote gender equality, special efforts should be made to emphasize men's shared responsibility and promote active involvement in responsible parenthood, sexual and reproductive behaviour, including family planning; prenatal, maternal and child health; prevention of unwarranted and high-risk pregnancies; shared control and contribution to family income, children's education, health and nutrition; and recognition and promotion of the equal value of children of both sexes. Male responsibilities in family life must be included in the education of children from the earliest ages. Special emphasis should be placed on the prevention of violence against women and children.²⁷

18. Tanner states that the women who are affected the most for having children are those in the informal sector, unemployed women and women who work for small businesses and those who perform seasonal work.²⁸ The author states that "[M]ore often than not, these women are completely reliant on their partners for financial support during maternity. Furthermore, lacunae such as the non-provision of maternity leave for women who adopt children, as well as the non-provision for multiple births or babies with special needs are not catered for."²⁹

²⁵ Women's Legal Centre "Submission on Maternity and Paternity Benefits for Self-Employed Workers" (26 September 2017) par 23.

²⁶ Government Communications "Maternity and Paternity Benefits for Self-Employed Workers (Project 143) (29 September 2017) 1.

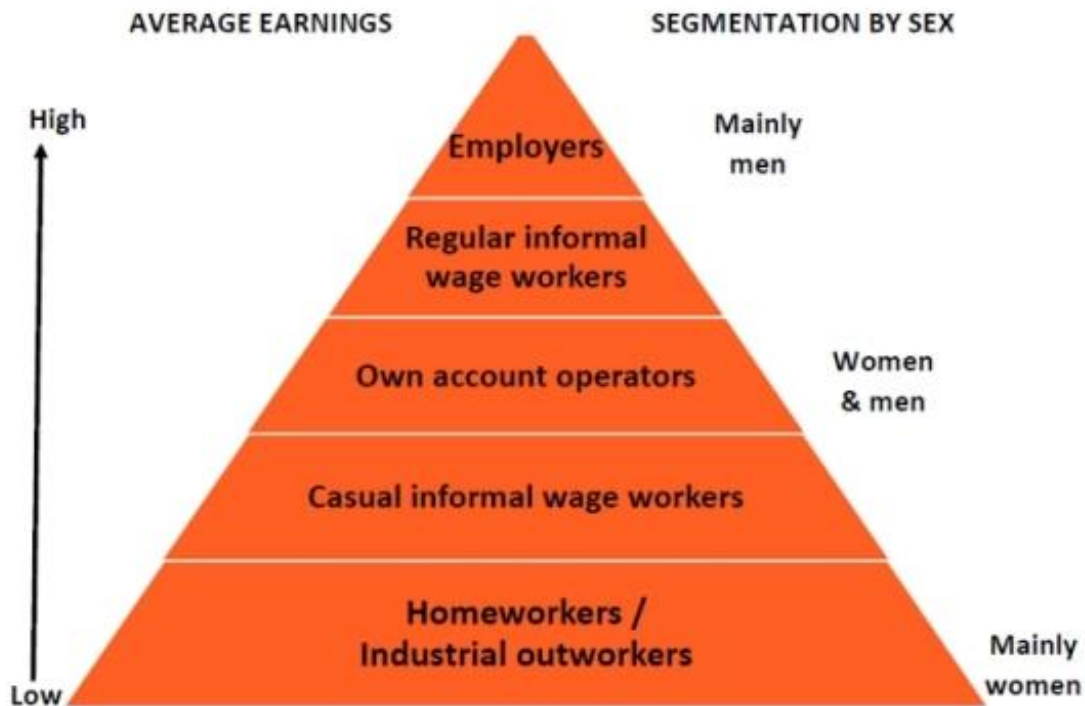
²⁷ United Nations "Programme of Action of the International Conference on Population and Development" (2014) 37.

²⁸ Tanner B "Social Justice and Equal Treatment for Pregnant Women in the Workplace" University of Johannesburg (2012) 293.

²⁹ *Idem*.

19. While inequalities between formal workers and informal workers are generally acknowledged, less attention has been paid to inequalities between informal workers, particularly on the basis of sex. WIEGO has developed a useful schematic to represent segmentation of earnings within the informal sector:³⁰

Table 1.1 Distribution of earnings in the informal sector by sex.



20. Employers within the informal economy have the highest earnings and are mostly men. They are followed by own-account workers, employees, and household and domestic workers. Women are overrepresented at the lower levels of the pyramid and underrepresented at the higher levels.³¹ The percentage distribution of informal and formal employment by sex is provided in the Table 1.2 below.

³⁰ WIEGO “Hierarchies of earnings and Poverty” available at <https://www.wiego.org/fr/node/7949> (last accessed 6 December 2020).

³¹ See Stats SA “Informal Economy Gender Series Volume VII Report No.03-10-23” 3, where it is reported that “the concept of decent work, particularly the vulnerability aspect of the informal sector and informal employment is because most women are usually trapped in insecure low-paying jobs.”

Table 1.2: Percentage distribution of informal and formal employment by sex, 2013 and 2019³²

Employment type	2013			2019		
	Male	Female	Total	Male	Female	Total
	N '000					
Formal employment	5 648	4 520	10 168	5 744	4 851	10 595
Informal employment	2 219	2 022	4 241	2 810	2 186	4 995
Percentage						
Formal employment	55,6	44,5		54,2	45,8	
Informal employment	52,3	47,7		56,2	43,8	

21. It is reported that “informal employment grew from 4.2 million informal jobs in 2013 to 5 million informal jobs in 2019. Males had the highest share of those employed in all types of employment compared to females. In informal employment, a decline from 47.7% in 2013 to 43.8% in 2019 was observed for participating females, while males recorded as increase from 52.3% in 2013 to 56.2% in 2019.”³³

22. The percentage distribution of persons in informal employment by sex and occupation is provided in Table 1.3 below.

³² Stats SA “Informal Economy Gender Series Volume VII Report No.03-10-23” 8.

³³ *Idem*.

Table 1.3: Distribution of persons in informal employment by sex and occupation, 2013 and 2019

Occupation	2013			2019		
	Male	Female	Total	Male	Female	Total
	N('000)					
Legislators, senior officials and managers	93	45	138	128	73	201
Professionals	34	16	50	14	11	25
Technical and associate professionals	82	85	167	73	72	145
Clerks	36	103	139	31	81	112
Service workers and shop and market sales workers	253	387	640	350	489	839
Skilled agricultural and fishery workers	15	12	26	21	10	31
Craft and related trades workers	599	87	686	816	77	893
Plant and machine operators and assemblers	270	29	299	355	33	388
Elementary Occupation	804	506	1310	981	588	1569
Domestic workers	34	753	787	40	752	793
Total	2219	2022	4241	2810	2186	4995

Source: QLFS, Q3: 2013 and Q3: 2019

**8Un-weighted numbers of 3 and below per cell are too small to provide reliable estimates.

23. As stated in paragraph 20 above, female workers in the informal economy are overrepresented in the low paying occupations such as domestic worker; service, shop and market sales. Male workers, on the other hand, are overrepresented in craft and related trade and other elementary occupations not specified. Rogan and Alfars argue that the disadvantages women experience do not derive from a single source.³⁴ They cite Chen, who has posited three main sources of disadvantage that impact adversely on the incomes of urban women informal workers:

- “(a) women as women impacted by gendered ideologies and social practices;
- (b) women as workers who are concentrated in forms of employment with a high risk of low returns and no social or labour protections; and

³⁴ Rogan M and Alfars L ‘Gendered inequalities in the South African informal economy’ (2019) Agenda 95.

- (c) women as members of marginalised urban communities with poor access to basic services and infrastructure.”³⁵

24. Rogan and Alfers, based, inter alia, on interviews with informal workers in South Africa, cite unequal child-care responsibilities, gender-based violence and the gendered impact of urban infrastructure deficits as drivers of women’s lower earnings and, therefore, their increased risk of experiencing poverty.³⁶

25. Bonthuys and Albertyn state that experience in countries with more generous parental leave provisions has shown that very few men make use of these paternity benefits.³⁷ The authors state that “instead of increasing the child-care responsibilities of fathers, these legal rules merely accommodate women’s primary child care responsibilities. The reasons for this male reluctance to take parental leave are both cultural and economic. Where both parents work outside the home, it makes economic sense for the person who earns less to remain at home or take leave to care for children. Cultural and social factors include the encouragement of long-term breastfeeding as an indication of good motherhood and the widely held assumption that men are unsuited to take care of children.”³⁸

C. Glossary of key terms

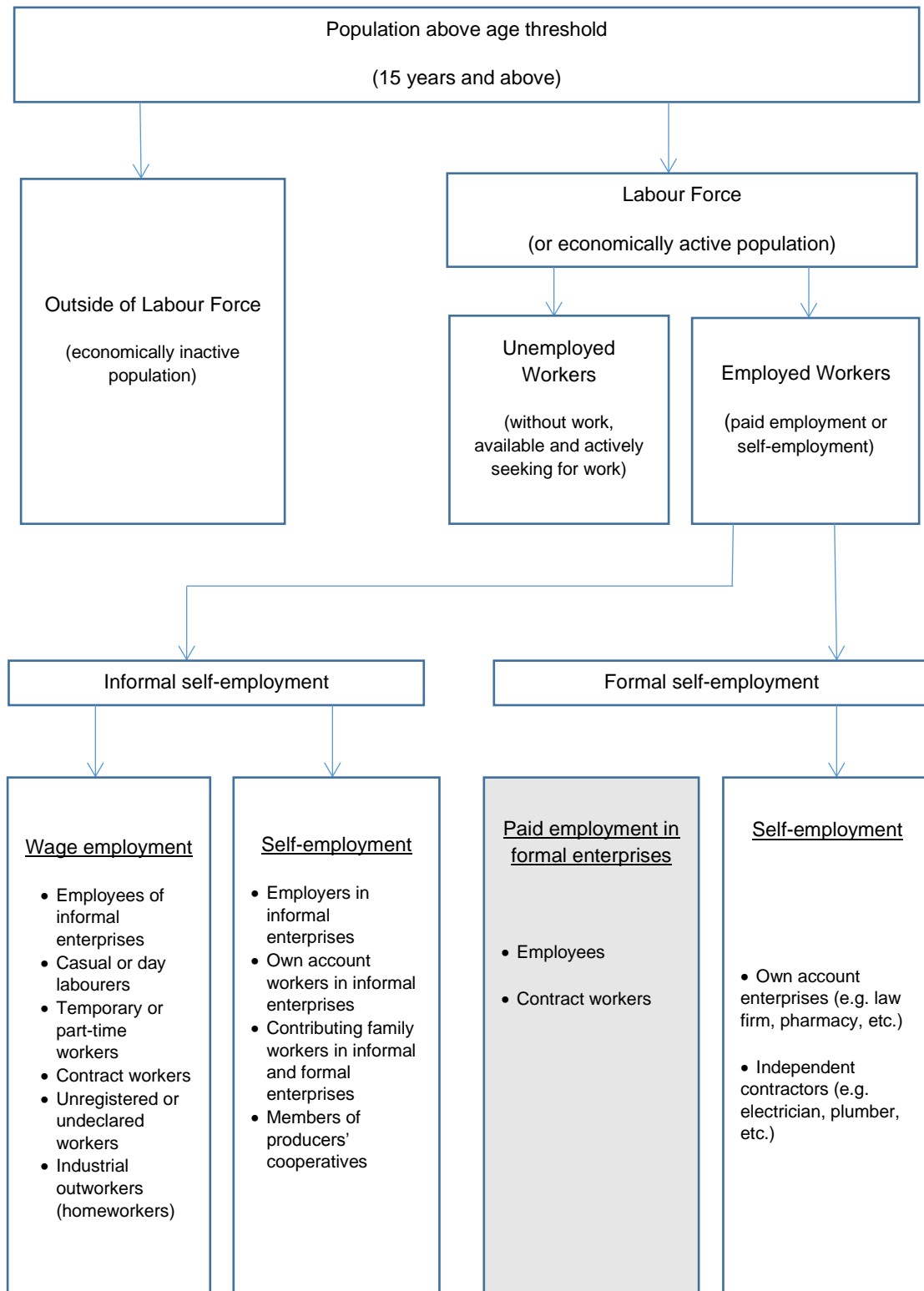
26. The scope of the investigation in terms of who should count as self-employed worker in the informal sector of the economy is presented in the following diagram below.

³⁵ *Idem.*

³⁶ *Ibid* 96-99.

³⁷ Bonthuys E and Albertyn C *Gender, Law and Justice* (2007) 273.

³⁸ *Ibid* 274.

Figure 1: Main categories of the Labour Force framework³⁹

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Figure 1 is adapted from Luebker M “Employment, unemployment and informality in Zimbabwe: Concepts and data for coherent policy-making” (July 2008) 11.

27. In its submission to the Commission, WIEGO asked whether the research will focus on informal wage employment only.⁴⁰ The research focuses on informal self-employment and informal wage employment, including employment outside of the informal sector or enterprises (that is, disguised wage workers).

28. Definitions in legislation are foundational to the interpretation of that legislation. It is therefore imperative that the scope of the project be delineated in a way that explores, holistically, the possibilities of extending social protection to workers who have traditionally been excluded, specifically in the context of pregnancy and childcare. At the same time, the definitions also have to take cognizance of resource availability, practicalities and the social protection system as a whole.

29. First, Statistics South Africa (Statistics SA) defines “informal sector” “in terms of registration and the size of the business in terms of the number of employees.”⁴¹ Thus Statistics South Africa defines “informal sector” to mean-

- (a) employers, own-account workers and persons working unpaid in their household business, whose business is not registered for VAT or income tax;
- (b) employees from whom income tax is not deducted by their employer and who work in businesses with fewer than five employees;⁴² or
- (c) all persons in the informal sector, employees in the formal sector, and persons working in private households who are not entitled to basic benefits such as pension or medical aid contributions from their employer, and who do not have a written contract of employment.⁴³

⁴⁰ WIEGO “Submission to the SALRC Research Proposal on Maternity and Paternity Benefits” 3.

⁴¹ Statistics South Africa “Survey of Employers and the Self-employed” (2013) 14 August 2014 3. The 2013 SESE states, however, that in line with international guidelines, agriculture and private households are identified separately and not included in either the formal or informal sector (at 3). This means that subsistence farmers (as opposed to farm workers) who are otherwise included in the scope of this investigation are not included in the above-mentioned definition (although they are included in the Statistics SA’s Quarterly Labour Force Survey).

⁴² Stats SA “Survey of Employers and the Self-employed” (2013) 14 August 2014 3.

⁴³ Stats SA “Informal Economy Gender Series Volume VII Report 03-10-23” viii.

30. Domestic workers in private households are excluded in the above-mentioned Statistics SA's definition of the informal sector, irrespective of their status in employment.⁴⁴ The data include all adults within and above the working age category of 15 years and older.⁴⁵ The Statistics SA's definition of "informal sector" or "informal sector employment" should not be confused with "informal employment" which is a much broader concept that defines informal employment as unprotected work both inside and outside of the informal sector measured by the absence of a written contract, medical benefits or a pension contribution.⁴⁶

31. Second, in 1993, the International Conference of Labour Statisticians (ICLS) adopted an international statistical definition of "informal sector". In terms of this Resolution, informal sector is statistically defined to mean-

- (a) a group of production units which form part of the household enterprise or, equivalently, unincorporated enterprises owned by households.
- (b) within the household sector, informal sector comprises (i) informal own-account enterprises and (ii) enterprises of informal employers.
- (c) irrespective of the kind of workplace where the productive activities are carried out, the extent of fixed capital assets used, the duration of the operation of the enterprise (perennial, seasonal or casual), and its operation as a main or secondary activity of the owner.⁴⁷

32. In 2006, the International Labour Organization (ILO) in its Employment Relationship Recommendation 198 of 2006, recognized that there might be instances where employment relationships are disguised to deny workers the protection they are due. Article 5 of ILO's Recommendation No. 198 further requires that Member States take particular account in national policy to ensure effective protection to workers especially those that are affected by the uncertainty as to the existence of an employment relationship, including women workers,

⁴⁴ Rogan M and Skinner C "The nature of the South African informal sector as reflected in the quarterly labour force survey, 2008-2014" (February 2017) 7.

⁴⁵ *Idem*.

⁴⁶ *Idem*.

⁴⁷ Resolution concerning statistics of employment in the informal sector, adopted by the Fifteenth International Conference of Labour Statisticians (January 1993) par 6.

as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.⁴⁸

33. In 2015, the International Labour Conference held in Geneva adopted Recommendation 204 which aims to provide guidance to Members in facilitating the transition of workers and economic units from the informal to the formal economy. In terms of this Resolution 204, “informal economy” is defined to mean-

- (a) all economic activities by workers and economic units that are, in law or in practice, not covered or insufficiently covered by formal arrangements; and
- (b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties.”⁴⁹

34. In its submission to the SALRC, Women in Informal Employment Globalizing and Organizing (WIEGO) states that there are “agreed ILO definitions of formal and informal work and economy which should be used in this research.”⁵⁰ Furthermore, WIEGO submits that Statistics SA’s official definition of informal sector employment is in line with the ILO’s definition of “informal sector.”⁵¹

35. Accordingly, the Statistics SA’s definition of “informal sector” and the ILO’s definition of “informal sector” and “informal economy” provided above will be used for purposes of this investigation. Loosely translated, informal sector refers to all economic activities by workers and economic units that are, in law or in practice, not covered or insufficiently covered by formal arrangements, save for illicit activities. The definition includes employment and self-

⁴⁸ ILO “R198 Employment Relationships Recommendation” (2006 No. 198).

⁴⁹ ILO “Recommendation 204 Concerning the Transition from the Informal to the Formal Economy, Adopted by the Conference at its One Hundred and Fourth Session” (12 June 2015) 4.

⁵⁰ WIEGO “Submission to the SALRC Research Proposal on Maternity and Paternity Benefits” 1.

⁵¹ *Idem*.

employment in the informal sector (enterprises), and also employment outside of the informal sector (enterprises).

36. Altman states that the intention underlying ILO's definition of "informal economy" is to extend the focus from enterprises that are not legally regulated to employment relationships that are not legally regulated or protected. This approach essentially includes at least one of two main characteristics, namely:

- (a) an enterprise that is not registered, operates outside the tax net, and most probably also falls outside of other regulatory norms such as labour law, and
- (b) wage workers who are in insecure and/or unprotected employment.⁵²

37. According to Devey *et al*, what is important about all contributions to the definition of "informal sector" is that they all have one common criterion which is that "informal economic activities are small in scale and elude government regulatory requirements such as registration, tax and security obligations and health and safety regulations."⁵³ However, the authors argue for the use of the term "informal economy" instead of "informal sector" for the reasons that informal economic activities encompass a wide variety of economic sectors (agriculture, manufacturing, services, etc.), different employment relations (self-employed, paid and unpaid workers and disguised waged workers) and activities with varied degree of economic potential ranging from survivalist to successful small enterprises.⁵⁴ This view is supported by the KwaZulu-Natal's Department of Economic Development and Tourism.⁵⁵

38. In addition, the authors argue that in reality there is no distinction between the formal and informal economy. A closer analysis reveals that the two are integrally linked and that the notion of informal economy implies that there is a formal economy.⁵⁶ According to the authors, most informal operators are linked through supply or customer networks to the

⁵² Altman M "Formal-Informal Economy Linkages" (April 2008) 6.

⁵³ Devey R, Skinner C and Valodia I *The Informal Economy* (2003) 144. Chen MA "The Informal Economy: Definitions, Theories and Policies" *WIEGO* (August 2012) 4.

⁵⁴ *Idem*.

⁵⁵ Department of Economic Development and Tourism "Policy for the Informal Economy of KwaZulu-Natal" (version 1.4) 20.

⁵⁶ *Idem*.

formal economy. Statistics SA states that the informal sector serves as a point of entry to the formal sector.⁵⁷

39. Davies and Thurlow view the linkages between the formal and informal economy as regions within the broader South African economy.⁵⁸ According to the authors, the formal economy contains most of South Africa's heavier industries (mining, commercial agriculture and financial services). By contrast, the informal economy contains subsistence agriculture, lighter manufacturing subsectors and a significant share of trade and transport services.⁵⁹

40. In times of economic hardships when enterprises downsize or shut down, those workers who are laid off and cannot find alternative formal employment jobs often end up in the informal economy.⁶⁰ Chen remarks that we should also bear in mind that informalization of employment relations is a feature of contemporary economic growth and global economy.⁶¹

41. The informal sector is a fairly large and heterogeneous sector. It is made up of a wide range of informal occupations and comprises a wide array of industries. It is reported that "informal employment grew from 4.2 million jobs in 2013 to 5 million informal jobs in 2019 and accounted for almost a third of total employment respectively."⁶² Chen recommends that for policy-making purposes, it is useful that informal sector employment be subdivided, first into self-employment and wage employment, and second, within these two broad categories into more homogeneous sub-categories according to the status in employment as follows:⁶³

- (a) Informal self-employment to include
 - (i) Employers in informal enterprises

⁵⁷ Stats SA "Labour Market Dynamics in South Africa" (2015) 02-11-02.

⁵⁸ Davies R and Thurlow J "Formal-Informal Economy Linkages and Unemployment in South Africa" (March 2009) HSRC 14.

⁵⁹ *Idem*.

⁶⁰ Chen MA "The Informal Economy: Definitions, Theories and Policies" Women in Informal Employment Globalizing and Organizing (August 2012) 3.

⁶¹ *Ibid* 6.

⁶² Stats SA "Informal Economy Gender Series Volume VII Report 03-10 23" 8.

⁶³ Chen MA "The Informal Economy: Definitions, Theories and Policies" Women in Informal Employment Globalizing and Organizing (August 2012) 7.

- (ii) Own account workers in informal enterprises
 - (iii) Contributing family workers in informal and formal enterprises
 - (iv) Members of informal producers' cooperatives
- (b) Informal wage employment to include
- (i) Employees of informal enterprises
 - (ii) Casual or day labourers
 - (iii) Temporary or part-time workers
 - (iv) Contract workers
 - (v) Unregistered or undeclared workers
 - (vi) Industrial outworkers (homeworkers)

42. The City of Cape Town's informal trading policy states that the policy applies to all informal trading as defined in section 2 (that is, trading in goods and services in the informal sector by an informal trader) which takes place on public space or private land where it is included in a trading plan.⁶⁴ By contrast, the Department of Economic Development and Tourism of KwaZulu-Natal (KZN) states that there is a wide variety of different types of informal economy operations taking place in KZN. These include but not limited to operations listed in Schedule A of this policy.⁶⁵

43. Rogan and Skinner state that the dominant industry in the informal sector continues to be trade.⁶⁶ This is confirmed by the information obtained from Stats SA in Table 1.4 below.

⁶⁴ City of Cape Town "Informal Trading Policy" (2013) 9.

⁶⁵ Department of Economic Development and Tourism "Policy for the Informal Economy of KwaZulu-Natal" (undated).

⁶⁶ Rogan M and Skinner C "The nature of the South African informal sector as reflected in the quarterly labour force survey, 2008-2014" (February 2017) 2.

Table 1.4: Distribution of persons in informal employment by sex and industry, 2013 and 2019

Industry	2013			2019		
	Male	Female	Total	Male	Female	Total
	N('000)					
Agriculture, hunting, forestry, and fishing	193	73	265	238	88	326
Mining and quarrying	6	*2	8	7	*2	9
Manufacturing	142	126	268	192	141	334
Electricity, gas and water supply	3	*0	3	*2	*0	*2
Construction	511	27	538	636	30	666
Wholesale and retail trade	572	622	1194	737	647	1384
Transport, storage and communication	260	26	286	354	13	367
Financial intermediation, insurance, real estate and business services	145	83	228	204	122	326
Community, social and personal services	167	296	462	198	373	571
Private households	220	767	988	242	769	1011
Total	2219	2022	4241	2810	2186	4995

Source: QLFS, Q3: 2013 and Q3: 2019

***Un-weighted numbers of 3 and below per cell are too small to provide reliable estimates.

44. Based upon the industries, sectors or subsectors that are found in the informal economy (Table 1 above), a list of trading activities, occupations and professions in the informal economy can be populated as follows:

[THIS IS NOT AN EXHAUSTIVE LIST OF ALL THE TRADES, OCCUPATIONS AND PROFESSIONS FOUND IN THE INFORMAL ECONOMY]

Industry, sector, subsector	Trade, occupation or profession
1. Agriculture, hunting, forestry and fishing	<ul style="list-style-type: none"> • Farm worker • Subsistence farmer • Livestock trader/ small scale farmer • Fisher

- | | | |
|----|---------------------------------------|---|
| 2. | Mining and Quarrying | |
| 3. | Manufacturing | |
| 4. | Electricity, Gas and Water | <ul style="list-style-type: none"> • Electrician • Plumber |
| 5. | Construction | <ul style="list-style-type: none"> • Builder • Carpenter |
| 6. | Wholesale and retail Trade | <ul style="list-style-type: none"> • Panel beater • Tuck shop operator • Restaurant / food outlets • Street or kerbside trader • Beach trader • Trader at Events • Pedestrian mall trader • Seasonal trader (seasonal/ once-off/ short term trader) • Road intersection trader (as permitted in terms of Regulation 322 of the National Road Traffic Regulations, 2000) • Public market trader (flea and craft markets) • Trader in public open spaces (including parks, cemeteries, etc.) • Mobile (vehicle-based) trader (fish, ice-cream, prepared food, soft drink, fruit and vegetables or other agricultural produce) |
| 7. | Transport, Storage and Communications | <ul style="list-style-type: none"> • Payphones operator • Taxi driver • Waste picker |

- Photographer
 - Tour guide
 - Car guide
8. Financial intermediation, insurance, real estate and business services
9. Community, social and personal services including creative arts⁶⁷
- Freelance performer,⁶⁸
 - Musician
 - Painter
 - Sculptor
 - Hairdressing and hair cut
 - Grass cutter
 - Car wash
 - Shoes and shoe repairer
 - Sewer
 - Traditional wear, décor and beadwork
 - Community health care worker
 - Informal child-care worker
 - Traditional medicine
10. Private households
- Home renovator
 - Home-based vendor
 - Tuck shop operator

⁶⁷ WIEGO submits that creative arts make up a huge category of self-employed workers, input from Rachel Moussié following workshop held on 17 May 2021.

⁶⁸ In its submission to the SALRC, the South African Guild of Actors states that Freelance workers are contracted from time to time to delivering their performance/ services at various locations, studios, theaters or corporate venues. Freelance workers are currently excluded from the mainstream economy as they are not employees and are self-employed. Due to this act, Freelancers cannot access any social benefits including maternity and paternity benefits and UIF.

45. Stakeholders and members of the public are requested to help the Commission in populating the list of trading activities, occupations and professions in the informal economy identified under paragraph 19 of the Executive Summary above.

46. Definitions of other relevant terminology used in this investigation are provided below. In this investigation, unless the context otherwise indicates-

“Adoption benefits” refers to at least ten consecutive weeks adoption leave (as provided for in section 25B of the BCEA) commencing on the date the adoption order is granted, or the date that the child is placed in the care of a prospective adoptive parent by a competent court, pending the finalization of an adoption order in respect of that child, whichever date occurs first. Parental benefits are payable at a rate of 66% of the beneficiary’s earnings as at the date of application, subject to the applicable maximum income threshold as provided for in section 12(3)(cA) of the UIA, 2001.

“Care”, among others, means the right and responsibility for-

- (a) caring for the child;
- (b) supporting and guiding the child;
- (c) assuming responsibility for the child’s general upbringing, health, education, safety, social interactions, and general welfare.⁶⁹

“Commissioning parental benefits” refers to at least ten consecutive weeks leave commencing on the date that a child is born as a result of a surrogate motherhood agreement (as provided for in section 25C of the BCEA), or at least ten consecutive days parental leave (as provided for in section 25A of the BCEA) commencing on the date when a child is born as a result of a surrogate motherhood agreement. Parental benefits are payable at a rate of 66% of the beneficiary’s earnings as at the date of application, subject to the applicable maximum income threshold as provided for in section 12(3)(cA) of the UIA, 2001.

“Contributing family worker” means a worker who holds a 'self-employment' job in a market-oriented establishment operated by a related person living in the same household,

⁶⁹ Section 1 of the Children’s Act 38 of 005.

who cannot be regarded as a partner because their degree of his or her commitment to the operation of the establishment, in terms of working time or other factors to be determined by national circumstances, is not at a level comparable to that of the head of the establishment.⁷⁰

“Early Childhood Development” means the physical, cognitive, linguistic, and socio-emotional development of a child from the prenatal stage up to age eight. This development happens in a variety of settings like homes, schools, health facilities, community-based centers; and involves a wide range of activities from childcare to nutrition to parent education. Providers of services can include public, private, and non-governmental agencies.⁷¹

“Early Childhood Development Programme” means a programme that provides one or more forms of daily care, development, early learning opportunities and support to children from birth until the year before they enter formal school. The programme may include, but not limited, to-

- (a) Community-based play groups operating for specific hours;

⁷⁰ OECD *Glossary of Statistical Terms* (2007) 146.

⁷¹ The World Bank “Early Childhood Development” (July 2010). The Department of Social Development’s National Integrated Early Childhood Development Policy states (at 55) that Government commits to the provision of those early childhood development services in the short-to-medium term which are a necessary precondition for the realisation of the previously listed set of rights not subject to progressive realisation, namely:

- (a) Free birth certification for all children born in South Africa;
- (b) Basic preventative, promotive and curative health care and nutrition for pregnant women, infants and young children to secure their mental and physical health;
- (c) Preventative and curative maternal, infant and child food and nutrition services;
- (d) Support for parents to empower and enable them to take the lead in their infants and children’s optimal development, including the provision of income support, nutritional support, psychosocial support and support for the early education of children from birth;
- (e) In their parent’s absence, safe quality childcare and early learning which nurtures the young child’s development;
- (f) Early learning support and services from birth in the home, community and in centres; and
- (g) Publicly accessible information about early childhood development services and support and their proven importance for ensuring optimal early childhood development.

Furthermore, the Policy states that Government will realise the full comprehensive early childhood development programme in the longer term, with priority being given to the implementation of the essential components of this package in the short to medium terms.

- (b) Outreach and support programmes for young children and their families/ caregivers, at a household level;
- (c) Parenting support and enrichment programmes;
- (d) Support for the psychosocial needs of young children and their families;
- (e) Early childhood development programmes provided at partial care facilities and at child and youth care facilities, as contemplated in section 93(5) of the Children's Act; and
- (f) Any other programme that focuses on the care, development and early learning of children from birth until the year before they enter formal school.⁷²

“Early Childhood Development Service” means services or support provided to infants and young children or to the child's parent or caregiver by a government department or civil society organization with the intention to promote the child's early emotional, cognitive, sensory, spiritual, moral, physical, social and communication development.⁷³ These services include the following-

- (a) Parenting support and capacity development
- (b) Child-centred social security
- (c) Free birth registration
- (d) Health care
- (e) Food and nutritional support
- (f) Safe and affordable day care for children where parents are absent
- (g) Early learning support and services
- (h) Protection from abuse, neglect and exploitation
- (i) Play and recreational facilities
- (j) Inclusive and specialized services for children with disabilities
- (k) Early childhood development information⁷⁴

“Economic unit” in the context of informal economy includes-

- (a) a unit that employs hired labour;

⁷² DSD “National Integrated Early Childhood Development Policy” (2015) 15.

⁷³ *Idem*.

⁷⁴ *Ibid*, 22.

- (b) a unit that is owned by an individual working on his or her own account, either alone or with the help of contributing family workers;
- (c) a cooperative and social and solidarity economic units;⁷⁵
- (d) a household enterprise.

“Employee” means-

- (a) any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.⁷⁶

47. Section 200A of the Labour Relations Act 66 of 1995 (LRA) and section 83A of the Basic Conditions of Employment Act 75 of 1997 (BCEA) create a series of rebuttable presumptions as to who is an employee, which applies to all workers earning below the prescribed threshold each year. At present this threshold is R205 433.30 per annum. Therefore, according to Section 200A of the LRA, unless the contrary is proved, a person who works for or renders services to any other person is presumed, regardless of the form of the contract, to be an employee if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) a person's hours of work are subject to the control or direction of another person;

⁷⁵ International Labour Conference Recommendation 204 Concerning the Transition from the Informal to the Formal Economy, Adopted by the Conference at its One Hundred and Fourth Session, Geneva (12 June 2015) 4.

⁷⁶ Section 1 of BCEA. This definition is also found in the Labour Relations Act, Employment Equity Act and Skills Development Act. In some instances, workers would be defined as ‘employees’ for purposes of labour legislation. Paragraph (b) of the definition was intended to prevent employers from evading the provisions of labour legislation by concluding contracts that would be considered as independent contractors’ contracts as opposed to employment contracts. Employees are all those workers who hold the type of job defined as “paid employment jobs”. Employees with stable contracts are those “employees” who have had and continue to have, an explicit (written or oral) or implicit contract of employment, or a succession of such contracts, with the same employer on a continuous basis. “On a continuous basis” implies a period of employment which is longer than a specified minimum determined according to national circumstances. If interruptions are allowed in this minimum period, their maximum duration should also be determined according to national circumstances. Regular employees are those ‘employees with stable contracts’ for whom the employing organisation is responsible for payment of relevant taxes and social security contributions and/or where the contractual relationship is subject to national labor legislation.

- (c) in the case of a person who works for an organization, the person forms part of that organization;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last 3 months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person;
- (g) the person only works for or renders services to one person;

48. The presumption in sections 200A of the LRA and section 83A is rebuttable, such that even if one of the aforementioned factors is present, the alleged employer could still, on a balance of probabilities, prove that the alleged employee is in fact not an employee for purposes of the labour legislation.⁷⁷

49. Furthermore, the BCEA distinguishes 'employee' from 'independent contractor' and 'senior managerial employee'. The latter is defined in section 1 of the BCEA as a person who has the authority to hire, discipline and dismiss employees, and to represent the employer internally and externally. A 'senior managerial employee' is therefore a particular class of 'employee', but still an 'employee'. Usually, the crucial distinction to be made is between 'employees' and 'independent contractors'.

“Employer” means a worker who, working on his or her own account or with one or a few partners, hold the type of job defined as a 'self-employment job' and, in this capacity, on a continuous basis (including the reference period) have engaged one or more persons to work for them in their business as employee(s). The meaning of "engage on continuous basis" is to be determined by national circumstances, in a way which is consistent with the definition of "employees with stable contracts". The partners may or may not be members of the same family or household.⁷⁸

⁷⁷ Code of Good Practice: Who is an Employee item 27 Notice 1774 published in Government Gazette No.29446 dated 1 December 2006.

⁷⁸ OECD *Glossary of Statistical Terms* (2007) 244.

“Entrepreneur” means someone who operates his or her own business or engages independently in a trade, occupation or profession.⁷⁹

“Formal sector” means

- (a) all economic activities by workers and economic units that are, in law or in practice, covered by formal arrangements; but
- (b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties.⁸⁰

“Gender equality” means that persons of all genders are treated with equal respect and concern. Differentiation on the basis of gender is rational and does not amount to unfair discrimination that infringes, unjustifiably, on the dignity of affected persons.⁸¹

“Family responsibility leave” refers to three days paid leave which an employee is entitled to take when his/her child is sick or in the event of the death of employee’s child, adopted child, grandchild, sibling, spouse, life partner, parent, adoptive parent, or grandparent. In terms of section 27(3) of the BCEA, an employer must pay an employee for a day’s family responsibility leave the wage the employee would ordinarily have received for work on that day and on the employee’s usual pay day.

⁷⁹ WIEGO proposes that Terms such as ‘own account operator’ and ‘employer’ be used instead of ‘entrepreneur’, ‘micro-business’ and ‘survivalist enterprise’, “Comments to the SALRC Research Proposal Paper on Maternity and Paternity Benefits” 5. It is important that the term ‘entrepreneurship’ be defined in order to distinguish it from ‘self-employment’. The two concepts are not synonymous. Self-employment includes entrepreneurial activities (e.g. individuals who own their own business that employs other workers), own account workers as well as wage employment. The concept of entrepreneurship, in particular female entrepreneurs, is central to the Government’s programme of radical economic transformation and attempts to achieve a marked increase in the growth of the small business sector as well as sustaining existing small businesses which must be one of the major contributors to job creation, Republic of South Africa “Medium Term Strategic Framework 2014-2019, 21.

⁸⁰ Definition adapted from the International Labour Conference *Recommendation 204 Concerning the Transition from the Informal to the Formal Economy, Adopted by the Conference at its One Hundred and Fourth Session* (12 June 2015).

⁸¹ *Harksen v Lane* 1998 (1) SA 300 (CC) paras 43-46.

“Household enterprise” means a unit that is engaged in the production of goods and services which are not constituted as separate legal entities independently of the households or household members that own them, and for which no complete set of accounts are available which would permit a clear distinction of the production activities of the enterprises from the other activities of their owners and the identification of any flows of income and capital between the enterprise and the owners.⁸²

“Independent contractor” means a worker who is a registered provisional taxpayer, determines his or her own hours, runs his or her own business or trade in his or her own name, is free to carry out work for more than one employer at the same time, invoices the employer for each project and is paid accordingly, is not subject to the deduction of Pay As You Earn or Unemployment Insurance Fund contributions from his or her invoice, does not receive any allowances, medical aid or bonus, and is not be eligible for any kind of leave.⁸³

50. Since independent contractors are excluded from the scope of the BCEA and the Labour Relations Act, they would not be entitled to annual leave, sick leave and claim unfair dismissal.⁸⁴ An employee typically signs a contract with the employer, usually at the start of a new job. However, in the event that there is no written contract, all terms and conditions of the BCEA may still apply. In contrast, an independent contractor does not have a contract of employment but a contract of work.

51. Sections 200A(1) of the LRA and 83A(1) of the BCEA both create a rebuttable presumption of employment status if one of seven listed factors is present and there is a valid contract that the parties intended to create legal obligations.⁸⁵ These factors are:

“(a) the manner in which the person works is subject to the control or direction of another person;

⁸² Resolutions concerning statistics of employment in the informal sector, adopted by the Fifteenth International Conference of Labour Statisticians (January 2013) par 7.

⁸³ South African Guild of Editors “Employees vs Independent Contractors” (November 2016) 2.

⁸⁴ *Idem*.

⁸⁵ See *Universal Church of the Kingdom of God v Myeni and Others* [2015] 9 BLLR 918 (LAC); (2015) 36 ILJ 2832 (LAC) par 40.

- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person;
- or
- (g) the person only works for or renders services to one person.”

52. An alleged employer can rebut the presumption by showing that even though one or more of the factors are present, the totality of relevant factors indicates a relationship of independent contracting, as opposed to one of employment. The above factors in the LRA and BCEA mirror the tests that have been developed at common law, namely the control-test, the organisation test and the most-often applied dominant impression test. The factors in the legislation is therefore used as part of the dominant impression test, which requires the weighing up of all relevant factors and an inquiry as to whether the dominant impression created by the totality of factors is that the relationship is one of employment or of independent contracting.

“Informal economy” means

- “(a) all economic activities by workers and economic units that are, in law or in practice, not covered or insufficiently covered by formal arrangements (such as a written contract, medical benefits or a pension contribution); but
- (b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties.”⁸⁶ or

⁸⁶ International Labour Conference *Recommendation 204 Concerning the Transition from the Informal to the Formal Economy, Adopted by the Conference at its One Hundred and Fourth*

- (c) economic units that are engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned. These units typically operate at a low level of organization, with little or no division of labour and capital as factors of production and on a small scale. Labour relations, where they exist, are based mostly on casual employment, kinship or personal and social relations rather than contractual arrangements with formal guarantees.⁸⁷

“Maternity benefits” refers to at least four consecutive months’ (or 17, 32 weeks) maternity leave, including where a contributor has a miscarriage or gives birth to a still-born child, as provided for in section 25 of the BCEA). These benefits are payable at a rate of 66% of the beneficiary’s earnings as at the date of application, subject to the applicable maximum income threshold as provided for in section 12(3)(c) of the UIA, 2001. The contributor must, however, have been in employment for at least 13 weeks prior to the date of claiming maternity benefits.

“Maternity protection” includes measures such as maternity leave, cash transfers and medical benefits, health protection at work, non-discrimination, good quality maternal health care, breastfeeding and childcare arrangements at work.⁸⁸

“Member of a producers’ cooperative unit” means a worker who holds a ‘self-employment’ job in a cooperative producing goods and services, in which each member

Session (12 June 2015) 4. According to Altman (Formal-Informal Economy Linkages (2008) 6) the definition of informal economy “covers any business or employment relationship that is not seen to be sufficiently covered by formal arrangements. In other words, this definition includes both employment and self-employment in informal enterprises, and also employment outside of informal enterprises. The intention was to extend the focus from enterprises that are not legally regulated to employment relationships that are not legally regulated or protected. This approach essentially includes at least one of two main characteristics, namely:

- (a) an enterprise that is not registered, operates outside the tax net, and most probably also falls outside of other regulatory norms such as labour law, and
- (b) wage workers who are in insecure and/or unprotected employment.”

⁸⁷ Resolutions concerning statistics of employment in the informal sector, adopted by the Fifteenth International Conference of Labour Statisticians (January 2013) par 5.

⁸⁸ Living and Loving Staff “How South Africa’s maternity leave compares internationally” <https://www.livingandloving.co.za/pregnancy-blogs/south-africas-maternity-leave-compares-internationally> (February 2020) accessed on 10 June 2020.

takes part on an equal footing with other members in determining the organization of production, sales and/or other work of the establishment, the investments and the distribution of the proceeds of the establishment amongst their members. It should be noted that employees of producers' cooperatives are not to be classified to this group.⁸⁹

“Own-account worker” means a worker who, working on his or her own account or with one or more partners, hold the type of job defined as a 'self-employment job', and have not engaged on a continuous basis any 'employees' to work for him or her during the reference period. It should be noted that during the reference period the members of this group may have engaged 'employees', provided that this is on a non-continuous basis. The partners may or may not be members of the same family or household.⁹⁰

“Paid employment job” means a job where the incumbent holds explicit (written or oral) or implicit employment contract which gives him /her a basic remuneration which is not directly dependent upon the revenue of the unit for which he/she works (this unit can be a corporation, a non-profit institution, a government unit or a household). Some or all of the tools, capital equipment, information systems and/or premises used by the incumbents may be owned by others, and the incumbent may work under direct supervision of, or according to strict guidelines set by the owner(s) or person(s) in the owners' employment. Persons in 'paid employment jobs' are typically remunerated by wages and salaries, but may be paid by commission from sales, by piece-rates, bonuses or in-kind payments such as food, housing or training.⁹¹

“Parental benefits” refers to at least ten consecutive days parental leave (as provided for in section 25A of the BCEA) commencing when the employee's child is born or the date that the adoption of an employee's child is granted, or the date that a child is placed in the care of prospective adoptive parent by a competent court, pending finalization of adoption order, whichever date occurs first. Parental benefits are payable at a rate of 66% of the beneficiary's earnings as at the date of application, subject to the applicable maximum income threshold as provided for in section 12(3)(cA) of the UIA, 2001.

⁸⁹ OECD *Glossary of Statistical Terms* (2007) 479.

⁹⁰ OECD *Glossary of Statistical Terms* (2007) 568.

⁹¹ Resolution concerning the International Classification of Status in Employment, Adopted by the Fifteenth International Conference of Labour Statisticians (January 1993).

“Parental rights and responsibilities” among others, mean

- (a) the right of care of the child;
- (b) the right to maintain contact with the child;
- (c) the right to act as the guardian of the child; and
- (d) the responsibility to contribute towards the maintenance of the child.⁹²

“Self-employment” involves workers who have created their own employment opportunities and are not accountable to an employer. Self-employed persons are not necessarily informal workers, but the two terms are also not mutually exclusive. An informal worker works for a company or entity that is not registered. An informal worker could be self-employed and someone working for themselves could be operating informally.”⁹³ Self-employment includes entrepreneurial activities (e.g. individuals who own their own business that employs other workers), own account workers as well as wage employment.⁹⁴

“Self-employment job” means a job where the remuneration is directly dependent upon the profits (or the potential for profits) derived from the goods and services produced (where own consumption is considered to be part of profits). The incumbent makes the operational decisions affecting the enterprise or delegate such decisions while retaining responsibility for the welfare of the enterprise.”⁹⁵

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer.

⁹² Section 18 of the Children’s Act 38 of 2005.

⁹³ DPME “Policy Options for Extending Social Protection to Informal Workers in South Africa: An issue paper for the Planning Commission” (undated) vii.

⁹⁴ Republic of South Africa “Medium Term Strategic Framework 2014-2019, 21.

⁹⁵ OECD *Glossary of Statistical Terms* (2007) 709.

“Social assistance” is a subcategory of social security and is generally tax-funded and aimed at ensuring a minimum standard of living.

“Social insurance” is a subcategory of social security and requires contributors, usually employers and/or employees, to contribute to communal funds from which beneficiaries are paid out when they meet eligibility requirements. Social insurance measures include unemployment insurance and workers’ compensation.

“Social protection” means “comprehensive social protection”, “which is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.”⁹⁶

“Social security” is “a set of public, private or public-private measures that mediate the financial consequences when certain risks eventuate.”⁹⁷ The ILO Social Security (Minimum Standards) Convention 102 of 1952 include the following risks: illness, maternity, employment injuries and diseases, unemployment, invalidity, old age, death, health care provisioning and subsidies for families with children.

“Subsistence work or labour” means (unpaid) work done by women either within the household or outside the household, but which directly benefits the livelihood of the household. It is not viewed as having financial importance in economic terms, but has a direct survivalist impact on the livelihood of a woman and her family.⁹⁸

⁹⁶ Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa “Report No 3: Constitutional framework of social security in South Africa: Regulation, Protection, Enforcement and Adjudication” (2002) 41.

⁹⁷ Collier D, et al *Labour Law in Context* (2018) 498.

⁹⁸ Women’s Legal Centre “Submission on Maternity and Paternity Benefits for Self-Employed Workers” (26 September 2017) footnote 4. See also Department of Planning, Monitoring and Evaluation “Policy Options for Extending Social Protection to Informal Workers in South Africa: An issue paper for the Planning Commission” (undated) vi.

“Surrogate mother” means an adult woman who enters into a surrogate motherhood agreement with the commissioning parent.⁹⁹

“Surrogate motherhood agreement” means an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.¹⁰⁰

“Workers’ cooperative” means an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles.¹⁰¹

⁹⁹ Section 1 of the Children’s Act, 2005 (Act 38 of 2005).

¹⁰⁰ *Idem*.

¹⁰¹ Section 1 of the Co-operatives Act 14 of 2005.

CHAPTER 2: OVERVIEW OF MATERNITY AND PARENTAL PROTECTION REGIME IN SOUTH AFRICA

A. Introduction

1. The progressive realisation of the Constitutional right to social security is essential to the fight against poverty, inequality and unemployment in South Africa.¹ If the implementation of this socio-economic right is not monitored and tracked over time, its inclusion “on paper might not be felt in reality by millions of poor people.”²

2. The Constitution provides that:

[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.³

3. For purposes of this investigation, the most important basic rights that are provided for under sections 27(1) and 28(1) of the Constitution are the following:

- (a) the right to have access to social security;
- (b) the right to have access to social assistance, for those unable to support themselves;
- (c) the right to have access to health care services;
- (d) the right to have access to reproductive health care services; and
- (e) every child’s right to family or parental care, or to appropriate alternative care when removed from the family environment.

¹ Dawson H, “Monitoring the right to social security in South Africa: An analysis of the policy gaps, resource allocation and enjoyment of the right” (September 2013) SPII 2.

² *Idem*.

³ Section 27(1)(c).

4. In terms of section 27(2) of the Constitution, the State is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights provided for in sections 27(1). Although the limitation clause in section 27(2) of the Constitution is silent on the time-frames, the percentage or coverage of people over time or even how the state should finance access to socio-economic rights, there is, however, no doubt that this obligation is binding on the state.⁴

5. The South African public social security system is perceived as a two-pillar system comprising of the State revenue funded social assistance (non-contributory) and social insurance (contributory) programme.⁵ The third pillar that is envisaged in the key reform proposals for a comprehensive social security system for the Republic of South Africa is “supplementary private retirement and insurance plans.”⁶

6. According to the report by the Department of Planning, Monitoring and Evaluation (DPME)-

South Africa has a very well-developed social protection system with over 18 million citizens covered. In 2019, there are 12.7 million recipients of the Child Support Grant; 154,277 Care Dependency Grant and 317,206 on the Foster Care Grant. There are, however, significant gaps. Social insurance is available to working-age adults who are formally employed but there is very little social protection to people working in the informal sector. This is well recognized in the social protection chapter of the National Development Plan (Chapter 11) which states that social protection systems must establish mechanisms to cover the risks associated with temporary and part-time workers and the increasing numbers of self-employed. One objective of the plan is therefore to rectify this gap by extending social protection to informal workers.⁷

7. It is stated in Chapter 1 of this Discussion Paper that this investigation aims to look at a number of possible legal mechanisms address the gap that currently exists in the State’s social protection system, in that self-employed (own account and wage) workers are

⁴ Dawson H, “Monitoring the right to social security in South Africa: An analysis of the policy gaps, resource allocation and enjoyment of the right” (September 2013) SPII 2.

⁵ In terms of the NDP, there two components to the basic architecture of a state’s social security system are social assistance and social insurance, 329.

⁶ Inter-departmental Task Team on Social Security and Retirement Reform “Comprehensive Social Security in South Africa: Discussion Document” (March 2012) 5.

⁷ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission (undated) ii.

excluded from receiving maternity and parental benefits when the mother enters confinement. The possible legal mechanism includes:

- a) extension of the State's social assistance programme;
- b) extension of the statutory social insurance scheme that currently provides for maternity and parental benefits to workers employed formally (Unemployment Insurance Fund, hereinafter "UIF");
- c) creation of a comprehensive social security system covering all employees including self-employed workers (National Social Security Fund (NSSF) and National Health Insurance (hereinafter "NHI"); or
- d) a combination of any of the above mechanisms.

8. An overview of the above-mentioned legal mechanisms is provided in the next sections. An overview of the proposed comprehensive social security system is discussed first under section B. The social assistance and social insurance programmes, that is, interventions designed to stimulate the need for the utilization of health care services, are discussed under section C. The proposed National Health Insurance scheme, that is, interventions designed to provide access to health care services, is discussed under section D.

B. Comprehensive social protection system

9. In March 2012, the IDTT released a discussion document containing proposals for the reform of the social security system of South Africa. In the discussion document, the IDTT proposes the establishment of a National Social Security Fund (NSSF) "which will be financed by contributions from workers and employers and will pay pensions, disability and survivor benefits, and unemployment benefits."⁸ The social security is perceived in the discussion document as comprising of three principal pillars, that is, social assistance, which is funded by the fiscus; the mandatory social insurance, which is funded by employer and employee contributions; and the voluntary private retirement and insurance plans, which are funded by either the employee or the employer, or a combination of the two.

⁸ IDTT "Comprehensive Social Security in South Africa Discussion Document" (March 2012) 4.

10. The discussion document states that the establishment of the proposed NSSF should be accompanied by measures to address deficiencies in the existing social security institutions such as the fact that “social assistance does not reach all intended targets.”⁹ The view that social grants do not reach out to all the intended beneficiaries was reiterated by the then Minister for Social Development, the Hon Ms Bathabile Dlamini, who proposed that social grants should be extended to people between the ages of 18 and 59 who are currently excluded.¹⁰ Thus the social insurance pillar targets low-income workers who earn below a given prescribed income threshold. Such workers will not be obliged to contribute to the NSSF for the specified risk benefits.

11. The discussion document proposes that a “simplified contribution arrangement for self-employed individuals and informal workers will also be established.”¹¹ Thus workers who earn above a given prescribed income threshold will be required to contribute to the NSSF on a mandatory basis for the specified risk benefits.

12. The proposed social security reforms are consistent with the government’s broader development strategy and the NDP.¹² The NDP states that the comprehensive social protection system of the RSA includes the establishment of a National Health Insurance Fund that enables equitable access to health care for everybody regardless of a person’s earning potential.¹³ This includes the provision of, among others, “free health care for pregnant women and children under six years of age.”¹⁴

13. The maternity and parental protection system proposed by the Commission find resonance with the above stated philosophy underlying the establishment of a NSSF and NHI.

⁹ *Ibid.*

¹⁰ Speech made by Minister Bathabile Dlamini at NEDLAC on 25 November 2016, Legalbrief issue No.4995 dated 6 August 2020.

¹¹ IDTT “Comprehensive Social Security in South Africa Discussion Document” (March 2012) 5.

¹² *Idem.*

¹³ NPD, 299.

¹⁴ *Ibid.*, 326.

14. The following sections discuss the types of financing interventions that can be implemented by the state to enhance the right of access to maternal and child health. The interventions are classified into two broad categories, namely:

- (a) demand-side (DS Financing) interventions: that is, interventions designed to stimulate the need for the utilization of health care services; and
- (b) supply-side (SS Financing) interventions: that is, interventions designed to provide access to health care services.

C. Demand-side financing interventions

1. Social assistance

(a) *Child support grant*

15. Social assistance in South Africa is delivered through eight different types of social grants.¹⁵ The social assistance prong of the South African social security system is much bigger than the social insurance prong, in that “payments made on social grants each year exceed payments made by the UIF by more than 10 times, confirming that South Africa’s social protection system is skewed towards social assistance rather than social insurance”.¹⁶

16. Legalbrief reports that social grants which were increased and expanded during lockdown help to moderate the impact of poverty.¹⁷ According to a study conducted by the

¹⁵ DPME “Policy Options for Extending Social Protection to Informal Workers in South Africa: An issue paper for the Planning Commission” (undated) 5. These are (i) child support; (ii) older persons; (iii) disability; (iv) foster care; (v) care dependency; (vi) grant-in-aid; (vii) social relief of distress; and (viii) war veterans grants.

¹⁶ DPME “Policy Options for Extending Social Protection to Informal Workers in South Africa: An issue paper for the Planning Commission” (undated) 8.

¹⁷ Legalbrief Issue No.5033 dated 1 October 2020. The CSG was increased by R300 in May 2020, and by additional R500 from June to October 2020 during lockdown. Following the budget speech delivered by the Minister of Finance, Mr Tito Mboweni, on Wednesday 24 February 2021, the care dependency grant was increase by R80 to R1 860 pm; the foster care grant by R40 to R1040 pm; and the child support grant by R20 to R445 pm, <https://ewn.co.za/2020/02/26/here-s-all-the-social-grant-increases-for-2020> (accessed on 03 March 2021).

National Income Dynamics, government social grants “had a significant impact on extreme poverty, reducing the number of households that went hungry by 27%. Hunger levels are, however, still far above pre-coronavirus levels, with as many as 16% of households reporting that they went hungry in the seven days preceding the survey.”¹⁸

17. The South African Social Security Agency (SASSA) established in terms of section 2 of the South African Social Security Agency Act, 2004 (Act No.9 of 2004) is responsible for the management, administration and payment of social assistance grants. SASSA reports to the Minister of Social Development. The DSD is responsible for developing policy with regard to social assistance and monitoring of the implementation of the State’s social assistance programme through SASSA.

18. Section 4 (**Provision of social grants**) of the Social Assistance Act, 2004 (Act 13 of 2004) provides that the “Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for that purpose, make available-

- (a) a child support grant;
- (b) a care dependency grant;
- (c) a foster child grant;
- (d) a disability grant;
- (e) an older person’s grant;
- (f) a war veteran’s grant; and
- (g) a grant-in-aid.

19. The foster child grant (FCG) is a grant meant for children in need of protection and placement in a foster care home. The FCG can be extended until the age of 21 provided that the child is still studying. Care dependency grant (CDG) is payable to care givers of children who are severely disable and in need of support services.

20. Section 6 of the Social Assistance Act, 2004 provides as follows:

6. Child support grant

Subject to section 5-

¹⁸ Legalbrief Issue No.5033 dated 1 October 2020.

- (a) *a person who is the primary care giver of a child; or*
- (b) *a child who heads a child-headed household, as contemplated in section 137 of the Children's Act, 2005 (Act No.38 of 005),
is eligible for a child support grant.*

21. Thus, a child support grant (CSG) is payable to parents or primary caregivers of children between the ages of 0 to 18.¹⁹ Children aged 16 and above who are heading a family also qualify as primary care givers. According to the Centre for Health Policy (CHP), “[t]he CSG was introduced in 1998 mainly to ensure that young children received sufficient nutrition at a critical stage of their development. The CSG has proven successful in reducing hunger, improving nutrition, and in promoting health and development in young children, among many other benefits.”²⁰ The beneficiaries of the CSG are South African citizens, persons who are resident in South Africa or a member of a group or category of persons prescribed by the Minister by notice in the *Gazette*.²¹

22. Section 5(2) of the Social Assistance Act provides that the “Minister may prescribe additional requirements or conditions in respect of-

- (a) income threshold;
- (b) means testing;
- (c) age limits, disabilities and care dependency;
- (d) proof of and measures to establish or verify identity, gender, age, citizenship, family relationship, care dependency, disabilities, foster child and war veterans' status;
- (e) forms, procedures and processes for applications and payments; and
- (f) measures to prevent fraud and abuse.

¹⁹ SASSA “2020-2025 Strategic Plan” 22.

²⁰ The Centre for Health Policy “Investigating the Potential Impact of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 3.

²¹ Section 5(1)(b)-(c) of the Social Assistance Act 13 of 2004.

23. In order to qualify for the current R450 monthly CSG,²² single parents must not earn more than R52 800 per annum, or R105 600 per annum in respect of married parents.²³ The child must be under 18 years old, not be cared for in a State institution and must live with the primary care giver who is not paid for looking after the child. In terms of the draft amendments to the Regulations relating to the application for and payment of social assistance,²⁴ the formula for the determination of the income threshold for the CSG is:

A = B x 10: where

(I) A = annual income threshold

(II) B = annual value of the child support grant, that is, R450 x 12 (=R5 400) x 10 = R54 000

24. Clause 3 of Annexure B of the draft Regulations stipulates that “[w]here a person in a spousal relationship has been deserted for a period of at least three months by his or her spouse and the spouse is unwilling to support that person, the applicant is to be regarded as not being in a spousal relationship for the purpose of determining the means test as contemplated in regulation 19.”²⁵

25. The number of child related social grants paid by SASSA from 2014/15 financial year to December 2019 is presented in Table 2.1 below.

Table 2.1: Number of social grants per grant type²⁶

Grant type	2014/15	2015/16	2016/17	2017/18	2018/19	Dec/19
Care dependency grant	126,777	131,040	144,952	147,467	150,001	154,277
Foster child grant	499,774	470,015	440,295	416,016	386,019	317,206

²² Notice No.R361 published in Government Gazette No.43143 dated 25 March 2020.

²³ Information available at <https://www.gov.za/services/child-care-social-benefits/child-support-grant> (accessed on 15 October 2020).

²⁴ Notice No. R. 39 published in Government Gazette No.44099 dated 25 January 2021.

²⁵ Notice No. R. 39 published in Government Gazette No.44099 dated 25 January 2021.

²⁶ SASSA Strategic Plan 2020/2025 23.

Child support grant	11,703,165	11,972,900	12,081,375	12,269,084	12,452,072	12,702,612
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26. As can be seen from Table 2.1 above, the CSG has the biggest number of beneficiaries compared to all the 8 grant types. As of December 2019, of the 18 138 552 total grants paid by SASSA, 12 702 612 were CSG, which constitutes 70% of the total grants paid by SASSA. As at the end of the 2019/20 financial year, a total amount of 64.9 billion was the projected expenditure for the CSG alone as per Table 2.2 below.

Table 2.2: Social grant expenditure per grant type ('000)²⁷

Grant type	2015/16	2016/17	2017/18	2018/19	2019/20
Care dependency grant	2,394,455	2,613,674	2,843,336	3,068,027	3,429,783
Foster child grant	5,406,785	5,326,150	4,950,744	5,114,210	5,080,800
Child support grant	47,308,536	51,476,941	55,906,388	60,611,568	64,967,275

27. SASSA points out that “approximately 31% of South African population depends on the social assistance programme to meet their basic needs. Furthermore, statistics indicate an upward trend in poverty, with the number of people who are said to be living below the food poverty line constituting about 25% of the population. By 2015, approximately 42% of women were living below the lower-bound poverty line compared to 38% of males.”²⁸

28. Nhongo points out that social protection transfers such as child grants are not many in the Southern Africa.²⁹ However, South Africa and Mauritius “lead in the range of provision and the amounts of transfers provided.”

²⁷ *Idem.*

²⁸ SASSA Strategic Plan 2020/2025 20.

²⁹ Nhongo TM “Social Protection and Informal Workers in Africa” (September 2013) 5.

(b) Basic income grant

29. Although policy proposals to introduce a basic income grant (BIG) have been made since 2000, this grant was not included in the Social Assistance Act on the grounds that it would have been too expensive.³⁰ In July 2020, the Minister for Social Development indicated that government may introduce a BIG for unemployed non-grant recipients between the ages of 18 and 59.³¹ According to Minister Zulu, “historic and emergent factors, in particular the Covid-19 pandemic, had spurred discussions on how the poor will continue accessing support once the R350 Social Relief of Distress (SRD) grant is discontinued.”³² The proposed BIG is intended to replace the Covid-19 SRD grant when it expires by the end of April 2021.³³ The SRD was introduced by the President of South Africa, Mr Cyril Ramaphosa, in his R500 billion economic stimulus package announced in April 2020. In his address to the nation, the President said that:

Another significant area that requires huge additional expenditure is the relief of hunger and social distress in our communities across the country. While we have put in place measures to protect the wages of workers in the formal economy and have extended support to small, medium and micro-sized businesses, millions of South Africans in the informal economy and those without employment are struggling to survive. Poverty and food insecurity have deepened dramatically in the course of just few weeks. To reach the most vulnerable families in the country, we have decided on a temporary 6 months Coronavirus grant.³⁴

30. The SRD grant is administered by SASSA. It was paid for 6 months from May until October 2020. On 11 February 2021, the SRD was extended by the President by a further period of three months. More than 9.6 million applications were processed by SASSA per

³⁰ Dawson H “Monitoring the right to social assistance in South Africa. An analysis of the policy gaps, resource allocation and enjoyment of the right” (September 2013) 6.

³¹ The Minister for Social Development, Ms Lindiwe Zulu, was speaking during a government social cluster briefing, Shoba S “Basic income grant on the table for South Africa’s unemployed poor” <https://www.dailymaverick.co.za/article-2020-07-14> (accessed on 14 July 2020).

³² *Idem*.

³³ Legalbrief Issue No.5130 dated 15 March 2021.

³⁴ TimesLive “President Cyril Ramaphosa’s speech on R500bn rescue package” available at <https://www.dispatchlive.co.za/news/2020-04-21-in-full-president-cyril-ramaphosas-speech-on-r500bn-rescue-package-and-covid-19-lockdown-ending-in-phases/> (accessed on 21 April 2020).

month from May 2020 to January 2021. As at 12 February 2021, the total amount paid by SASSA in respect of the SRD had exceeded R16 billion.³⁵

31. Responding to the question as to who will be eligible for the BIG, the Minister said that:

Currently, the most vulnerable groups of our population are the youth between 18 and 24 and the elderly between 50 and 59. Targeting these groups first and then progressively expanding to other age groups may be warranted. SASSA's infrastructure reaches 31.2% of the population and the grant would be unconditional and individually targeted.³⁶

32. The Social Protection Floors Recommendation, 2012 calls for basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability.³⁷

33. The draft National Youth Policy also calls for the introduction of a basic universal income for unemployed youth, similar to the Covid-19 SRD, to support youth transition into employment and entrepreneurship.³⁸ Although the BIG is supported by all the major opposition parties in Parliament, however, the Minister indicated that "the tight fiscal position in which government finds itself, with mounting debt and ever increasing debt service costs coupled with pandemic spending, have required deep cuts to government expenditure that will make a BIG hard to implement."³⁹

34. In the media statement released by the DSD, the Minister Zulu stated that "the BIG is part of a broader agenda to ensure universal coverage of all citizens in a comprehensive and coherent social security system."⁴⁰ The DSD hopes to finalise proposal for the BIG,

³⁵ South African Government (<https://www.gov.za/speeches/president-cyril-ramaphosa-extends> accessed on 12 February 2021)

³⁶ Shoba S, "Basic income grant on the table for South Africa's unemployed poor" <https://www.dailymaverick.co.za/article-2020-07-14> (accessed on 14 July 2020).

³⁷ Article 5(c) of the Social Protection Floors Recommendation, 2012 (No 202).

³⁸ Department of Women, Youth and Persons with Disabilities "National Youth Policy 2020-2030 Draft" 21. See also Legalbrief Issue No.5129 dated 12 March 2021.

³⁹ Legalbrief Issue No.5130 dated 15 March 2021.

⁴⁰ DSD "Pathways towards the Basic Income Grant" <http://www.dsd.gov.za/index.php/latest-news/21-latest-news/337-17march2021> (accessed on 30 March 2021).

including financing options and implementation pathways in the course of the 2021/2022 financial year.⁴¹

2 Social insurance

35. Social insurance is delivered through a number of statutory funds. These include the Unemployment Insurance Fund (UIF), Compensation Funds, and the Road Accident Fund. The UIF is established in terms of section 4 of the Unemployment Insurance Act, 2001 (Act 63 of 2001). It is responsible for the payment from the Fund of, among others, illness; maternity; parental; adoption; commissioning parent and dependent's benefits related to the unemployment of employees in line with section 27(1)(2) of the Constitution. The UIF is administered by the UIF Board. The Board reports to the Minister of Employment and Labour. The DEL is responsible for developing policy on matters related to employment, including unemployment insurance.

36. The DPME points out that:

Much has been achieved in terms of social protection in South Africa, especially in delivering social assistance to non-working vulnerable groups. However, some significant gaps remain. One of the most important gaps is the delivery of social insurance to informally employed adults."⁴²

(a) *Maternity cash benefit*

37. The position currently is that only "employees" as defined in employment and labour legislation are entitled to maternity benefits of a fixed rate of 66% of the contributor's earnings as at the date of application, subject to the prescribed maximum income threshold.⁴³ However, in order to qualify for maternity benefits, the contributor must have been in employment for at least 13 weeks prior to claiming the benefits from the UIF.

38. Table 2.3 below provides a breakdown of the number of employees who claimed maternity and adoption benefits from 2004/2005 to 2018/2019 financial year.

⁴¹ *Idem.*

⁴² DPME "Policy Options for Extending Social Protection to Informal Workers in South Africa: An issue paper for the Planning Commission" (undated) 5.

⁴³ See definition of "employee" in Chapter 2 of this Discussion Paper.

Table 2.3: Number of employees who claimed maternity and adoption benefits

Beneficiary	Type of benefit	Payment rate	Application process
Employee mother; including a contributor with a miscarriage during 3 rd trimester or bears a still-born child	Maternity cash benefit Adoption cash benefit	66% flat rate of applicable income	Application to be submitted 8 weeks prior to the birth of the child or within 12 months after birth of a child
Total number of people who claimed maternity and adoption benefits⁴⁴			
Financial Year	No. of people who claimed maternity benefits	No. of people who claimed adoption benefits	Total
2015/2016	90 522	40	90 562
2016/2017	98 496	42	98 538
2017/2018	110 687	38	110 725
2018/2019	106 267	36	106 303
2019/2020	109 126	24	109 150
2020/2021	78 644	12	78 656

39. The statutory UIF system is generally based on compulsory participation and is tailored for employees mainly in the formal sector who can easily comply with the formal registration and other administrative requirements. If the statutory UIF system were to be extended to the self-employed and own account workers in the informal sector, it implies that each new employer has to be identified, registered, educated and persuaded to comply with all the rules of the scheme and capacity would have to be developed to enforce these rules.

40. Furthermore, in the case of informal sector self-employed workers, contributions may be difficult to secure, and maintaining up-to-date and correct records is administratively complicated when such persons work intermittently and irregular hours. Van Ginneken points out that there is also some conflict with the underlying concept of “replacement

⁴⁴ Information obtained from the UIF on 05 May 2021.

income” in situations where it is not always clear that the income to be replaced can be accurately and efficiently determined.⁴⁵

41. The Maternity Protection Convention, 2000 (No.183) Convention requires that maternity cash benefits shall be at a level which ensures that a woman can maintain herself and her child in proper conditions of health and with a suitable standard of living. Different countries calculate the cash component of the benefit in different ways, but the most common appears to be based in previous earnings. In the instance where a woman has not previously been employed or cannot provide a history against which a calculation can be made a flat rate may be suitable cash component.⁴⁶

42. Domestic workers were included under the UIF with effect from 2003. Section 1 of the Unemployment Insurance Act, 2001 (Act 63 of 2001) (UIA) defines a domestic worker to mean:

an employee who performs domestic work in the home of his or her employer, and includes a

- (a) Gardener;
- (b) Person employed by a household as a driver of a motor vehicle; and
- (c) Person who takes care of any person in that home but does not include a farm worker.

43. Farm workers are included under the UIF on the basis of section 2(1) of the Act which provides that “[t]his Act applies to all employers and employees, other than employees employed for less than 24 hours a month with a particular employer, and their employers.”

44. The Fund has streamlined registration procedures and provides free online registration procedures in order to reduce administrative hurdles for employers and the employees.⁴⁷

⁴⁵ Ginneken W “Social security for the informal sector: investigating the feasibility of pilot projects in Benin, India, El Salvador and Tanzania” <file:///G:/temporaire/SocPol/567spl1.htm>.

⁴⁶ Women’s Legal Centre “Submission on Maternity and Paternity Benefits for Self-Employed Workers” (26 September 2017) par 32. The Centre states that Mongolia uses 70% of the average earnings, Iceland uses 80% of the earnings and Senegal uses 100% including any direct allowances or benefits to calculate the cash component.

⁴⁷ ILO “Decent Work and the Informal Economy” (undated) 8.

45. It would appear that there is at present no ILO standard for maternity cash benefits for non-standard workers. This could mean that article 6 of Maternity Convention 183 does not apply to self-employed workers.⁴⁸ In her comparative study of maternity and work in South Africa and Ukraine, Tanzer states that-

ILO's approach foregrounds maternity benefits at the cost of a broader conception of non-discrimination and largely applies to formally employed women, effectively excluding both women in the informal economy and men from its paradigm of protection.⁴⁹

46. This is contrary to CEDAW which "adopts a broad approach to the question of application and applies to all women, both inside and outside the formal workplace, as well as to men."⁵⁰

47. A number of international instruments in the African Union and Southern African Development Community (SADC) regions clearly demonstrate South Africa's obligation to extend adequate social security benefits to all the workers regardless of status and type of employment. For instance, article 4(3) of the SADC Code on Social Security (2008) obliges member states to establish and progressively raise their systems of social security to equal the standard set by ILO.

48. In Namibia, self-employed workers, such as domestic employees as well as employees of SMEs, like shebeens, hair salons, panel beaters and construction workers, who are registered in terms of section 20 of the Social Security Act, of 1994 participate in the state's social insurance scheme (MSD) on a voluntary basis. However, they have to bear the full amount of the contribution.

49. Likewise, in Middle and Southeast Asia, informal sector self-employed workers participate in the social insurance scheme on a voluntary basis in India and Laos People

⁴⁸ Article 6 of the Convention contains two standards for cash benefits for employed workers. The first is that the cash benefit must be at a level which ensures that a woman can maintain herself and her child in proper health conditions with a suitable standard of living. Secondly, cash benefits must not be less than two-thirds of a woman's previous earnings.

⁴⁹ Tanzer Z "Still searching for transformative equality: A comparative study of maternity work in South Africa and Ukraine" (2014) 4.

⁵⁰ *Idem*.

Democratic Republic. Section 10 of the Unorganized Workers Social Security Act, (2008) (India) provides for the registration and issuing of identity cards to unorganized sector workers.

50. The Directive on the Equal Treatment of Men and Women (2010/41/EU) passed by the EU Parliament and Council paved the way for the extension of maternity and parental benefits for self-employed and informal sector workers the in the EU region. Consequently, countries like the United Kingdom and Australia, among others, provide State maternal and parental benefits to self-employed workers.

(b) Maternity leave benefit

51. The position currently is that mainly female employees are entitled to at least four consecutive months' maternity leave. No employee may resume work for six weeks after the date of birth of the baby, unless otherwise authorized by a medical practitioner.⁵¹ In terms of the new sections 25A; 25B; and 25C of the BCEA, an employee who did not qualify for maternity leave will now be entitled to parental leave; adoption leave and commissioning parental leave respectively as discussed in the sections below.

52. There is certainly a strong case for extension of maternity leave to informal sector female workers. Mokomane points out that since South Africa has one of the highest proportions of female-headed households in Africa, it follows that many female workers in South Africa are assuming responsibility alone as the economic provider and caregiver for their children.⁵² The consulted literature also reveals that work-family conflict perpetuates gender inequality. Although the work-family conflict may also limit men's involvement in family matters, however, the conflict is especially higher for women.⁵³

⁵¹ Section 25(3) of the BCEA, 1997.

⁵² Mokomane Z "Work-family conflict and gender equality in South Africa" (September –October 2009) Human Sciences Research Council 2.

⁵³ *Idem*.

53. Stats SA reports that of the 4.2 million workers employed in informal employment in 2013, 5,5% women had paid leave. This figure increased to 5.6% in 2019.⁵⁴ Elsewhere in the report, it is stated that “some of the basic conditions of employment are not met in informal economies, such as maternity leave benefits.”⁵⁵

54. The view that maternity is a right to be enjoyed solely by female employees was held to be misplaced by the Durban Labour Court in the *MIA v State Information Technology* matter.⁵⁶ The court held that this approach ignores the fact the right to maternity leave created in the Basic Conditions of Employment Act in the current circumstances (of same sex union) is an entitlement not linked solely to the welfare and health of the child’s mother but must of necessity be interpreted to and take into account the best interests of the child.

(c) Parental cash benefit

55. The position currently is that only employees are entitled to parental cash benefits. Parental benefits are payable at a rate of 66% of the beneficiary’s earnings as at the date of application, subject to the applicable maximum income threshold.

56. NEDLAC has proposed that persons employed in the informal sector be included in the Labour Laws Amendment Bill as it is an international trend to consider persons employed in the informal sector as employees.⁵⁷ The Committee resolved that comprehensive research should be done in order to address all the concerns regarding the Bill.

⁵⁴ Stats SA “Informal Economy Gender Series Volume VII Report No.03-10-23” 16. It must be noted that StatsSA’s definition of “informal employment” includes employees in the formal sector, *ibid*, viii.

⁵⁵ *Ibid*, 2.

⁵⁶ *MIA v State Information Technology* (D312/2012) [2015] ZALCD.

⁵⁷ PMG “Meeting of the Portfolio Committee on Labour” held on 09 November 2016. The meeting noted that “amendments to deal with informally-employed or self-employed people, as well as resignations, were new proposals which were still under consideration.”

(d) Parental leave benefit

57. The position currently is that only employees are entitled to at least ten consecutive days' parental leave; and at least ten weeks consecutively for adoption leave and commissioning parental leave respectively.⁵⁸

D. Supply-side financing interventions

1. Provision of health care services

58. Currently, South Africa has “a transitional or pluralist health system consisting of a tax-funded health system for the majority and a system of medical schemes for a relatively small proportion of the population.”⁵⁹ The public health system is organized into three areas of health care service delivery, namely:

- (a) primary health care services;⁶⁰
- (b) hospital and specialized services; and
- (c) emergency medical services.

59. Responsibility for the provision of health care services is decentralized into three spheres of government. At the national level, the Minister of Health is responsible for determining policy and measures necessary to protect, promote, improve and maintain the health and well-being of the population, after consultation with the National Health Council. This includes issuing of norms and standards relating to the equitable provision and financing of health care services.⁶¹ At the provincial level, this responsibility is executed by the relevant member of the Executive Council, after consultation with the Provincial Health

⁵⁸ Sections 25A; 25B; and 25C respectively of the BCEA are not operational yet. In terms of section 17 of the Labour Laws Amendment Act, 2018 (Act No.10 of 2018) these sections will come into operation on a date to be fixed by the President by proclamation in the Gazette.

⁵⁹ NDP 307.

⁶⁰ Primary health care comprises of eight components. These are: public education; proper nutrition; clean water and sanitation; maternal and child health care; immunization; local disease control; accessible treatment and drug provision. Lavery S “8 Components of Primary Health Care” available at <http://www.ehow.com/list> (accessed on 24 April 2015).

⁶¹ Sections 3, 21 and 23 of the National Health Act 61 of 2003.

Council. At the municipal level, the relevant member of the Executive Council is empowered to establish district health councils for every district in the province.⁶² Section 32 of the National Health Act 2003 provides that “every metropolitan and district municipality must ensure that appropriate municipal health services are effectively and equitably provided in their respective areas.

60. There is insufficient integration or linkages between health and social services.⁶³ Although the Department of Health (DOH) already provides support to pregnant women and children through the supply of free public health services that are targeted to the needy, however, a substantial number of pregnant women fail to access optimal health care.⁶⁴ According to the CHP, “a comprehensive package of maternal health services including antenatal care, micronutrient supplementation, delivery, emergency obstetric care, prevention of mother-to-child transmission, antiretroviral therapy for HIV and postnatal care, is available.”⁶⁵

2. Establishment of National Health Insurance

61. In terms of the memorandum on the objects of the National Health Insurance (NHI) Bill, 2019,⁶⁶ Cabinet has approved the policy for the transformation of the South African health care system to achieve universal coverage for health services, which includes the creation of a National Health Insurance Fund as a strategy for moving towards Universal Health Coverage (UHC).

⁶² *Ibid*, section 31.

⁶³ CHP *op cit*, 14. Although the proposed maternity and early child support grant will promote linkages between the DOH and DSD, however, this may raise concerns regarding the mandate of the two departments, for instance, “where a woman has a miscarriage or terminated her pregnancy, the question is whether the pregnancy grant will still be payable under these circumstances, *idem*.

⁶⁴ CHP *op cit*, 13.

⁶⁵ *Idem*.

⁶⁶ The National Health Insurance Bill was published in Government *Gazette* No.42598 dated 26 July 2019.

62. The goal of the National Health Insurance is to move towards universal coverage by serving as a strategic and active purchaser of personal health care services by-

- (a) ensuring that the entire population, and not just particular groups, are entitled to benefit from needed, high quality health care;
- (b) extending over time the range of services to which the population is entitled; and
- (c) reducing the extent to which the population has to make direct, out-of-pocket payments for health services.⁶⁷

63. Legalbriefs reports that the Minister of Health, Hon Mr Zweli Mkhize, “has promised an aggressive catch-up drive to restore community health services and persuade people to seek healthcare as South Africa emerges from the pandemic.”⁶⁸ The Minister confirmed that South Africa will forge ahead with the implementation of the NHI Bill which was submitted to Parliament in July 2019.⁶⁹

64. According to the DOH, “a key pillar within the social protection framework is an equally funded health system that promotes social solidarity, affordability and fair access to needed health services that cover the full spectrum of health promotion, prevention, curative and rehabilitative care. The right to access quality health services will be on the basis of need and not socioeconomic status.”⁷⁰

⁶⁷ Section 5.2 of the Memorandum on the Objects of the National Health Insurance Bill, 2019.

⁶⁸ Legalbrief Issue No.30 dated 21 October 2020.

⁶⁹ *Idem*.

⁷⁰ Department of Health “National Health Insurance for South Africa” (December 2015) 62, 9.

CHAPTER 3: SOUTH AFRICA'S LEGISLATIVE AND POLICY FRAMEWORK

A. Introduction

1. It is stated in the Preface to this Discussion Paper that one of the objectives of the legal research component of this investigation is to consider South Africa's legal obligations to expand its current maternity and parental benefits regime to ensure compliance with relevant provisions within the South African Constitution. Chapter 3 (section B) provides a detail analysis of the relevant Constitutional provisions that allow for, if not compel, government to extend maternity and parental benefits in South Africa to workers in the informal economy. Section C provides a detail analysis of the existing legislative and policy framework for maternity and parental benefits in South Africa. A case is made on the basis of the analysis of Constitutional provisions, supplemented by relevant case law, that by failing to extend maternity benefits and protections to all categories of workers, the State is indirectly permitting unfair discrimination through its employment legislation, against specific categories of workers.

B. Constitutional provisions

2. The Constitution of the Republic of South Africa, 1996 (Constitution) is the principal source of legal authority.¹ The Constitution is imbued with distribute justice and values upon which democratic South Africa is based.² The courts are constitutionally obliged to promote the values founded in the Constitution whenever they interpret the Bill of Rights. The Constitutional Court has used the notion of values to promote the common good and welfare

¹ Legal Resources Centre (LRC) "Maternity and Paternity Benefits for Self-Employed Workers in South Africa: A survey of Relevant Law" 5 ("Survey of Relevant Law"). The Survey of relevant law was conducted by Sharita Samuel of the LRC with the assistance of LRC staff. It was presented before Project 143 Advisory Committee meeting held in January 2018.

² Mbazira C, "Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice" (2008) SALJ 88.

of society.³ In *Azanian People's Organisation v President of the Republic of South Africa*, the Constitutional Court held that:

"[t]he resources of the State have to be deployed ...in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past."⁴

3. Section 7 of the Constitution provides that the Bill of Rights "is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." It "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."⁵ The Bill of Rights compels the state to take reasonable legislative and other measures within its available resources to achieve the realization of the rights contained in the Constitution.⁶

4. Section 39 of the Constitution of the Republic of South Africa provides as follows:

- (1) *When interpreting the Bill of Rights, a court, tribunal or forum-*
 - (a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
 - (b) *must consider international law; and*
 - (c) *may consider foreign law.*
- (2) *When interpreting any legislation and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

5. Thus section 39 of the Constitution lays down the rules for the constitutional interpretation of any legislation, common law or customary law by any court, tribunal or forum. The Constitution is perceived as an instrument to transform the South African society

³ *Idem*.

⁴ *Azanian People's Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC) par 43.

⁵ Constitution, section 8.

⁶ *Ibid*, sections 26(2) and 27(2).

based on socio-economic deprivation to one based on equal distribution of resources.”⁷ It is particularly in respect of socio-economic rights that the transformative nature of the Constitution has been underscored.⁸

6. Gender equality, women empowerment and the elimination of all forms of discrimination against women is a constitutional imperative. The Bill of Rights ensures the foundation for a non-racist, non-sexist and human rights-based society where equality, gender, sex, sexual orientation, class, and social security, among others, are primary considerations. The Bill of Rights guarantees the following rights and freedoms:

1. Section 9: Equality

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

7. The equality clause goes on to prohibit state discrimination on the so-called listed grounds of ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’, the so-called vertical prohibition on discrimination,⁹ and introduces the concept of horizontal prohibition against discrimination by others, to be governed by appropriate national legislation, the so-called Equality Act.¹⁰ In this regard, the courts have held that differentiation on illegitimate grounds, or analogous grounds based on a person’s attributes

⁷ Mbazira C, “Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice” (2008) SALJ 85.

⁸ *Idem*. See also Roux T “Understanding *Grootboom*-A Response to Cass R Sunstein” (2002) *Centre for Constitutional Studies* Vol 12, No.2 Edmonton, Alberta 41.

⁹ Constitution, section 9(3)

¹⁰ *Ibid*, section 9(4), as governed by the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.

or characteristics which have the potential to impair a person's fundamental dignity, would constitute discrimination.¹¹

8. The equality clause introduces the presumption of unfairness, in that discrimination on one or more of the grounds listed in section 9(3) is automatically deemed to be unfair, unless the discrimination is proven to be fair.¹² This clause has important considerations for the burden of proof in establishing and rebutting an allegation of unfair discrimination.

9. In *Head of Department: Department of Education, Free State Province v Welkom High School and Another*,¹³ two respondent schools adopted pregnancy policies that provide for the automatic exclusion from school of pregnant learners and thus discriminated unfairly against the pregnant learners in violation of their right to equality in terms of section 9 of the Constitution. The Constitutional Court held that:

Apart from discriminating on the listed ground of pregnancy in a manner calculated to stigmatise, the exclusionary provisions are gender discriminatory in that they apply compulsory exclusionary (and punitive stigmatizing) provisions to pregnant female learners but not to male learners who impregnate female learners, and in so doing reinforce sexist stereotypes that it is girls who are to blame for unwanted pregnancies.¹⁴

10. The Women's Legal Centre argues that the Commission is embarking on a process that requires a reconceptualization of socio-economic rights and the right to work and more specifically just and favourable working conditions.¹⁵ Substantive equality must be placed at the forefront of this undertaking. This approach is necessitated because women are positioned differently to men and differently to each other within the South African context. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men

¹¹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) par 24.

¹² Constitution, section 9(5).

¹³ 2014 (2) SA 228 (CC).

¹⁴ *Ibid*, par 15.4.

¹⁵ Women's Legal Centre "Submission on Maternity and Paternity Benefits for Self-Employed Workers."

must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.¹⁶

11. A key issue to be determined, is, first, whether the State's failure to provide self-employed workers a mechanism to access social security in the form of maternity and parental protection and benefits, constitutes discrimination. Secondly, whether such discrimination amounts to unfair discrimination in violation of section 9 of the Constitution. In the matter of *Harksen v Lane*,¹⁷ the court provided guidance in determining unfair discrimination. In outlining the test for constitutional invalidity, the court held as follows:

(a) *Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*

(b) *Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*

(b)(i) *Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

(b)(ii) *If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*

¹⁶ *Idem.*

¹⁷ *Harksen v Lane* 1998 (1) SA 300 (CC).

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2)(of the interim Constitution).

- (c) *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).*¹⁸

12. The test of unfairness focuses on the impact of the discrimination on the complainant and others in his or her situation. The court in *Harksen* outlined guidelines in this regard, to assist in establishing unfairness. These include the position of the complainant and whether they have been the victim of past patterns of discrimination; the purpose of the discriminatory law or practice and particularly whether it is aimed at achieving a worthy and important societal goal; and the extent to which the rights of the complainant have been impaired.¹⁹

13. In deciding whether the limiting act or conduct can be permitted in terms of the limitation clause, regard must be had to the test of proportionality outlined in section 36. This requires considering the purpose of the limitation and all the other factors referred to in section 36, which include: the right being limited and its importance to an open and democratic society; the nature and extent of the limitation, which would require an assessment of the extent to which the right is infringed; the relationship between the limitation and its purpose, which would require an assessment of the nexus or link between the limitation and the purpose sought to be attained; and whether there is a less restrictive means to achieve the purpose.²⁰ The impact on the complainant is of central importance in this deliberation, as the more egregious the violation, the less likely it is to be deemed fair.

14. It can be argued that the State's maternity and parental benefits legislative framework constitutes differential treatment, effectively preventing categories of female and male workers from accessing maternity and parental benefits while granting the same to others, based on their category of employment. It can be argued further that this differential treatment constitutes discrimination, in violation of section 9(1) of the Constitution, in that

¹⁸ *Ibid* para 53.

¹⁹ *Harksen v Lane, op cit*, para 50.

²⁰ Constitution, section 36.

there cannot be said to be any rational connection between the exclusion of self-employed workers from the maternity and parental benefits regime, and a legitimate government purpose, beyond possible concerns about affordability and an appropriate mechanism to manage their inclusion.

15. The question must be asked whether such discrimination constitutes unfair discrimination, noting that the basis for the exclusion of these workers is their category of employment, which does not form one of the prohibited grounds for discrimination envisaged by section 9(3) of the Constitution. It could be argued that this should be viewed as an analogous ground, following the rationale of the *Hoffmann v South African Airways* judgement.²¹ The justification for this argument is that discrimination on this ground impairs the fundamental dignity of self-employed, informal economy workers, and does not represent what the drafters of the Constitution intended when they decreed that everyone has the right to social security, as opposed to only designated employees in the formal economy. While ensuring that female “employees” have access to maternity benefits is a victory in the promotion of gender equality, by excluding atypical female workers from such benefits, the state is widening the divide between categories of workers on an employment basis. In South Africa, this is inextricably linked to class, race and socio-economic status.

16. In *Larbi-Odam and Others v Member of the Executive Council for Education and Another*,²² the Constitutional Court had to consider an application to declare government regulations which discriminated against the appellants on grounds not specified in section 8(2) of the interim Constitution invalid because of inconsistency with the Constitution. Mokgoro J held that “to determine whether the discrimination in this case is unfair, regard must be had primarily to the impact of the discrimination on the appellants, which in turn requires a consideration of the nature of the group affected, the nature of the power exercised, and the nature of the interests involved.”²³ The court declared the regulations to be inconsistent with the Constitution and invalid since they affected employment opportunities of the appellants which are undoubtedly a vital interest.

²¹ 2001 (1) SA 1 (CC) par 24.

²² 1997 (12) BCLR 1655

²³ *Idem*, par 23.

17. In applying the *Harksen v Lane* enquiry to determine whether or not such discrimination constitutes unfair discrimination, the position of self-employed workers as victims of past patterns of discrimination, their unequal access to economic participation and their impoverished socio-economic status in society has been noted in this discussion paper. There can be no worthy or important societal goal put forward by the State that justifies excluding such workers from the maternity and parental protection regime. In addition, the gendered component of this discrimination must be highlighted, in that it is women self-employed workers, among others, who are affected by this exclusion. In this, we see the persistence of gender inequality, in that many cases that on the face of it may not constitute a gender equality matter, nonetheless have gender implications. This amplifies the convergence between poverty and gender inequality.²⁴ Finally, the implication for the denial and abuse of fundamental constitutional rights has been extensively detailed, including the impact on such workers' right to dignity. On the basis of this enquiry, it is evident that this exclusion constitutes unfair discrimination.

18. In determining whether or not this unfair discrimination could be permitted in terms of the limitations clause as governed by s 36 of the Constitution, it can be argued that the limitation of the rights to equality and dignity would not pass the test of proportionality as envisaged by this section. An open and democratic society could not countenance such harm occasioned against rights forming part of the foundational principles and values of our Constitution. The purpose of the exclusion of this category of workers from the right to social security is not apparent from the framing of the legislation, an assumption being that the cost and logistical implications might be challenging to address.

2. Section 10: Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

19. As noted, central to an enquiry into whether discrimination is regarded as unfair, is the impact on its victims, and dignity is pivotal to answering this question.²⁵ In the *Hoffmann*

²⁴ Kate O'Regan 'The Right to Equality in the South African Constitution' (2013) 25 *Columbia Journal of Gender and Law* 110 at 114.

²⁵ Currie & De Waal *The Bill of Rights Handbook* (2015), 253.

matter,²⁶ the Constitutional Court had to determine whether the respondent's practice of refusing to employ as cabin attendants people who are living with Human Immunodeficiency Virus (HIV) violates the appellant's rights to equality, human dignity and fair labour practices. The Court held that the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination.²⁷ Furthermore, the Constitutional Court held that section 38 of the Constitution provides that where a right contained in the Bill of Rights has been violated, the court may grant appropriate relief.

3. Section 11: Life

Everyone has the right to life.

20. The right to life, health and human dignity are inextricably bound.²⁸ They are the foundation of all the personal rights contained in the Bill of Rights. The right to life could arguably be threatened in instances where pregnant informal sector self-employed workers are not able to financially afford leaving their place of work in the latter months of their pregnancies, or to return to trade early after the birth or miscarriage of a child, endangering the female worker's life and that of the child. The implications for maternal and child mortality are grim.

4. Section 12: Freedom and security of the person

(2) *Everyone has the right to bodily and psychological integrity, which includes the right-*

(a) *to make decisions concerning reproduction;*

(b) *to security in and control over their body; ...*

²⁶ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

²⁷ *Ibid*, par 40.

²⁸ *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 36.

5. 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.

21. In a gendered socio-economic context, many women do not have the choice to opt for an occupation that offers social protections, including maternity benefits. The limited opportunities and support available to them result in many women being forced into the informal sector, where no such benefits are available.²⁹

6. Section 23: Labour relations

Everyone has the right to fair labour practices.

22. In instances where pregnant informal economy workers are denied workplace protections guaranteed under labour provisions for designated 'employees', either in the form of non-discrimination and dismissal on the basis of pregnancy, or the provision of appropriate protective clothing or alternative duties non-harmful to the mother or her foetus, these rights may be violated.

7. Section 24: Environment

Everyone has the right to an environment that is not harmful to their health or wellbeing.

8. Section 27: Health care, food, water and social security

27 (1) *Everyone has the right to have access to-*

- (a) *health care services, including reproductive health care;*
- (b) *sufficient food and water; and*
- (c) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*

(2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*

²⁹ Bonthuys and Albertyn (2007), *op cit*, 9.

23. The Constitutional Court has tailored section 27 in a manner that supports the inclusion of workers in the informal sector in the state parental benefit scheme.³⁰ In *Khosa and Other v Minister of Social Development and Others*,³¹ the Constitutional Court held that-

There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.

24. Although the Court did not explicitly address the issue of maternity and parental benefits in the *Khosa* case, the decision suggests that workers in the informal sector cannot legally be excluded from maternity and paternity benefit schemes if they are citizens or permanent residents.³² Alternatively, their exclusion may be unconstitutional if they are among the poorest of the poor.³³

25. The Constitutional Court of Uganda held that:

“As a fundamental right, the right to health of women should be made available and accessible by the state through the formulation of necessary laws and programs. In the absence of any mechanisms, these rights become ineffective and would constitute

³⁰ LRC “Survey of Relevant Law” 10.

³¹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) par 74.

³² LRC “Survey of Relevant Law” 10.

³³ *Idem*.

a breach of obligations vested upon the state. When this arises, the court may issue necessary orders or directives for the state to fulfil its responsibilities.”³⁴

26. The court interpreted the right to health “as an inclusive right that does not only extend to timely and appropriate provision of health care but also to determinants of health that include healthy occupational and environmental conditions.”³⁵

27. The right to basic maternal health care services comprises, among others, of the following elements:

- (a) sexual and reproductive health services;
- (b) access to family planning;
- (c) pre- and post-natal care;
- (d) emergency obstetric services (sufficient number of trained and skilled attendants and support staff); and
- (e) access to information.³⁶

28. The constitutional provisions in this regard are key to an appreciation of the denial of maternity benefits and social security to informal sector workers. The guarantees outlined in this section of the Constitution, while equally subject to the limitations outlined in section 36 of the Constitution, are subjected to an inbuilt qualifier. Here, the Constitution imposes on the state the obligation to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’.³⁷ Although the Constitutional Court of Uganda agreed with the government’s submission to the effect that the provision of basic maternal health care services depends upon the

³⁴ *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 54.

³⁵ *Ibid*, 8

³⁶ *Ibid*, 9.

³⁷ Constitution, section 27(2)

availability of resources, however, the court held that lack of financial resources should not be used as a blanket excuse and defence for failure to provide the services.³⁸

9. Section 28: Children

(1) *Every child has the right-*

- (b) *to family care or parental care, or to appropriate alternative care when removed from the family environment;*
- (c) *to basic nutrition, shelter, basic health care services and social services;...*

29. Section 28 of the Constitution also applies to parents as the caregivers and bearers of children. This provision does not exclude newborn babies and fetuses from the right to parental care.³⁹

30. Polity reports that eight of the nine provincial Social Development Departments had cut subsidies to approved ECD centres during lockdown on the grounds that “schools could in any event not function during a lockdown.”⁴⁰ However, the Gauteng High Court declared the conduct of the Minister for Social Development and MECs in the Eastern Cape, Gauteng, Free State, KwaZulu-Natal, Limpopo and Mpumalanga to be “in breach of their constitutional and statutory duty to implement the subsidies in their respective provinces.”⁴¹ The court held that government is obliged to pay the subsidies “in order to give ECD centres the means to provide access to nutrition and educational stimulation to infants and young vulnerable children.”⁴²

³⁸ *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 19.

³⁹ LRC “Survey of Relevant Law” 9.

⁴⁰ Polity information available at <https://www.polity.org.za/article/court-finds-minister-lindiwe-zulu-has-failed-in-her-constitutional-and-statutory-duties-yet-again-regarding-early-childhood-development-centers> (accessed on 22 October 2020).

⁴¹ *Idem.*

⁴² *Idem.*

31. The Constitutional Court had an opportunity to interpret sections 26 and 27 of the Constitution in the *TAC*,⁴³ *Grootboom*,⁴⁴ *Soobramoney*⁴⁵ and *Mazibuko*⁴⁶ cases in a manner that was expected to give proper guidance to the constitutional interpretation of socio-economic rights in South Africa and what relief would be appropriate in the circumstances of the cases in question. In the *Grootboom* case, the Constitutional Court had to decide whether government has an obligation to take reasonable legislative and other measures within its available resources in order to provide access to adequate housing. Yacoob J held that reasonableness requires that a program implemented in order to realize a socio-economic right must be 'comprehensive', 'coherent', 'balanced' and flexible. More importantly, a program that excludes a significant sector of the society cannot be said to be reasonable.⁴⁷ The Constitutional Court held that the provision of socio-economic rights by the State is subject to the principle of progressive realization of these rights and the availability of resources. In Uganda, the Constitutional Court held that lack of availability of resources should not be used as a blanket excuse and defence to provide basic services. It found that some of the services did not require money to be rendered.⁴⁸

32. It is clear that the Constitutional Court adopted the reasonableness test to determine the nature of government's statutory obligation entailed by the socio-economic rights and by implication the content of these rights. In the *Grootboom* case, the Court rejected the notion of a minimum core in favour of an approach that seeks to judge each socio-economic right on merit.

33. According to Wesson-

⁴³ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

⁴⁴ *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC).

⁴⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁴⁶ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

⁴⁷ *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC), par 43.

⁴⁸ *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 19. Examples of services that did not require money cited by court include the delay by doctors and nurses in attending to the patients, bribes and corruption.

*The Court can be understood as seeking to protect the interests of vulnerable sectors of the society, while also leaving the primary responsibility for coordinating socio-economic rights in the hands of the state.*⁴⁹

34. In the *TAC* case,⁵⁰ the Constitutional Court held that government breached its duty to progressively realise the right of everyone to health care services, including reproductive health care, when it denied to provide “Nevirapine to pregnant women with HIV who give birth in the public sector, and to their babies in public health facilities to which the ‘appellants’ (government) present programmes for the prevention of mother-to-child transmission of HIV has not yet been extended.”

35. The Court held that-

The Constitution requires government to comply with the obligations imposed upon it. Should a court find the government to be in breach of these obligations, the court is required to provide effective relief to remedy that breach. In formulating that relief, the Court will be alert both to the proper functions of the legislature or executive under our Constitution, and to the need to ensure that constitutional rights are vindicated. There can be no argument that order 2 improperly trespasses on the exclusive domain of the legislature or executive. There was no basis, therefore, for attacking order 2 as being in breach of the separation of powers.⁵¹

36. According to the LRC, it is interesting to note that the employment status of the respondents who were represented by the Treatment Action Campaign was never mentioned in the judgement.⁵² This decision therefore suggests that when the state has a duty to realize the right to reproductive healthcare, the employment status need not necessarily be a restraining factor.⁵³

37. The *TAC* judgement also affirms the link between sections 27 and 28 of the Constitution in respect of the right to-

⁴⁹ Wesson M, “Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court” (2004) *South African Journal on Human Rights* 284.

⁵⁰ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) par 14.

⁵¹ *Ibid*, par 20.

⁵² LRC “Survey of Relevant Law” 11.

⁵³ *Idem*.

- (a) Family care or parental care;
- (b) Health care services, including reproductive health care;
- (c) Social security, including if they are unable to support themselves and their dependants, appropriate social assistance; and/or
- (d) Appropriate alternative care when removed from the family environment.⁵⁴

38. In the *Mazibuko* case,⁵⁵ the primary question that had to be decided by the Constitutional Court is the extent of the State's positive obligation entailed by the socio-economic rights. In this case, the applicants, who are five residents of Phiri in Soweto, argued that the allocation of 6 kilolitres of free water per stand per month by the City of Johannesburg is unreasonable within the meaning of section 27(1)(b) of the Constitution.⁵⁶

39. Referring to its decision in the *TAC* case, the court reiterated its position on the relationship between sections 26(1) and 26(2); and sections 27(1) and 27(2) of the Constitution and held that "[We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to respect, protect, promote and fulfil such rights."⁵⁷

40. Applying this approach to the right of access to water, O' Regan held that "[T]he Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus, it places a positive obligation upon the State to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness."⁵⁸

⁵⁴ *Idem*.

⁵⁵ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

⁵⁶ Section 27(1)(b) of the Constitution provides that "[E]veryone has the right to have access to sufficient food and water."

⁵⁷ *Mazibuko*, *op cit*, par 49.

⁵⁸ *Ibid*, par 66.

41. Sections 9, 10, 11, 12, 22, 23, 24, 27 and 28 of the Constitution detail the right of everyone to equal protection under the law and the states' obligation not to unfairly discriminate directly or indirectly against anyone on any of the grounds including sex, gender, pregnancy, or employment status (section 22 of the Constitution).⁵⁹ The above mentioned sections of the Constitution, read together with the directives of section 39 of the Constitution and the Constitutional Court decision in the *Grootboom* case, among other cases, allow for, if not compel, the extension and implementation by government of a robust parental benefit scheme in South Africa to workers in the informal economy.

42. The Constitutional Court of Uganda had to determine whether the government's omission to adequately provide basic maternal health care services in public health facilities, including the provision of emergency obstetric care, violates the right to health, life and the rights of women in contravention of the Constitution of the Republic of Uganda which guarantees these rights. It found that "the government's omission to provide adequate basic maternal health care services in public health facilities violate the right to health in contravention of Articles 8A, 39 and 45 read together with objectives XIV and XX of the constitution."⁶⁰

43. Furthermore, the court held that "the right to health, life and human dignity are inextricably bound. There can be no argument that without the right to health, the right to life is in jeopardy."⁶¹

C. Existing legislative and policy framework for maternity and parental benefits in South Africa

44. Since the adoption of the Constitution in May 1996, South Africa has been making consistent efforts at fulfilling its obligations as contained in the Constitution and in regional and international conventions ratified by South Africa through enacting legislation, policies

⁵⁹ LRC "Survey of Relevant Law" 6.

⁶⁰ *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 34

⁶¹ *Ibid*, 36.

and strategies for women empowerment and provision of human rights.⁶² The existing maternity and parental benefit scheme in the Republic is contained in various provisions of the following principal legislation:⁶³

- (a) Basic Conditions of Employment Act, 1997 (Act 75 of 1997);
- (b) Unemployment Insurance Act, 2001 (Act 63 of 2001);
- (c) Unemployment Insurance Contributions Act, 2002 (Act 4 of 2002);
- (d) Social Assistance Act, 2004 (Act 13 of 2004);
- (e) Medical Schemes Act, 1998 (Act 131 of 1998);
- (f) National Health Act, 2003; (Act 61 of 2003);
- (g) Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996);
- (h) National Health Insurance Bill [B11-2019];
- (i) Labour Relations Act, 1995; (Act 66 of 1995);
- (j) Employment Equity Act, 1998 (Act 55 of 1998);
- (k) Skills Development Act, 1998 (Act 97 of 1998);
- (l) Occupational Health and Safety Act, 1993 (Act 85 of 1993);
- (m) Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993);
- (n) Mine Health and Safety Act, 1996 (Act 29 of 1996);
- (o) Children's Act, 2005 (Act 38 of 2005);
- (p) National Small Enterprise Act, 1996 (Act 102 of 1996); and
- (q) National Development Plan;
- (r) National Integrated Early Childhood Development Policy, 2015
- (s) White Paper on Social Welfare, 1997

1 Social Insurance Scheme

(a) *Basic Conditions of Employment Act, 1997 (Act 75 of 1997)*

45. The Basic Conditions of Employment Act, 1997 (BCEA) is the primary domestic legislation governing maternity leave (section 25); parental leave (section 25A); adoption

⁶² Department of Women "South Africa's Beijing +20 Report" January 2015 8.

⁶³ LRC "Survey of Relevant Law" 11.

leave (section 25B); commissioning parental leave (section 25C); family responsibility leave (section 27); as well as the protection of employees before and after the birth of a child (section 26).⁶⁴ The LRC states that in the absence of paternity leave in South Africa, “fathers often take family responsibility leave at the birth or adoption of a child.”⁶⁵

46. The BCEA in its current format does not apply to self-employed and own account workers in the formal and informal sectors due to the fact that the Act defines an employee to mean-

- “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer,

and “**employed**” and “**employment**” have a corresponding meaning

47. Section 25 of the BCEA provides as follows:

Maternity leave

- (1) An employee is entitled to at least four consecutive months’ maternity leave.
- (2) An employee may commence maternity leave-
 - (a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or
 - (b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee’s health or that of her unborn child.
- (3) No employee may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.
- (4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.
- (5) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to -

⁶⁴ LRC “Survey of Relevant Law” 12.

⁶⁵ *Idem*.

- (a) commence maternity leave; and
 - (b) return to work after maternity leave.
- (6) Notification in terms of subsection (5) must be given -
- (a) at least four weeks before the employee intends to commence maternity leave; or
 - (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.
- (7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No 63 of 2001)

48. According to the Solidary Centre, employment legislation⁶⁶ excludes informal sector workers who on paper appear to be self-employed, yet in fact they are working under the supervision of someone else.⁶⁷ Furthermore, the Centre points out that case law seems to define the term 'employee' more broadly to include informal sector workers and some workers who might otherwise be considered self-employed workers.⁶⁸

49. There was a general concern from labour organizations that the paternity leave provisions provided for in the legislative framework are inadequate. The Portfolio Committee on Labour heard that the BCEA in the format prior to amendments brought about by section 3 of the Labour Laws Amendment Act 10 of 2018, changed a father's role from a primary caregiver to a secondary caregiver with only three days family responsibility leave in a 12-month cycle available for fathers.⁶⁹

50. Section 3 of the Labour Laws Amendment Act 10 of 2018 amends section 25 of the Basic Conditions of Employment Act, 1997 by the introduction of the following new provisions:

Parental leave

⁶⁶ Employment legislation is used to refer to legislation administered by the Department of Labour.

⁶⁷ The Solidarity Centre "Maternity Protection for Self-Employed Workers" (September 2016) 14.

⁶⁸ *Ibid* at 13.

⁶⁹ Minutes of meeting of the Portfolio Committee on Labour held on 02 November 2016.

25A. (1) *An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave.*

(2) *An employee may commence parental leave on-*

(a) *the day that the employee's child is born; or*

(b) *the date-*

(i) *that the adoption order is granted; or*

(ii) *that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalization of an adoption order, whichever date occurs first.*

(3) *An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to-*

(a) *commence parental leave; and*

(b) *return to work after parental leave.*

(4) *Notification in terms of subsection (3) must be given-*

(a) *at least one month before the-*

(i) *employee's child is expected to be born; or*

(ii) *date referred to in subsection 2(b); or*

(b) *if it is not reasonably practicable to do so, as soon as is reasonably practicable.*

(5) *The payment of parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No.63 of 2001).*

Adoption leave

25.B (1) *An employee, who is an adoptive parent of a child who is below the age of two, is subject to subsection (6), entitled to-*

(a) *adoption leave of at least ten weeks consecutively; or*

(b) *the parental leave referred to in section 25A.*

(2) *An employee may commence adoption leave on the date-*

(a) *that the adoption order is granted; or*

(b) *that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalization of an adoption order in respect of that child,*

whichever date occurs first

(3) *An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to-*

(a) *commence adoption leave; and*

(b) *return to work after adoption leave.*

(4) *Notification in terms of subsection (3) must be given-*

(a) *at least one month before the date referred to in subsection (2); or*

(b) *if it is not reasonably practicable to do so, as soon as is reasonably practicable.*

- (5) *The payment of adoption benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No.63 of 2001).*
- (6) *If an adoption order is made in respect of two adoptive parents, one of the adoptive parents may apply for adoption leave and the other adoptive parent may apply for parental leave referred to in section 25 A: Provided that the selection of choice must be exercised at the option of the two adoptive parents.*
- (7) *If a competent court orders that a child is placed in the care of two prospective adoptive parents, pending the finalization of an adoptive order in respect of that child, one of the prospective adoptive parents may apply for adoption leave and the other prospective adoptive parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two prospective adoptive parents.*

Commissioning parental leave

- 25C. (1) *An employee, who is a commissioning parent in a surrogate motherhood agreement is, subject to subsection (6), entitled to-*
- (a) *commissioning parental leave of at least ten weeks consecutively; or*
 - (b) *the parental leave referred to in section 25A.*
- (2) *An employee may commence commissioning parental leave on the date a child is born as a result of a surrogate motherhood agreement.*
 - (3) *An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to-*
 - (a) *commence commissioning parental leave; and*
 - (b) *return to work after commissioning parental leave.*
 - (4) *Notification in terms of subsection (3) must be given-*
 - (a) *at least one month before a child is expected to be born as a result of a surrogate motherhood agreement; or*
 - (b) *if it is not reasonably practicable to do so, as soon as is reasonably practicable.*
 - (5) *The payment of commissioning parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No.63 of 2001).*
 - (6) *If a surrogate motherhood agreement has two commissioning parents, one of the, one of the commissioning parents may apply for commissioning leave and the other commissioning parent may apply for parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two commissioning parents.*

- (7) *In this section, unless context otherwise indicates- 'commissioning parent' has the meaning assigned to it in terms of section 1 of the Children's Act, 2005 (Act No.38 of 2005); and 'surrogate motherhood agreement' has the meaning assigned to it in terms of section 1 of the Children's Act, 2005 (Act No.38 of 2005).*
- (8) *If a competent court orders that a child is placed in the care of two prospective adoptive parents, pending the finalization of an adoptive order in respect of that child, one of the prospective adoptive parents may apply for adoption leave and the other prospective adoptive parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two prospective adoptive parents.*

51. Section 3 of the Labour Laws Amendment Act 10 of 2018 came into operation with effect from 1 January 2020.

52. Section 26 of the BCEA provides for the protection of employees before and after birth of a child. This section provides as follows:

26. Protection of employees before and after birth of a child

- (1) *No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.*
- (2) *During an employee's pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if –*
 - (a) *the employee is required to perform night work, as defined in section 17 (1) or her work poses a danger to her health or safety or that of her child; and*
 - (b) *it is practicable for the employer to do so.*

53. In terms of section 87(1)(b) of the BCEA, the Minister must issue a Code of Good Practice on the Protection of Employees during pregnancy and after birth of a child. Since many workers work during pregnancy and some return to work whilst they are still breast-feeding, the Code provides guidelines for employers and employees against potential

hazards in their work environment during pregnancy, after birth of a child and whilst breast-feeding.⁷⁰

54. In *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd*,⁷¹ the applicant sought damages against the respondent for loss incurred when she, in terms of the respondent's Maternity Leave and Women in Risk Area Policy, was placed on unpaid maternity leave and further extended unpaid maternity leave when she fell pregnant.⁷²

55. Three issues had to be decided by the Labour Court: First, whether clause 5.4 of the Policy was in contravention of section 26(2) of the BCEA; or second, section 6(1) of the Employment Equity Act, 1998⁷³ (EEA) and third, whether she was discriminated against on the grounds of race. The Court dismissed the applicant's assertion that the Policy was in contravention of section 6(1) of the EEA because it was modelled on the BCEA. Furthermore, the court also dismissed the applicant's claim of discrimination in contravention of section 26 of the BCEA, having found that the respondent had complied with the Act when it placed the applicant on unpaid maternity leave since section 26(2)(b) of the BCEA only requires an employer to find suitable, alternative employment if it is practicable to do so.⁷⁴

56. It was however noted that "the BCEA fell short of international standards in that Article 6(2) of the International Labour Organization's Maternity Protection Recommendation states that where there is no suitable, alternative employment, the employee must be placed on

⁷⁰ <http://www.labour.gov.za/DOL/legislation/codes-of-good-...> (accessed on 6 February 2020).

⁷¹ (JS706/14) [2017] ZALCJHB 404.

⁷² See http://www.schindlers.co.za/2017/manyetsa_vs_newkleinfontein/ (accessed on 6 February 2020).

⁷³ Section 6(1) of Employment Equity Act, 199 provides as follows:

6. Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

⁷⁴ LRC "Survey of Relevant Law" 15.

paid maternity leave.”⁷⁵ It is submitted that “legislation should provide that women should be given paid maternity leave where there are no alternative positions as provided for by the International Labour Organization’s Maternity Protection Recommendation.”⁷⁶ In order to give effect to this proposal, it is recommended that section 26 of the BCEA be amended by the addition of the following subsection 3:

- (3) In the event that no suitable, alternative employment may be offered to a pregnant employee who is required to perform night work, as defined in section 17 (1) or her work poses a danger to her health or safety or that of her child, the employer must offer a pregnant employee paid maternity leave for a period of six months after the birth of her child.

57. Section 27 of the BCEA regulates family responsibility leave which an employee may take when his/ her child is born or sick.⁷⁷ This section provides as follows:

27. Family responsibility leave

- (1) *This section applies to an employee -*
- (a) *who has been in employment with an employer for longer than four months; and*
 - (b) *who works for at least four days a week for that employer.*
- (2) *An employer must grant an employee, during each annual leave cycle, at the request of the employee, three days’ paid leave, which the employee is entitled to take -*
- (b) *when the employee’s child is sick; or*
 - (c) *in the event of the death of -*
 - (i) *the employee’s spouse or life partner; or*
 - (ii) *the employee’s parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.*
- (3) *Subject to subsection (5), an employer must pay an employee for a day’s family responsibility leave -*

⁷⁵ See http://www.schindlers.co.za/2017/manyetsa_vs_newkleinfontein/ (accessed on 6 February 2020).

⁷⁶ *Idem.*

⁷⁷ LRC “Survey of Relevant Law” 16.

- (a) *the wage the employee would ordinarily have received for work on that day; and*
- (b) *on the employee's usual pay day.*
- (4) *An employee may take family responsibility leave in respect of the whole or a part of a day.*
- (5) *Before paying an employee for leave in terms of this section, an employer may require reasonable proof of an event contemplated in subsection (2) for which the leave was required.*
- (6) *An employee's unused entitlement to leave in terms of this section lapses at the end of the annual leave cycle in which it accrues.*
- (7) *A collective agreement may vary the number of days and the circumstances under which leave is to be granted in terms of this section.*

(b) Unemployment Insurance Act, 2001 (Act 63 of 2001)

58. Sections 24 to 26 of the Unemployment Insurance Act, 2001 (Act 63 of 2001) make provision for the right to maternity benefits (section 24); application for maternity benefits (section 25); and payment of maternity benefits (section 26). These sections provide as follows:

24. Right to maternity benefits

- (1) *Subject to section 14, a contributor who is pregnant is entitled to the maternity benefits contemplated in this Part for any period of pregnancy or delivery and the period thereafter, if application is made in accordance with prescribed requirements and the provisions of this Part.*
- (3) *When taking into account any maternity leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the maternity benefit may not be more than the remuneration the contributor would have received if the contributor had not been on maternity leave.*
- (4) *For purposes of this section the maximum period of maternity leave is 17, 32 weeks.*
- (5) *A contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a full maternity benefit of 17.32 weeks;*
- (6) *A contributor is not entitled to benefits unless she was in employment, whether as a contributor or not, for at least 13 weeks before the date of application for maternity benefits.*

25. Application for maternity benefits

- (1) *An application for maternity benefits must be made in the prescribed form at an employment office at any time before or after childbirth: Provided that the application shall be made within a period of 12 months after the date of childbirth.*
- (3) *The claims officer must investigate the application and, if necessary, request further information.*
- (4) *If the application complies with the provisions of this Chapter, the claims officer must-*
 - (a) *approve the application;*
 - (b) *determine-*
 - (i) *the amount of the benefits for purposes of section 13(3);*
 - (ii) *the benefits the applicant is entitled to in terms of section 13(4); and*
 - (c) *stipulate how the benefits are to be paid.*
- (5) *If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.*

26. Payment of maternity benefits

The Director-General must pay the maternity benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.

59. Sections 27 to 29 make provision for adoption benefits, application for adoption benefits and payment of adoption benefits.

60. The Unemployment Insurance Amendment Act, 2016 (Act 10 of 2016) which came into operation on 19 January 2017, brought about further improvements in the provision of State maternity benefits for employees who are covered by the Act. The Act increased the rate of maternity benefits to a fixed rate of 66% of the contributor's earnings as at the date of application, subject to the prescribed maximum income threshold.⁷⁸

61. Thus, section 12 of the UIA, 2001 provides as follows:

⁷⁸ Section 4(b) of Unemployment Insurance Amendment Act 10 of 2016.

Right to benefits

“3.(c) For the purposes of Part D, maternity benefits must be paid at a rate of 66% of the earnings of the beneficiary at the date of application, subject to the maximum income threshold set in terms of paragraph (a).”

62. This is in line with international law on maternity protection.⁷⁹ The contributor must, however, have been in employment for at least 13 weeks prior to claiming maternity benefits.⁸⁰ A contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to full maternity benefits of 17 to 32 weeks.⁸¹ Furthermore, the Act provides that payment of maternity benefits may not be affected by the payment of unemployment benefits.⁸²

63. The Legal Service of the Department of Social Development is of the view that, if the purpose of the SALRC investigation is to investigate shortcomings in the current maternity and parental protection mechanisms, then the research should propose the amendment of the Unemployment Insurance Amendment Act 10 of 2016 to include the extension of the statutory social insurance scheme (UIF) to include self-employed informal workers.⁸³ A recommendation in this regard is made in Chapter of this Discussion Paper.

64. There are no restrictions for same-sex parents or single mothers.⁸⁴ Following the signing into law of the Labour Laws Amendment Act, 2018 (Act No. 10 of 2018), Timeslive reports that the Parliamentary portfolio committee on labour “remains of the view that the amendments are broad and their gender neutrality will play a leading role in advancing equality.”⁸⁵ Furthermore, the Unemployment Insurance Act, 2001 makes provision for adoption benefits provided that the adoption is carried out in terms of the Children’s Act,

⁷⁹ Article 4(6) of the Maternity Protection Convention (Revised), 1952 (No.103) and article 6 of Convention No.183 provide that the amount of cash benefits shall not be less than two-thirds (66%) of the woman’s previous earnings.

⁸⁰ Unemployment Insurance Act, 2001 section 24(6).

⁸¹ *Ibid* section 24(5).

⁸² *Ibid* section 13(5)(b).

⁸³ Department of Social Development “Comments on the Research Paper: Project 143: Maternity and Paternity Benefits for Self-Employed Workers” (22 August 2017) 2.

⁸⁴ The Solidarity Centre “Maternity Protection for Self-Employed Workers” (September 2016) at 10. See *MIA v State Information Technology* where the Labour Court held that the view that maternity is a right to be enjoyed solely by female employees is misplaced.

⁸⁵ Timeslive available at <http://www.timeslive.co.za/news/south-africa/2018-11-28-dads-can-claim...> (accessed on 06 February 2020).

2005 and the application for benefits is submitted within six months after the date of the order of adoption.⁸⁶ At the Labour Portfolio Committee held on 30 November 2016, the African Christian Democratic Party made a proposal for the introduction of a range of additional maternity and parental benefits. These include increased adoption leave and commissioning parental leave.⁸⁷

65. Section 8(a)(cA) of the Labour Laws Amendment Act 10 of 2018 amended section 12 of the Unemployment Insurance Act, 2001 (Right to benefits) by the introduction of parental benefits as contemplated in Part DA of Chapter 3 of the Act.

66. Section 11 of the Labour Laws Amendment Act 10 of 2018 amended section 26 of the Unemployment Insurance Act, 2001 by the introduction of the following new sections:

- (i) 26A: Right to parental benefits;
- (ii) 26B: Application for parental benefits; and
- (iii) 26C: Payment of parental benefits.

67. The above-mentioned sections provide as follows:

Right to parental benefits

- 26A. (1) *Subject to section 14, a contributor who is the parent of a child is entitled to the parental benefits contemplated in this Part if the application is made in accordance with the prescribed requirements and the provisions of this Part and if the contributor-*
- (a) *has been registered as the father of the child in terms of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992);*
 - (b) *is the-*
 - (i) *parent of a child below the age of two in an adoption order; or*
 - (ii) *prospective adoptive parent of a child below the age of two, in terms of a court order that placed the child in the care of the prospective adoptive parent, pending the finalisation of the adoption order in respect of that child; or*
 - (c) *is the parent of a child who has been born as a result of a surrogate motherhood agreement referred to in the Children's Act, 2005 (Act No. 38 of 2005):*

⁸⁶ Sections 27-28 of Unemployment Insurance Act 63 of 2001. The reference in the Act to the Child Care Act, 1983 (Act 74 of 1983) needs to be amended.

⁸⁷ Meeting of the Portfolio Committee on Labour held on 30 November 2016 (<http://pmg.org.za/> accessed on 11 March 2017). See also Labour Laws Amendment Bill PMB 5-2015.

Provided that the contributor did not claim the adoption benefits referred to in section 27 or the commissioning parental benefits referred to in section 29A in respect of the child.

- (2) *The entitlement-*
 - (a) *contemplated in subsection (1)(a) and (c) commences on the date of childbirth; and*
 - (b) *contemplated in subsection (1)(b) commences on-*
 - (i) *the date that the competent court grants the adoption order; or*
 - (ii) *the date that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child,**whichever date occurs first.*
- (3) *When taking into account any parental leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the parental benefit may not be more than the remuneration the contributor would have received if the contributor had not been on parental leave.*
- (4) *For purposes of this section the maximum period of parental leave is ten consecutive days.*
- (5) *A contributor is not entitled to benefits unless he or she was in employment, whether as a contributor or not, for at least 13 weeks before the date of application for parental benefits.*

26B. Application for parental benefits

- (4) *An application for parental benefits must be made in the prescribed form at an employment office.*
- (2) *The application must be made within 12 months after-*
 - (a) *the date of childbirth; or*
 - (b) *the date that-*
 - (i) *a competent court grants the adoption order; or*
 - (ii) *a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child,**whichever date occurs first.*
- (5) *The claims officer must investigate the application and, if necessary, request further information regarding the period the applicant was not working in order to care for the child.*
- (4) *If the application complies with the provisions of this Chapter, the claims officer must-*
 - (a) *approve the application;*
 - (b) *determine-*
 - (i) *the amount of the benefits for purposes of section 13(3); and*
 - (ii) *the benefits the applicant is entitled to in terms of section 13(4);*

- (c) *authorise the payment of the benefits; and*
 - (d) *stipulate how the benefits are to be paid.*
- (5) *If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.*

26C. Payment of parental benefits

The Director-General must pay the parental benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.

68. In terms of Proclamation No.R56 of 2019, published in Government Gazette No.42805 dated 29 October 2019, sections 8(a)(Ca) and 11 of the Labour Laws Amendment Act 10 of 2018 came into operation on 1 November 2019.

(c) Unemployment Insurance Contributions Act, 2002 (Act 4 of 2002)

69. The Unemployment Insurance Contributions Act was enacted in order to make provision for the payment of contributions for the benefit of the Unemployment Insurance Fund and procures for the collection of such contributions.⁸⁸ Section 6 of the Act provides that both the employee and employer must contribute one percent of the employee's remuneration during any month towards the UIF. The Act could be amended to allow workers in the informal sector (own account and self-employed workers) to contribute towards the UIF.⁸⁹

(d) Medical Schemes Act, 1998 (Act 131 of 1998)

70. The private health sector is subject to a wide array of legislation, including regulations and bylaws that together constitute the regulatory framework for the provision of healthcare services.⁹⁰ The Medical Schemes Act consolidates all laws governing the medical scheme industry and makes provision for the establishment of the Council for Medical Schemes (CMS) as regulator for the industry. Private schemes also take various forms. The most common examples are medical schemes which are found in almost all countries. They are

⁸⁸ Section 2 of the Unemployment Insurance Contributions Act, 2002.

⁸⁹ LRC "Survey of Relevant Law" 51.

⁹⁰ Competition Commission "Health Market Inquiry" (September 2019) 47.

funded predominantly by the employer or jointly by the employer and employee. On 30 July 2015, Business Day reported that the CMS could allow medical schemes to launch products for low-income workers as early as 2016. The paper reported that there are about 6-million people in the formal sector who cannot afford medical scheme coverage. If the Council approves, this would pave the way for medical schemes to devise very basic benefit options that could cost as little as R200 per person per month.⁹¹

(e) National Health Act, 2003 (Act 61 of 2003)

71. The National Health Act, 2003 regulates the provision of national healthcare services by promoting and fulfilling the people's right of access to healthcare as provided for in section 27 of the Constitution. Section 4 of the Act makes provision for the determination by the Minister of Health, after consultation with the Minister of Finance, of categories of persons eligible for free health services at public health establishments. Subsection 3 provides that clinics and community health centres must provide-

- (a) *pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes, with free health services;*
- (b) *all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health services; and*
- (c) *women, subject to the Choice on Termination of Pregnancy Act, 1996 (Act No.92 of 1996) free termination of pregnancy services."*

72. Health services are defined in section 1 of the Act to mean

- (a) *health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;*
- (b) *basic nutrition and basic health care services contemplated in section 28(1) of the Constitution;*
- (c) *medical treatment contemplated in section 35(2)(e) of the Constitution; and*
- (d) *municipal health service.*

⁹¹ Business Day (<http://lexis.hosted.inet.co.za/> accessed on 30 July 2015).

(f) *Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996)*

73. The Choice on Termination of Pregnancy Act, 1996 makes provision for the circumstances in which, and conditions under which, pregnancy may be terminated (section 2);⁹² the place at which the termination of pregnancy may take place (section 3); the provision of counselling by the State (section 4); and the mandatory requirement for consent by the expectant mother (section 5).

74. Other relevant legislation administered by the Department of Health include the Sterilisation Act, 1998 (Act 44 of 1998).⁹³ The right to choose whether to continue with the pregnancy or not, as well as the right not to procreate at all, are consistent with the constitutional right to bodily and psychological integrity. Section 12(2) of the Constitution provides as follows:

⁹² Section 2(1) of the Act provides that a pregnancy may be terminated-

- (a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
- (b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- (c) after the 20th week of gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-
 - (i) would endanger the woman's life;
 - (ii) would result in a severe malformation of the foetus;
 - (iii) would pose a risk of injury to the foetus.

⁹³ The purpose of the Sterilisation Act, 1998 is to provide for the right to sterilize; the circumstances and conditions under which sterilisation may be performed (section 2); the circumstances under which sterilisation may be performed on persons incapable of consenting or incompetent to consent due to mental disability (section 3); provision of consent (section 4); and place where sterilization may take place (section 5).

Freedom and security of the person

12(2) Everyone has the right to bodily and psychological integrity, which includes the right-

- (a) to make decisions concerning reproduction;*
- (b) to security in and control over their body; and ...*

(g) Occupational Health and Safety Act, 1993 (Act 85 of 1993)

75. The Occupational Health and Safety Act, 1993 (OHS Act) makes provision for the health and safety of persons in a workplace, and for the protections of persons other than persons at work against hazards to health and safety arising out of the activities of persons at work.

76. Generally, the OHS Act provides that every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.⁹⁴

77. The provisions of the OHS Act presupposes that by excluding own account and self-employed workers from the protection provided for in the Act, the government is barring workers in the informal sector from making their working environment healthy and safe and without risk to others. The other persons at risk include children and fetuses.⁹⁵

(h) Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993)

78. The Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA), makes provision for the compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

79. Likewise, the exclusion of workers in the informal economy from the provisions of COIDA implies that the government is barring such workers from benefiting from the state

⁹⁴ Section 8(1) of the Occupational Health and Safety Act, 1993.

⁹⁵ LRC "Survey of Relevant Law" 49.

social security system contrary to the provisions of sections 24(a) [right to an environment that is not harmful to one's health and wellbeing], and 27(1)(c) [right to social security] of the Constitution.

80. As noted, in *Mahlangu and Another v Minister of Labour and Others*,⁹⁶ the Constitutional Court held that “when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism.” The court held that the State’s obligation under section 27(2) of the Constitution “to take reasonable legislative and other measures, within available resources, includes the obligation to extend COIDA to domestic workers.”⁹⁷ Failure to do so is “a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution.”⁹⁸ By implication, the court also held that “the international instruments alluded to above certainly demand that the type of benefits provided by COIDA (employment legislation) be considered a component of the right to social security”⁹⁹ and therefore be extended to the category of workers who are currently excluded from the protection provided for the law.¹⁰⁰

(i) *Mine Health and Safety Act, 1996 (Act 29 of 1996)*

81. The objects of the Mine Health and Safety Act, 1996 are, among others, to protect and promote the health and safety of persons in the mining industry; and to provide for the enforcement of health and safety measures in the entire industry.

82. Like the provisions of the OHS Act, the provisions of the Mine Health and Safety Act suggest that by excluding own account and self-employed workers from the protection

⁹⁶ 2020 ZACC 306/19.

⁹⁷ *Ibid*, 66.

⁹⁸ *Idem*.

⁹⁹ *Ibid*, 58.

¹⁰⁰ The international instruments alluded to by the Constitutional Court are the following: CEDAW; ICESCR; the Convention on the Elimination of All Forms of Racial Discrimination; Convention on Domestic Workers; African Charter on Human and Peoples’ Rights; and the Maputo Protocol.

provided for in the Act, the government is barring the mining industry from fulfilling its obligation to minimize risks to workers.¹⁰¹

2 Social Assistance Schemes

(a) Social Assistance Act, 2004 (Act 13 of 2004)

83. Social security benefits are currently available in the form of various state funded grants. These include childcare grants. According to the Women's Legal Centre, these forms of social assistance are not providing women, children and families with a dignified life. They are also of little to no assistance for women who are self-employed in proactively and positively recognizing women's work and financial contribution. The nature of the benefit therefore needs to take into account the obligation to address poverty specifically without penalizing women who have embarked on income generating activities so as to better their circumstances.¹⁰²

84. Minimum benefits must include adequate prenatal, childbirth and postnatal healthcare and must be combined with access to affordable social care services, in particular early childhood development services.¹⁰³

85. Maternity benefits are relevant to infant and maternal mortality rates. Women in the confinement or post-natal stages may be vulnerable physiologically and emotionally. If they are required to go on working during this time instead of taking maternity leave, their lives and health may be in jeopardy and their babies may not receive optimal care. Therefore, poor women's inability to access maternity benefits may be partly responsible for the high rates of maternal and infant mortality in this group. The provision of maternity benefits as part of the State's social security system might indirectly tackle the problem of infant and maternal mortality, while directly boosting equality for women.

¹⁰¹ LRC 'Survey of Relevant Law' 52.

¹⁰² Women's Legal Centre "Submission on Maternity and Paternity Benefits for Self-Employed Workers" (26 September 2017) par 26-27.

¹⁰³ Ibid par 29.

86. In South Africa, many women are self-employed in micro (survivalist) or small businesses in the informal sector.¹⁰⁴ This is especially true among black communities.¹⁰⁵ In addition, black women have the highest birth rate compared with other race groups nationally.¹⁰⁶ These two facts about black women as a group suggest that the State might need to consider providing vulnerable groups of self-employed women with maternity benefits. Not only would new mothers benefit from this added social security, but so would their babies. It is a fact that healthier babies grow up to be healthier children.

3 Employment legislation

(a) *Labour Relations Act, 1995 (Act 66 of 1995)*

87. The Labour Relations Act, 1995 (LRA) was enacted so as to give effect to section 23 of the Constitution, to provide for a conducive framework in which employees and their trade unions, and employers and employer organizations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.¹⁰⁷

88. Section 187(1)(c) of the LRA provides that that a dismissal is automatically unfair if the grounds for it is employee's pregnancy, intended pregnancy or any reason related to her pregnancy. In *Lukie v Rural Alliance CC T/a Rural Development Specialist*,¹⁰⁸ the Court found that the respondent (employer) unfairly dismissed the applicant (employee) by failing to allow her to return to work after taking maternity leave in contravention of section 187(1)(c) of the LRA.

¹⁰⁴ A "survivalist" or "micro-enterprise" may by definition refer to the informal rather than formal sector. During the course of the research proposed here, such definitions and categories will be studied and clarified.

¹⁰⁵ For estimates on the number of self-employed women in informal and formal sectors, see for example "Survey of Employers and the Self-Employed" (2013, Stats SA) and "Labour Force Survey" (Stats SA); see also Steenkamp (2008) "The returns to self-employment in South Africa: an analysis of household survey data" unpublished thesis, UKZN, accessed via National Research Foundation in August 2014.

¹⁰⁶ NDP 77. See also Swartz, L "Fertility transition in South Africa and its implications on the four major population groups" (2002) (UN/POP/CFT/2002/CP/16) available at <http://www.un.org/en/development/desa/population/events/pdf/expert/4/swartz.pdf>.

¹⁰⁷ Section 1 of the Labour Relations Act, 1995.

¹⁰⁸ (D 1022/2002) [2004] ZALC 43 (28 May 2004).

89. As noted, the LRA's definition of an employee aligns with that of the BCEA, and is governed by the Code in this regard, as outlined in the Chapter 2: Definitions of this Discussion Paper. As such, self-employed workers and independent contractors in both the formal and informal sectors, would not be covered by the provisions and protections of the LRA, while their employees would.

90. Section 200A of the Labour Relations Act provides as follows:

200A.Presumption as to who is employee

- (1) *Until the contrary is proved, for the purposes of this Act, any employment law and [section 98A](#) of the Insolvency Act, 1936 (Act No. 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:*
 - (a) *the manner in which the person works is subject to the control or direction of another person;*
 - (b) *the person's hours of work are subject to the control or direction of another person;*
 - (c) *in the case of a person who works for an organisation, the person forms part of that organisation;*
 - (d) *the person has worked for that other person for an average of at least 40 hours per month over the last three months;*
 - (e) *the person is economically dependant on the other person for whom he or she works or renders services;*
 - (f) *the person is provided with tools of trade or work equipment by the other person; or*
 - (g) *the person only works for or renders services to one person.*
- (2) *Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of [section 6](#)(3) of the Basic Conditions of Employment Act.*
- (3) *If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of [section 6](#)(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.*
- (4) *NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.*

91. In order to protect self-employed women workers who supply the informal market with their labour in huge numbers, it is proposed that section 200A of the Labour Relations Act, 1995 be amended to read as follows:¹⁰⁹

“(d) *the person has worked for that other person for an average of at least [40] 20 hours per month over the last three months*”

The SALRC is inviting input and comment on the proposed amendment of section 200A(1)(D) of the Labour Relations Act, 1995.

(b) *Employment Equity Act, 1998 (Act 55 of 1998)*

92. The purpose of the Employment Equity Act, 1998 is promote the achievement of equal opportunities and fair treatment in employment and the elimination of unfair discrimination, and by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.¹¹⁰

93. Section 6(1) of the EEA provides that-

“6(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.”

94. A case could be made on the basis of the provisions, that by failing to extend maternity benefits and protections to all categories of workers, the state is indirectly permitting unfair discrimination through its employment legislation, against specific categories of workers. While the basis for discrimination in this instance, strictly speaking is that of the category of employment, that this is rooted in the gender, sex and pregnancy of the worker, and the impact this has on the worker's dignity, would be a compelling case to include this as an

¹⁰⁹ The Solidarity Centre “Maternity Protection for Self-Employed Workers” (September 2016) 15.

¹¹⁰ Section 2 of the Employment Equity Act, 1998. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 applies to all people except those covered by the Employment Equality Act 55 of 1998.

analogous ground, akin to that envisaged in the *Hoffmann v South African Airways*.¹¹¹ This would support the assertion that the exclusion of such workers from maternity benefits and protections, is tantamount to unfair discrimination in the workplace, prohibited by the EEA.

95. Another primary purpose of the EEA is to give effect to the obligations of the Republic as a member of the International Labour Organization. The focus of one of the key strategic priorities of the R204 NTT, that is, Building an enabling regulatory and policy environment, is a legal review of all relevant legislation, including the LRA; BCEA; EEA; UIA; COIDA; and others, in order to facilitate the transition from the informal to the formal economy.

96. In the context of the R204 roadmap to a national strategy for the formalization of the informal economy, it is clear that government has a duty to extend the maternity and parental benefit scheme to all the workers in the informal sector. The EEA places a duty upon government to take affirmative action to redress discriminatory practices in employment for all occupational categories of the country's workforce.¹¹²

(c) *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)*

97. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA) was enacted as envisaged by s 9(4) in the Bill of Rights, as the national legislation to prevent and prohibit unfair discrimination.¹¹³ In terms of its prevention and general prohibition of unfair discrimination, PEPUDA provides that "[n]either the State nor any person may unfairly discriminate against any person,¹¹⁴ while its prohibition on the basis of gender declares that 'no person may unfairly discriminate against any person on the ground of gender, including (f) discrimination on the ground of pregnancy; (g) limiting women's access to social services or benefits, such as health, education and social security...'"¹¹⁵

¹¹¹ *Hoffmann v South African Airways* 2001 1 SA 1 (CC) par 40.

¹¹² LRC "Survey of Relevant Law" 46.

¹¹³ Constitution, section 9(4).

¹¹⁴ PEPUDA, section 6.

¹¹⁵ *Ibid*, section 8.

98. It can be argued that the state is unfairly discriminating against a particular category of women, in the form of self-employed workers, by denying their inclusion in a social security measure. That PEPUDA includes as a prohibited ground of discrimination on the basis of gender, the limiting of women's access to social services, particularly enforces this argument. By excluding this category of workers from the maternity benefits regime, the state is effectively limiting their access to social benefits in the form of paid maternity leave and associated maternity benefits, expressly outlawed by PEPUDA.

(d) Skills Development Act, 1998 (Act 97 of 1998)

99. The purpose of the Skills Development Act, 1998 (SDA) is, among others, to provide an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce, and to provide for and regulate employment services.

100. Section 2(1)(a)(iii) of the SDA provides that the purpose of the Act is to promote self-employment. Thus the exclusion of own account and self-employed workers in the informal economy negates and frustrates the achievement of a number of the primary purposes of the SDA, one of which is to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.

4 Other legislation and policy

(a) Children's Act, 2005 (Act 38 of 2005)

101. Section 2 of the Children's Act provides that the objects of this Act are, among others, to-

(b) to give effect to the following constitutional rights of children, namely -

- (i) family care or parental care or appropriate alternative care when removed from the family environment;*
- (ii) social services;*
- (iii) protection from maltreatment, neglect, abuse or degradation; and*

- (iv) *that the best interests of a child are of paramount importance in every matter concerning the child;*
- (c) *to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;*

102. According to Government Communications, men should play the following role in the upbringing and development of children: taking children to the hospital; helping children with homework; reducing the rate of ill-treatment of children; disciplining children appropriately and encouraging children on aspects of life.¹¹⁶ The ICPD 1994 states that in order to promote gender equality, special efforts should be made to emphasize men's shared responsibility and promote active involvement in responsible parenthood, sexual and reproductive behaviour, including family planning; prenatal, maternal and child health; prevention of unwarranted and high-risk pregnancies; shared control and contribution to family income, children's education, health and nutrition; and recognition and promotion of the equal value of children of both sexes. Male responsibilities in family life must be included in the education of children from the earliest ages. Special emphasis should be placed on the prevention of violence against women and children.¹¹⁷

(b) *National Small Enterprise Act, 1996 (Act 102 of 1996)*

103. The purpose of the National Small Enterprise Act, 1996 is to provide for the establishment of the Advisory Body and the Small Enterprise Development Agency; and to provide guidelines for organs of state in order to promote small business in the Republic. One of the key strategic priorities of the R204 NTT is to strengthen the participation of workers and economic units in the transition from the informal to the formal economy. Organized Business has undertaken a number of initiatives to address the challenges faced by the informal economy.

¹¹⁶ Government Communications "Maternity and Paternity Benefits for Self-Employed Workers (Project 143) (29 September 2017) 1.

¹¹⁷ United Nations "Programme of Action of the International Conference on Population and Development" (2014) 37.

104. These initiatives include the following:

- (a) The Enterprise Room is a transformation consultancy, specializing in enterprise, supplier and social development;
- (b) Harambee Youth Employment Accelerator, is a not-for-profit organization that has helped nearly 50 000 young work-seekers into employment and given thousands more relevant skills to find their own employment;
- (c) Finfind aggregates all the public and private sector SME finance offerings into one simple platform and provides an automated matchmaking facility between the lender and the seeker;
- (d) CCMA BUSA Labour Advice Webtool for small business, is a tool which aims to address the challenges SMEs, their management and employees have in the labour relations sphere.¹¹⁸

(c) *National Development Plan*

105. In terms of the NDP, a social protection system must carry out five functions, namely: protection; prevention; promotion; transformation and development functions.¹¹⁹ Both the SDGs and the NDP call for infant and maternal morbidity to be curbed. South Africa's fertility rate is deemed to be at an acceptable level,¹²⁰ but the same cannot be said about its infant

¹¹⁸ NEDLAC Decent Work Country Programme Steering Committee "Accelerating the transition from the informal to formal economy" 14.

¹¹⁹ NDP 327. Protective interventions aim to protect the most vulnerable and at risk individuals and households from further exposure to poverty. These include food parcels and social relief of distress. Preventive interventions aim to prevent people from falling into deeper poverty and vulnerability. Relevant examples include social grants. Promotive interventions aim to enhance the capabilities of individuals and communities to participate in all spheres of activity through developmental, rehabilitative and therapeutic services. Examples include early childhood development, DSD "Comprehensive Report on the Review of the White Paper for Social Welfare, 1997" 41.

¹²⁰ "Reproductive Health Policies" (2014) wallchart downloaded from www.un.org on 01/09/2014 shows South Africa as having a fertility rate of 2.4 children per woman in 2014, which is comparable with the world average of 2.5 and the average for all developing regions of 2.6, but higher than the average of 1.7 for developed regions. Similarly, the NDP published by the National Planning Commission of South Africa in 2011 lists the fertility rate among all women in SA that year as 2.3 (range 2.2 to 4.1); main sources of data used in the NDP are Statistics SA and the Actuarial Society of Southern Africa (ASSA) (2011) "Demographic scenarios", an unpublished report prepared for the NPC. See also *Concise Report on the World Population Situation in 2014*; and "New UN Population Projections Released: Pockets of High Fertility Drive Overall Increase" by EL Madsen at <http://www.newsecuritybeat.org/2013/06/population-projections-released-pockets-high-fertility-drive-increase/>. In terms of other reproductive indicators, South Africa's unmet need for family planning was a low 14% in 2003-2004, slightly

and maternal morbidity rates.¹²¹ According to the reported figures, in 2012 the death of babies and children younger than 1 year old accounted for 5.5% of all deaths nationally.¹²² Malnutrition was the third leading cause of death for babies aged between 29 days and 11 months (following intestinal infectious diseases and influenza or pneumonia).

106. The NDP, published in 2011, states that “[t]otal deaths in the country have increased sharply... the rate doubled for young children under the age of five...”¹²³ Elsewhere, the NDP states that “[A]t present, given South Africa’s extremes of unemployment and working poverty, many people regularly experience hunger and find it difficult to meet the basic needs of their families.”¹²⁴ In addition, under the topic of education, training and innovation, the NDP lists “Eradicat[ing] micronutrient deficiencies in children under 18 months” as a target.¹²⁵

107. The NDP lists, as a necessary action, the design of a “nutrition intervention for pregnant women and young children, to be piloted by the Department of Health...”¹²⁶ The NDP restates the same goal a couple of pages later where it lists, as a necessary action, “[e]nhance food security and nutrition, focusing initially on pregnant women and young children.”¹²⁷

108. The NDP also states, under the targets for Health Care for All that “[t]he infant mortality rate should decline from 43 to 20 per 1 000 live births and the under-five mortality rate should

higher than the world averages of 10% (developed regions) and 12% (developing regions) in 2012.

¹²¹ South Africa’s maternal mortality ratio was 140 (per 100,000 live births) in 2013, which is lower than the global average of 210 in the same year, but is still regarded as “unacceptable”. In developed countries, maternal mortality ratios are as low as 1 or 2 and generally under 10 women dying per 100,000 live births. Prevention of maternal mortality is listed as a national priority for 2013 in SA on the UN’s *Reproductive Health Policies 2014* wallchart. In addition, the NDP (at p 80) states that the mortality rate of children under 5 doubled between 1998 and 2008.

¹²² Stats SA “Mortality and causes of death in South Africa” (2012) 14.

¹²³ NDP 80.

¹²⁴ *Ibid* 21.

¹²⁵ *Ibid* 34.

¹²⁶ *Ibid* 35.

¹²⁷ *Ibid* 7.

be less than 30 per 1 000, from 104. Maternal mortality should decline from 500 to 100 for every 100 000 live births.”¹²⁸ The United Nations (hereinafter “UN”) figure for South Africa for 2012 – the year after the NDP was published – was more optimistic, however, stating that our maternal mortality rate is currently 140 per 100 000 live births.¹²⁹ In addition, South Africa is shown as acknowledging that reduction in maternal mortality is a priority concern.¹³⁰

109. With regard to fertility rates, in South Africa the average number of children per woman is estimated at 2.3 to 2.4.¹³¹ This figure is in line with the global average of 2.5 and the standard replacement rate of 2.1.¹³² However, the number of children born to South African women varies widely across the various population groups. Unfortunately, women who are least able to provide for their children often tend to have the biggest families. This pattern is seen across the world and is of extreme concern to the UN.¹³³ According to Swartz,¹³⁴ writing in 2002 for a UN conference, in South Africa the subgroup with the highest fertility rate was black women who live rurally. Similarly, the NDP states that “South Africa’s fertility levels differ according to location and socioeconomic characteristics. They are highest in the mainly rural provinces and municipalities.”¹³⁵ However, according to the NDP, by 2011 the proportion of urbanization was higher than the global average, at roughly 60%.¹³⁶ Therefore, it is possible that the urban-rural split may not influence the current investigation materially. The SALRC will be able to assess that after reviewing the empirical data.

110. The NDP notes that “Black South Africans generally live shorter lives and have a higher fertility rate than white South Africans, although the fertility rate among the black population is dropping sharply.”¹³⁷ It further discusses the fact that “[h]igh fertility rates are

¹²⁸ *Ibid* 36.

¹²⁹ Wallchart “Reproductive Health Policies” (2014).

¹³⁰ *Ibid*.

¹³¹ NDP 79; see also footnote 5 above.

¹³² *Ibid* 79. Also Wallchart “Reproductive Health Policies” (2014). Also “Female Labour Force Participation” by Lin Lean Lim (2002) at 203; accessed from www.un.org/esa/population/publications/completingfertility.htm (UN/POP/CFT/2002BP/9).

¹³³ United Nations “Concise Report on the World Population Situation” (2014).

¹³⁴ See footnote 4.

¹³⁵ NDP 79-80.

¹³⁶ *Ibid* 83.

¹³⁷ *Ibid* 77.

generally found in contexts of poverty and powerlessness, where the infant mortality rate is high, and opportunity and education for women is low”.¹³⁸ Poorly educated women in impoverished communities often lack control over their own reproduction. In addition, many are single mothers, a pattern that was exacerbated by apartheid policies on migrant labour for men. Nonetheless, African women might in fact prefer to have many children.¹³⁹ Their decision may be the result of social values which place a premium on childbearing (including, for some, continuing the ancestral line),¹⁴⁰ or because having many children is seen as a way of increasing the odds of at least one or two surviving into adulthood.

111. As noted above, women in poor communities tend to be self-employed in survivalist activities or micro-enterprises. It stands to reason that such women will struggle to provide for themselves and their families and are unlikely to be able to contribute much towards social security benefits. This scenario could indicate a huge financial responsibility for the State if it provides maternity benefits to the poorest among self-employed women. It also suggests that such an intervention might go a long way in addressing poverty and gender inequality.

112. The NDP states that a “focus on spreading opportunities for black people”,¹⁴¹ “better support for entrepreneurs”¹⁴² and “expanding employment and entrepreneurial opportunities”¹⁴³ are some of the challenges that South Africa must face if it is to develop a stronger economy. The NDP also states that according to a FinScope survey in South Africa, “90 percent of jobs created between 1998 and 2005 were in micro, small and medium firms. Despite this, total early-stage entrepreneurial activity rates in South Africa are about half of what they are in other developing countries.”¹⁴⁴ It goes on to say that microenterprises and

¹³⁸ *Ibid* 79.

¹³⁹ See for example “Why Has the Demographic Transition Stalled in Sub-Saharan Africa?” by EL Madsen (Aug 2013) at <http://www.newsecuritybeat.org/2013/08/demographic-transition-stalled-sub-saharan-africa/> accessed 29/08/2014

¹⁴⁰ Mwamwenda TS (1999) “Culture and self: An African perspective” in MM Mboya (ed) *Culture and Self: An African Perspective* at 1-17; Pretoria, Ilitha. Also Clasquin M (1999) “Transplanting Buddhism: an investigation into the spread of Buddhism, with reference to Buddhism in South Africa” Unpublished PhD thesis, Dept of religious studies, UNISA.

¹⁴¹ NDP 102.

¹⁴² *Ibid* 102.

¹⁴³ *Ibid* 103.

¹⁴⁴ *Ibid* 117.

entrepreneurial activity often “provide shock absorbers for extreme poverty and platforms for self-development” in developing countries. It is therefore imperative that disincentives to women and men who may otherwise pursue entrepreneurial activities are minimized.¹⁴⁵

(d) *National Integrated Early Childhood Development Policy, 2015*

113. The National Integrated Policy for Early Childhood Development (NIPECD) was approved by Cabinet in December 2015. As a signatory to the United Nations Convention on the Rights of the Child, the government of the RSA recognizes early childhood development, which forms part of the broader concept of child-centred social security, as a universal human right. Sections 2(b) and (c) of the Children’s Act, 2005 provide that the objects of this Act are:

- (b) to give effect to the following constitutional rights of children, namely -
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic.

114. The aim of the NIPECD is to ensure that every child, irrespective their family circumstances, is given a better start through investment in the early years from conception until before the child enters formal school.¹⁴⁶ According to the DSD, a national programme for the provision of centre and non-centre based support for pregnant women, mothers, fathers and infants in the first two years of life will be developed and implemented by 2024 with the following aims, among others:

- (a) to provide safe and affordable day care for children where parents are absent;

¹⁴⁵ *Ibid* 119.

¹⁴⁶ Department of Social Development “National Integrated Early Childhood Development Policy 2015” 6.

- (b) to facilitate the pre-registration of pregnant women in the third trimester of pregnancy for the CSG (verified through birth registration) to enable income-eligible mothers to have access to the grant from the first day of the child's life.¹⁴⁷

115. Absence of childcare services serves as a barrier to decent livelihoods for informal sector workers. Participants at the WIEGO's international meeting stated that women workers take a disproportionate responsibility for child care due to gender norms resulting in lower earnings, more flexible and vulnerable work, and limited or no access to social protection.¹⁴⁸ Child care is work that is done predominantly by women throughout their lifecycles. In order to be effective, participants at the international meeting proposed that "childcare services must be able to respond to women workers' realities based on where they are in their life cycles and the nature of their work."¹⁴⁹

116. The following social protection measures that can be adopted in order to support women informal workers when they have young children were proposed: pre-, peri- and post-natal health care services, maternity protections, child grants and public childcare services.¹⁵⁰

(e) *White Paper for Social Welfare, 1997*

117. The White Paper on Social Welfare is the first overarching social welfare policy to be adopted under the 1996 Constitution. It has its basis in section 27(1)(c) of the Constitution which provides for the right of access to social security, including appropriate social assistance for those who are unable to support themselves and their dependants. It forms the basis for a policy framework for the provision of comprehensive, integrated, rights-based, sustainable, and quality developmental social welfare services. The White Paper embraces

¹⁴⁷ *Ibid*, 23; 54.

¹⁴⁸ WIEGO "International Meeting on Child Care and Social Protection for Informal Workers Meeting Report" (November 2017) 3.

¹⁴⁹ *Idem*.

¹⁵⁰ *Idem*.

a number of policy considerations that guide the transformation of social welfare services in South Africa. These considerations are, among others, the following:

- (a) a developmental approach to social welfare services;
- (b) equitable and sustainable funding of social welfare services;
- (c) implementation of comprehensive, generic, integrated, family centred and community-based strategies; and
- (d) creating a balance between developmental, preventive, protective and rehabilitative interventions.¹⁵¹

118. The government policy on social welfare services is infused with notions of social transformation, human emancipation and reconstruction and development of the society.¹⁵² The White Paper states that the family is the basic unit of society. Family life will be strengthened and promoted through family oriented policies and programmes.¹⁵³ According to the DSD, the rights-based approach element of the White Paper “emphasizes social justice, a minimum standard of living, equitable access and equal opportunity to services and benefits, and a commitment to meeting the needs of all South Africans with a special emphasis on the needs of the most disadvantaged.”¹⁵⁴

5 Question for public comment

1. In order to protect self-employed women workers who supply the informal market with their labour in huge numbers, should section 200A of the Labour Relations Act, 1995 be amended to read as follows:

“(d) *the person has worked for that other person for an average of at least [40] 20 hours per month over the last three months*”?

¹⁵¹ Department of Social Development “Framework for Social Welfare Services” (August 2011) 8.

¹⁵² *Ibid*, 14.

¹⁵³ Department of Social Development “White Paper for Social Welfare” (August 1997) 15.

¹⁵⁴ Department of Social Development “Framework for Social Welfare Services” (August 2011) 15.

CHAPTER 4: SOUTH AFRICA'S OBLIGATIONS UNDER INTERNATIONAL LAW

A. Introduction

1. The Constitution is guided by a wide range of international, continental and regional human rights instruments to which South Africa is a signatory.¹ The Republic of South Africa has signed and ratified a number of protocols and conventions which compel the Republic to provide state maternity and parental benefits to all workers regardless of their employment status.² International instruments that have been approved and ratified by Parliament are legally binding on the Republic in terms of section 231(2) of the Constitution.³

2. Section 231 of the Constitution provides as follows:

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, bind the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) An international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

¹ Sections 39(1) and 233 of the Constitution.

² LRC "Survey of Relevant Law" 53.

³ *Idem*.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

3. In the event that the Republic has not ratified a given international instrument, section 233 of the Constitution requires of the courts to take into consideration international law when interpreting domestic legislation. Section 233 of the Constitution provides as follows:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

4. In the *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda*,⁴ the Constitutional Court of Uganda held that since the Republic of Uganda had ratified the CESC; CEDAW; Maputo Protocol and the African Charter, article 287 of the Constitution of the Republic of Uganda “enjoins the government to honour treaties which meant that the government had an obligation to guarantee and protect the rights spelt out in these treaties.

5. The obligations of the Republic as a member of the International Labour Organization, United Nations, African Union (hereinafter “AU”) and Southern African Development Community (hereinafter “SADC”) are discussed below. B. International labour organization

1 Maternity Protection Convention, 2000 (No.183) and gap analysis

6. South Africa is yet to ratify the International Labour Organization’s Maternity Protection Convention, 2000 (No.183). The aim of Convention 183 is to apply to all employed women and women in so-called atypical forms of employment.⁵

⁴ Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 8.

⁵ Articles 1 of Convention 183 states that the term ‘woman’ applies to any female person without discrimination and the term ‘child’ applies to any child without discrimination.

7. The Convention makes it clear that maternity protections should be extended to all categories of workers, including those in 'atypical' forms of work, such as self-employed women.⁶ The Preamble states that:

...in order to further promote equality of all women in the workforce and the health and safety of the mother and child, and in order to recognize the diversity in economic and social development of Members, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice...

8. The Convention states unequivocally that "a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks,"⁷ and that "maternity leave shall include a period of six weeks' compulsory leave after childbirth."⁸ Article 6 provides for the payment of maternity benefits, in the form of cash benefits, comprising two-thirds of the woman's previous earnings, and "at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living."⁹

9. Articles 6(5) and 6(6) are key to the extension of such benefits to women in atypical forms of work, and in instances where large numbers of women are affected. These articles provide that:

6(5) Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies.

6(6) Where a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance.

10. Tanzer points out that-

⁶ ILO Convention 183, article 2(1),

⁷ *Ibid*, article 4(1).

⁸ *Ibid*, article 4(4).

⁹ *Ibid*, article 6(2).

The ILO standards address only the rights of women who are employed or seeking employment. The most current ILO standard on maternity protection, laid out in Convention No.183, has extended protection to all employed women, including those in atypical forms of dependent work. Although it covers certain types of workers in the informal sector, it does not include those informal workers who do not have employers such as self-employed women, own account workers, or unpaid women doing domestic work.¹⁰

11. The ILO report, which analyses conformity of the 167 member States with the provisions of the Maternity Convention No.183 of 2000, found that-

[I]n many countries, various categories of workers are explicitly excluded from the scope of labour legislation and/or social security legislation or from the corresponding law regulating cash maternity benefits.¹¹

12. In particular, the ILO report found that women working in family undertakings are excluded from national coverage in, among others, Ecuador, Egypt, Lebanon, Nigeria, the Philippines, Sudan, Tunisia and Yemen.¹²

13. In its submission to the Commission, WIEGO points out that:

The research proposal refers to the ILO Convention 183 on Maternity Protection as a guiding document that informs the law review. The Convention includes five key components:

- 1. Maternity leave and other care-related leave provisions;*
- 2. Cash and medical benefits;*
- 3. Health protection at work for pregnant and breastfeeding women;*
- 4. Employment protection and non-discrimination through maternity; and*
- 5. Breastfeeding arrangements at work.¹³*

However, the research proposal will only focus on maternity leave and paternity leave and cash and medical benefits. This convention can be extended to self-employed workers as it includes “all employed women, including those in atypical forms of dependent work.” An explanation of the limited scope of the research proposal should

¹⁰ Tanzer Z, *Still Searching for Transformative Equality: A comparative Study of Maternity and Work in South Africa and Ukraine* 2014, at 7.

¹¹ ILO “Maternity at Work. A review of national legislation” (April 2010) 35.

¹² *Ibid*, 36.

¹³ WIEGO “Submission to the SALRC Research Proposal on Maternity and Paternity Benefits” 2.

be provided from the outset given the wide array of legal measures that can be taken based on Convention 183.”

14. Clearly South Africa does not have adequate systems and measures in place to live up to the standards and requirements outlined in this Convention. For member states to meet the core requirements of Convention 183, they need to provide for at least 14 weeks’ paid leave, at least two-thirds of the worker’s prior earnings, which are paid “by social security, public funds or in a manner determined by national law and practice where the employer is not solely responsible for payment.”¹⁴

15. As a starting point, Convention 183 applies to all employed women, including those in atypical forms of work, such as self-employed workers,¹⁵ and does not limit the scope of maternity protection to women in the formal economy.¹⁶ The ILO notes with concern that despite the Convention stipulating that it should apply to all categories of working women, “no matter what occupation or type of undertaking, including women employed in atypical forms of dependent work”, nonetheless, many countries exclude different groups of workers from protection in their legislation.¹⁷

16. While states are permitted to exclude limited categories of workers either wholly or in part from the scope of the Convention’s protections, should their application to these workers result in substantive challenges,¹⁸ this may only be done after consultation with representative structures of workers and employers concerned. Thereafter, states are obliged to report to the ILO on those categories excluded, the reasons therefore, and the measures being adopted by that state to ensure the progressive extension of the Convention’s protections to these workers.¹⁹ Clearly, the South African government would need to enact amendments to existing definitions of employees in employment and labour legislation that exclude self-employed women and men from contributing to the UIF, and thereby qualifying to claim maternity and parental benefits. The only exception available, is

¹⁴ ILO “Maternity at Work. A review of national legislation” at ix.

¹⁵ ILO Convention 183 *op cit* article 2(1).

¹⁶ ILO “Maternity cash benefits for workers in the informal economy” *op cit* at 2.

¹⁷ ILO “Maternity at Work. A review of national legislation” *op cit* at x.

¹⁸ ILO Convention 183 *op cit* article 2(2).

¹⁹ *Ibid*, article 2(3).

to consult with representative bodies of such workers, report this non-compliance to the ILO, and advise on measures being enacted to ensure the gradual extension of these benefits to self-employed workers.

17. Second, relating to maternity leave, every worker to whom Convention 183 applies is entitled to a period of maternity leave of not less than 14 weeks, although Recommendation 191²⁰ recommends extending this to 18 weeks. This leave period shall include a period of six weeks' compulsory leave after the birth of the child.²¹ Other than this compulsory period, women are entitled to structure their remaining weeks' leave around their particular needs.²² In the event that there is a lapse between the presumed and actual date of child birth, the prenatal portion of the maternity leave shall be extended, without any reduction in the compulsory portion of the postnatal leave.²³ Further, in the event of illness or birth-related complications, verified by medical certificate, leave shall be accorded before or after the maternity leave period.²⁴

18. Third, relating to benefits to which workers are entitled, these include cash benefits linked to the maternity leave provision. Convention 183 stipulates that benefits should be in the form of cash benefits for the duration of the maternity leave, "at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living."²⁵ Where these cash benefits are earnings-related, as would be the case with self-employed workers, the benefits should not be less than two-thirds of the workers' previous earnings²⁶, or comparable to an amount calculated on average²⁷, although Recommendation 191 suggest benefits should constitute the full amount of previous earnings.²⁸ States are obliged to ensure that a large majority of women to whom Convention

²⁰ ILO Recommendation 191 *op cit*.

²¹ ILO Convention 183 *op cit*, article 4(4).

²² ILO "Maternity at Work. A review of national legislation" *op cit* 14.

²³ ILO Convention 183 *op cit*, article 4(5).

²⁴ *Ibid*, article 5.

²⁵ *Ibid*, article 6(1) & (2).

²⁶ *Ibid*, article 6(3).

²⁷ *Ibid*, article 6(4).

²⁸ ILO Recommendation 191 *op cit* 191.

183 applies, is able to qualify for these benefits in terms of national laws and regulations enacted to give effect to this Convention.²⁹

19. Convention 183 does make provision for states whose economy and social security systems are not adequately developed to encompass the payment of benefits as envisaged by Article 6(3) and (4) of the Convention. It states that they would be deemed to be in compliance with these requirements, provided that “cash benefits are provided at a rate no lower than a rate payable for sickness or temporary disability in accordance with national laws and regulations.”³⁰ In such an instance, states are obliged to report accordingly to the ILO, providing reasons for non-compliance with these articles, indicate the rate at which such cash benefits will be provided, and in later reports, describe measures enacted to progressively raise the level of benefits.³¹

20. In the event that a worker does not qualify for cash benefits, the state is obliged to enact a mechanism to ensure she receives adequate benefits through social assistance funds, subject to a means test to determine the need for such assistance.³² An example might be where a self-employed worker is either unable to make contributions to the UIF, or is not able to report prior earnings, and is therefore excluded from claiming cash benefits during her period of maternity leave. In this instance, the South African government would have to introduce into the social assistance cluster of grants, a maternity support mechanism to extend adequate benefits during this period. Convention 183 also makes provision for medical benefits for the woman and her child, including prenatal, childbirth and postnatal care, as well as hospitalization care when necessary.³³

21. Fourth, in relation to the financing of the cash benefits during the period of leave to which workers are entitled, Convention 183 stipulates that this shall be provided through “compulsory social insurance or public funds, or in a manner determined by national law and practice.”³⁴ Benefits should not be based on an individual employer’s liability, unless this is

²⁹ ILO Convention 183 *op cit*, article 6(5).

³⁰ *Ibid*, article 7(1).

³¹ *Ibid*, article 7(2).

³² *Ibid*, article 6(6).

³³ *Ibid*, article 6(7).

³⁴ *Ibid*, article 6(8)

provided for in national legislation, and agreed to by national government and representative organisations of workers and employers.³⁵

22. The ILO points out that to achieve universal coverage in maternity protection will require a combination of contributory and non-contributory mechanisms, for instance, in the form of social insurance and social assistance. It advises that:

“An effective coordination of these mechanisms within the social protection system is essential to guarantee at least a basic level of income security for women workers in case of maternity, and to facilitate their access to maternal and child health care. These elements are key to building a social protection floor for all as part of each country’s national social security system and comprehensive continuum of care policies, and to contribute to the broader objectives of promoting the health and well-being of mothers and their children, to achieve gender equality at work and to advance decent work for both women and men.”³⁶

23. Non-contributory social assistance would be applicable in instances where workers do not meet the requirements to qualify for contributory social insurance cash benefits. Such self-employed workers would then be entitled to receive adequate benefits to replace their income, and maintain their and their child’s health and a suitable standard of living, as stipulated in Convention 183.³⁷ The ILO notes that in practice, “this applies to millions of women in the informal economy, with limited or no capacity to regularly contribute to social insurance schemes.”³⁸

24. By adopting this combination of social insurance and social assistance models, states would effectively increase universal coverage of maternity protection for all women workers.

³⁵ *Ibid*, article 6(8)(a) and (b).

³⁶ ILO “Maternity cash benefits for workers in the informal economy” *op cit* at 8.

³⁷ ILO Convention 183 *op cit*, article 6(1) & (2).

³⁸ ILO “Maternity cash benefits for workers in the informal economy” *op cit* at 2.

2 Recommendation Concerning the Transition from the Informal to Formal Economy (No.204)

25. On 12 June 2015, the International Labour Conference adopted Recommendation R204, Concerning the transition from the informal to the formal economy.³⁹

26. Article 18 of the International Labour Organisation's R204 provides that through transition to the formal economy, Members should progressively extend, in law and practice, to all workers in the informal economy social security, maternity protection, decent working conditions and a minimum wage that takes into account the needs of workers and considers relevant factors, including but not limited to the cost of living and the general level of wages in their country.

27. The R204 applies to all workers and economic units in the informal economy, including own account workers, wage workers, domestic workers, subcontracted workers, and members of cooperative and solidarity organizations.⁴⁰

28. The R204 NTT which is led by the DEL, is tasked with the responsibility of delivering tangible proposals for achieving the roadmap to a national strategy for the formalization of the informal economy.⁴¹ A national dialogue was held in Durban, in March 2018. The following key strategic priorities were identified by Government and Social Partners at the national dialogue as a means to facilitate the formalization of the informal economy in the Republic, namely:

- (a) Building an enabling regulatory framework and policy environment;
- (b) Strengthening the capacity of national, provincial and local government;
- (c) Measuring informality: A necessary tool to monitor the implementation of the strategy on formalization;

³⁹ The South African Government played a leading role in ensuring the adoption of this Recommendation by ILO in 2015, R204 NTT "Towards a model framework for negotiations and dialogue between local authorities and informal worker organisations in South Africa" 3.

⁴⁰ NEDLAC Decent Work Country Programme Steering Committee "Accelerating the transition from the informal to formal economy" 2.

⁴¹ R204 National Task Team "Progress Report Accelerating the Transition from the Informal to Formal Economy" (November 2019) 7.

- (d) Strengthening the participation of workers and economic units in the transition from the informal to the formal economy; and
- (e) Coordination process towards the development of a roadmap for the implementation and monitoring the transition from the informal to the formal economy.⁴²

3 Social Security (Minimum Standards) Convention 1952 (No.102)

29. South Africa is yet to ratify the Social Security (Minimum Standard) Convention, 1952 (No.102). Part VIII: Maternity Benefit of the Convention provides as follows:

(i) Article 46

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of maternity benefit in accordance with the following Articles of this Part.

(ii) Article 47

The contingencies covered shall include pregnancy and confinement and their consequences, and suspension of earnings, as defined by national laws or regulations, resulting therefrom.

(iii) Article 48

The persons protected shall comprise-

- (a) all women in prescribed classes of employees, which classes constitute not less than 50 per cent of all employees and, for maternity medical benefit, also the wives of men in these classes; or
- (b) all women in prescribed classes of the economically active population, which classes constitute not less than 20 per cent of all residents, and, for maternity medical benefit, also the wives of men in these classes; or
- (c) where a declaration made by virtue of Article 3 is in force, all women in prescribed classes of employees, which classes constitute not less than 50 per cent of all employees in industrial workplaces employing 20 persons or more, and, for maternity medical benefit, also the wives of men in these classes.

(iv) Article 49

- 1. In respect of pregnancy and confinement and their consequences, the maternity medical benefit shall be medical care as specified in paragraphs 2 and 3 of this Article.

⁴² *Ibid*, 9

2. The medical care shall include at least--
 - (a) pre-natal, confinement and post-natal care either by medical practitioners or by qualified midwives; and
 - (b) hospitalisation where necessary.
3. The medical care specified in paragraph 2 of this Article shall be afforded with a view to maintaining, restoring or improving the health of the woman protected and her ability to work and to attend to her personal needs.
4. The institutions or Government departments administering the maternity medical benefit shall, by such means as may be deemed appropriate, encourage the women protected to avail themselves of the general health services placed at their disposal by the public authorities or by other bodies recognised by the public authorities.

4 Social Protection Floors Recommendation, 2012 (No 202)

30. Article 5(a) of ILO's Social Protection Floors Recommendation, 2012 (No. 202) obliges Members to provide basic social security guarantees.⁴³ These guarantees which should be established by law include child and family benefits, health-care benefits, maternity benefits, employment benefits (guarantees), employment injury benefits as well as any other social benefits in cash or in kind.⁴⁴

31. The ILO R202 envisages the creation of comprehensive social protection systems and extending existing social security coverage. It calls for the creation of national minimum standards or "floors" of social protection, prioritizing access to those most in need, such as people living in situations of poverty, those unprotected by existing social protection mechanisms, including workers in the informal economy and their families.⁴⁵ In giving effect to this recommendation, member states should apply the following principles:⁴⁶

- "(a) universality of protection, based on social solidarity;
- (b) entitlement to benefits prescribed by national law;

⁴³ This article provides as follows:

"5. The social protection floors referred to in Paragraph 4 should comprise at least the following basic social security guarantees:

(a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality; ..."

⁴⁴ *Idem*.

⁴⁵ ILO R202, article 1.

⁴⁶ *Ibid*, 3(a) – (g).

- (c) adequacy and predictability of benefits;
- (d) non-discrimination, gender equality and responsiveness to special needs;
- (e) social inclusion, including of persons in the informal economy;
- (f) respect for the rights and dignity of people covered by the social security guarantees;
- (g) progressive realization, including by setting targets and time frames.”

32. The recommendation particularly calls for basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability.⁴⁷

5 Convention 156-Workers with Family Responsibilities

33. The Workers with Family Responsibilities Convention was adopted on 23 June 1981 by the General Conference of the ILO, following a realization that many of the problems facing all workers are aggravated in the case of workers with family responsibilities and the need to improve the conditions of workers by measures responding to their special needs designed to improve the working conditions of workers in general.

34. Article 4 of the Workers with Family Responsibilities Convention provides that “with a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken-

- (a) to enable workers with family responsibilities to exercise their right to free choice of employment; and
- (b) to take account of their needs in terms and conditions of employment and in social security.”

⁴⁷ *Ibid*, 5(c).

6 Domestic Workers Convention, 2011 (No 189)

35. In *Mahlangu and Another v Minister of Labour and Another*,⁴⁸ the Constitutional Court had to consider an application for confirmation of the High Court and SCA's declaration of constitutional invalidity of section 1(xix(v) of COIDA. This section expressly excludes domestic workers from the definition of "employee", thus excluding them from enjoying the social security benefits provided under COIDA.⁴⁹

36. The CGE argued before court that article 14 of the Domestic Workers Convention obliges South Africa as a State party to the Convention "to ensure that domestic workers enjoy protection and have access to social security."⁵⁰

Article 14 of the Domestic Workers Convention provides as follows:

"Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity."

Victor AJ held that:

"The purpose of social security is to ensure that everyone, including the most vulnerable members of our society, enjoy access to basic necessities and can live a life of dignity. Moreover, social security legislation serves a remedial purpose: namely, to undo the gendered and racialized system of poverty inherited from South Africa's colonial and apartheid past."⁵¹

⁴⁸ 2020 ZACC 306/19.

⁴⁹ COIDA makes provision for compensation for employees in the event of injury, disablement or death that occurs in the workplace.

⁵⁰ *Mahlangu and Another v Minister of Labour and Others*, par 22.

⁵¹ *Ibid*, 63.

37. The Constitutional Court held that the exclusion of domestic workers from social security legislation does not serve any legitimate objective. Instead, “their exclusion has a significant stigmatizing effect which entrenches patterns of disadvantage based on race, sex, and gender.”⁵²

C. United Nations

1. Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)

38. Although CEDAW entered into force in 1981, however, it was only ratified by the Republic of South Africa in 1995.⁵³

39. CEDAW contains several specific provisions designed to ensure the protection and non-discrimination of women on the grounds of pregnancy. As a starting point, as a means to ensure the elimination of discrimination against women in the workplace, Article 11(1) speaks particularly to the right to job security and all the benefits and conditions of service,⁵⁴ as well as the right to social security and the protection of health.⁵⁵

40. CEDAW specifically addresses the right to maternity leave, as a concrete measure to prevent discrimination against women on the grounds of childbearing and to ensure their right to work, by calling on state parties to “introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.”⁵⁶ CEDAW also encourages states to “enable parents to combine family obligations with work responsibilities and to participate in public life, in particular through promoting the establishment and development of a network of child-care facilities.”⁵⁷ Article

⁵² *Ibid*, par 64.

⁵³ United Nations <https://indicators.ohchr.org/>.

⁵⁴ CEDAW, article 11(1)(c).

⁵⁵ *Ibid*, 11(1)(e) and (f).

⁵⁶ *Ibid*, 11(2)(a) and (b).

⁵⁷ *Ibid*, 11(2)(d).

12 details additional obligations on state parties to enact measures “to eliminate discrimination against women in the field of health care”,⁵⁸ including access to family planning, as well as ensuring appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”⁵⁹

41. Article 2 of CEDAW requires State Parties to address:

“all aspects of their legal obligation...to respect, protect and fulfil women’s rights to non-discrimination...the obligation requires that State Parties must refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their ...economic, social...rights.”

42. The above-mentioned Article 2 of CEDAW prohibits discrimination on the basis of sex which would have the effect of denying women the recognition, enjoyment or exercise of their human rights in any field, on the basis of equality between men and women. In the matter of *Elisabeth de 29 Blok et al v Netherlands* (CEDAW/C/57/D/36/2012), it was argued that the State (The Netherlands) violated the obligation in Article 11(2)(b) of CEDAW by not providing maternity leave to self-employed women. The CEDAW Committee in its response to the court adopted an expansive or living tree interpretation of Article 11(2)(b) to cover self-employed women (para 8.4) and stated that failing to provide maternity benefits is a direct form of gender-based discrimination and violation of CEDAW (para 8.9). According to the Department of Women,⁶⁰ the success of this case is regarded as an important development in women’s human rights and in the evolution of CEDAW to protect new and different kinds of employment relationships. Furthermore, this case is also regarded as an important contribution to the jurisprudence of the CEDAW Committee.

⁵⁸ *Ibid*, 12(1).

⁵⁹ *Ibid*, 12(2).

⁶⁰ Department of Women “Response to the SALRC Research Proposal Paper: Project 143: Maternity and Paternity Benefits for Self-employed Workers” (24 April 2018) 4.

2. Beijing Declaration and Platform for Action

43. The main thrust of the Beijing Declaration and Platform for Action is the achievement of gender equality and empowerment of women, an agenda that carries on to live into the 2030 Agenda for Sustainable Development. Goal 5 of the SDGs provides for the achievement of gender equality and empowerment of all women and girls and to ensure that women have better access to sexual and reproductive health and reproductive rights.

3. Universal Declaration of Human Rights

44. The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly on 10 December 1948 as a common standard of achievements for peoples of all nations.⁶¹ It outlines fundamental human rights that must be universally protected by all the nations of the world. Although it is not binding, however, it has served as a model for national Bills of Rights and it is argued that it forms part of customary international law.⁶²

45. Ratified by South Africa in 1994, the UDHR states in Article 22 as follows:

“Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

46. The framing of this right makes clear the linkages between every individual’s right to social security, regardless of category of work or employment, the obligations undertaken by the state to enact appropriate measures to realise everyone’s right to economic, social and cultural rights, and their significance for the attainment of dignity. With human dignity forming one of the cornerstones of the founding provisions of the Constitution,⁶³ the significance of the right to social security could not be more underscored.

⁶¹ United Nations <https://www.un.org/en/universal-declaration-human-rights/index.html>.

⁶² Dugard J *International Law: A South African Perspective* 2011 Forth Ed Juta 325.

⁶³ Constitution, section 1(a).

47. Article 25 of the UDHR further requires states to enact measures to provide for the health and well-being of all, and mothers and children in particular. Such measures include social services and the right to security in the event of unemployment or other lack of livelihood.

4. United Nations Convention on the Rights of the Child

48. The Convention on the Rights of the Child entered into force in 1990. The convention was ratified by the Republic of South Africa in 1995.

49. Article 18 of the Convention on the Rights of the Child states that both parents shall share responsibility for bringing up their children and should always consider what is best for each child.

5. International Covenant on Economic, Social and Cultural Rights (ICESCR)

50. The ICESCR was adopted and opened for signature and ratification by the General Assembly resolution 2200A (XXI) of 16 December 1966 and became enforceable with effect from 3 January 1976.⁶⁴ South Africa ratified the ICESCR in 2015.⁶⁵

51. The ICESCR aims to ensure the protection of economic, social and cultural rights including the right to social security (article 9) and the right to health (article 12).

6. Convention on the Rights of Persons with Disabilities

52. The Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New

⁶⁴ United Nations <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

⁶⁵ United Nations <https://indicators.ohchr.org/>.

York and was opened for signature on 30 March 2007.⁶⁶ The Republic of South Africa ratified the CRPD on in November 2007.⁶⁷

53. Article 25 of the Convention on the Rights of Persons with Disabilities provides that State Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive. In particular, State Parties shall provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes.

7. Sustainable Development Goals Vision 2030

54. The Sustainable Development Goals were adopted in 2015 by all the United Nations Member States “as a universal call to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.”⁶⁸

D. African Union

1. African Charter on Human and Peoples’ Rights

55. The ACHPR was adopted by the Assembly of the Heads of State and Governments in 1981 and entered into force in 1986.⁶⁹ All member states have now ratified the ACHPR.

56. Article 16 of the African Charter on Human and People’s Rights provides for the right to enjoy the best attainable state of physical and mental health, and requires States Parties

⁶⁶ United Nations <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

⁶⁷ United Nations https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=en.

⁶⁸ United Nations Development Programme available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed on 30 September 2020).

⁶⁹ Dugard J *International Law: A South African Perspective* 2011 Forth Ed Juta 554.

to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

2. African Charter on the Rights and Welfare of the Child (ACRWC)

57. The African Charter on the Rights and Welfare of the Child, also known as the Children's Charter, was adopted by the AU in 1990 and entered into force in 1999.⁷⁰ The Charter was ratified by the Republic of South Africa in 2000.⁷¹

58. Article 14 of the Children's Charter states that-

Every child shall have the right to enjoy the best attainable state of physical, mental, and spiritual health. This includes the provision of nutritious food and safe drinking water, as well as adequate health care.

3. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)

59. The Maputo Protocol, also known as the Women's Protocol, is the first human rights treaty to be adopted by the African Union.⁷² It entered into force in November 2005. Since then, it has been accepted by about twenty-seven State parties as binding.⁷³ In SADC, nine States have become parties to the Women's Protocol, namely: Angola; Lesotho, Malawi, South Africa, Tanzania, Zimbabwe, Mozambique, Namibia and Zambia.

60. Of relevance to this investigation is Article 14 which provides as follows:

⁷⁰ See <https://www.bing.com/search?q=African+Charter+on+the+Rights+and+Welfare+of+the+> (accessed on 6 February 2020).

⁷¹ LRC "Survey of Relevant Law" 76.

⁷² Centre for Human Rights, University of Pretoria "The impact of the Protocol on the Rights of Women in Africa on Violence Against Women in six selected Southern African Countries: An Advocacy Tool" vii available at https://www.chr.up.ac.za/images/publications/centrepublishings/documents/gender_violence_against_women_advocacy_tool.pdf (accessed on 7 February 2020).

⁷³ *Idem*.

- “1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
- (a) the right to control their fertility;
 - (b) the right to decide whether to have children, the number of children and the spacing of children;
 - (c) the right to choose any method of contraception;
 - (f) the right to have family planning education.
2. States Parties shall take all appropriate measures to:
- (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
 - (b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
 - (c) protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”

4. Social Protection Plan for the Informal Economy and Rural Workers (2011 – 2015)

61. The Social Protection Plan for the Informal Economy and Rural Workers (SPIREWORK) was adopted by the African Union in 2011 in order to extend social protection benefits to vulnerable categories of workers largely denied protection by formal labour frameworks. Rural workers are defined as workers who “are engaged in agricultural and non-agricultural activities, and embrace the following categories:

- (a) self-employed workers, small farmers;
- (b) wage earners;
- (c) Seasonal and casual workers;
- (d) Cross-border migrant workers as seasonal and occasional workers in farming.”⁷⁴

62. According to Mpedi and Nyenti, SPIREWORK was precipitated by the African Union’s concern about the low and inadequate social security coverage for informal sector workers

⁷⁴ African Union “ Draft Document on Mainstreaming social protection plan for the informal economy and rural workers in the AU Comprehensive African Agriculture Development Programs (CAADP)” (April 2015) available at https://www.ilo.org/africa/media-centre/WCMS_361736/lang--en/index.htm (accessed on 30 September 2020).

in Africa.⁷⁵ SPIREWORK envisages a Minimum Social Protection Package, in terms of which member states are urged to:

“[d]efine and implement a Minimum Protection Substantive Package for informal and rural workers and members of their families, encompassing measures on access to market and land for stable workplace, health, maternity, death, retirement,”⁷⁶

and to:

“[r]eview their laws and regulations, policies, strategies and programmes as they relate to access of the informal and rural workers to social protection measures and undertake reform measures for more inclusive social protection systems.”⁷⁷

63. Member states are particularly urged to enact “a range of policies to enhance women’s economic security, such as the revision of labour laws to eliminate gender discrimination and ensure equal protection.”⁷⁸

E. Southern African Development Community

1. Charter of Fundamental Social Rights in the SADC

64. The Charter of the Fundamental Social Rights in SADC was signed in August 2003 in Namibia by about 11 SADC countries including the Republic of South Africa.⁷⁹

⁷⁵ Mpedi and Nyenti “Key International, Regional and National Instruments Regulating Social Security in the SADC: A General Perspective” (2015) 81.

⁷⁶ African Union “Social Protection Plan for the informal Economy and Rural Workers 2011-2015, B, 27, a. See also Mpedi and Nyenti, *op cit*, 82.

⁷⁷ *Ibid*, B, 27, d.

⁷⁸ *Ibid*, C, 31, f.

⁷⁹ Other signatories are Democratic Republic of Congo; Kingdom of Swaziland; Kingdom of Lesotho; Republic of Malawi; Republic of Mauritius; Republic of Namibia; Republic of Mozambique; Republic of Seychelles; United Republic of Tanzania; Republic of Zambia and the Republic of Zimbabwe.

65. Article 2 provides that the objective of the Charter shall be to facilitate, through close and active consultations among social partners and in spirit conducive to harmonious labour relations, the accomplishment of the following objectives:

- “(e) promote the establishment and harmonization of social security schemes;
- (f) harmonise regulations relating to health and safety standards at workplaces across the Region; ...”

66. Article 10 (Social Protection) of the Charter provides as follows:

1. Member States shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.
2. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.

2. Code on Social Security in the SADC (2008) (Minimum Standards)

67. Making reference to ILO Conventions 102 and 183, the Code obliges member states to establish and progressively raise their systems of social security, “at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952.”⁸⁰ Of particular significance, the Code calls on member states to progressively expand the coverage and impact of their social insurance schemes, to the entire working population,⁸¹ and that they “should provide and regulate social insurance mechanisms for the informal sector.”⁸² With specific reference to ILO Convention 183, the Code obliges member states to “ensure that women are not discriminated against or dismissed on grounds of maternity and that they enjoy the protection provided for in the ILO Maternity Protection

⁸⁰ Code on Social Security in the SADC, 2008, article 4(3).

⁸¹ *Ibid*, article 6(4).

⁸² *Ibid*, article 6(5).

(Revised) Convention No. 183 of 2000”,⁸³ and “progressively provide for paid maternity leave of at least 14 weeks and cash benefits of not less than 66% of income.”⁸⁴

3. SADC Protocol on Gender and Development

68. In August 2008, SADC Heads of State and Government signed and adopted the SADC Protocol on Gender and Development. Of the thirteen Member States that have signed, eleven already ratified the Protocol.⁸⁵ The Objectives of the Protocol are, among others, to provide for the empowerment of women, eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects.⁸⁶

69. Article 19 (Equal Access to Employment and Benefits) of the SADC Protocol on Gender and Development provides as follows:

1. States Parties shall, by 2015, review, amend and enact laws and policies that ensure women and men have equal access to wage employment in all sectors of the economy.
4. States Parties shall provide protection and benefits for women and men during maternity and paternity leave.

70. There is no doubt that the provisions of the SADC instruments discussed above clearly demonstrate the Republic of South Africa’s obligation to extend adequate social security benefits to all the workers regardless of status and type of employment.

F. Conclusion

71. The Constitution is guided by a wide range of international, continental and regional human rights instruments to which South Africa is a signatory. The Republic of South Africa

⁸³ *Ibid*, article 8(1).

⁸⁴ *Ibid*, Article 8(3)

⁸⁵ SADC <https://www.sadc.int/issues/gender/> (accessed on 7 February 2020).

⁸⁶ *Idem*.

has signed and ratified a number of protocols and conventions which compel the Republic to provide State maternity and parental benefits to all workers regardless of their employment status. International instruments that have been approved and ratified by Parliament are legally binding on the Republic in terms of section 231(2) of the Constitution. The international, continental and regional human rights instruments that allow for the extension of State maternity and parental benefits to workers in the informal sector are the following:

- (a) Maternity Protection Convention, 2000 (No.183) (articles 6(5) and 6(6) [Not ratified by South Africa];
- (b) Recommendation Concerning the Transition from the informal to Formal Economy (No.204) (article 18);
- (c) Social Protection Floors Recommendation, 2012 (No.202) (article 5(a));
- (d) Convention on the Elimination of All Forms of Discrimination Against Women (article 12);
- (e) Universal Declaration of Human Rights (article 25);
- (f) International Covenant on Economic, Social, and Cultural Rights (articles 9 and 12);
- (g) Convention on the Rights of Persons with Disabilities (article 25);
- (h) African Charter on the Rights and Welfare of the Child (article 14);
- (i) Protocol to the African Charter on Human and People's Rights and the Rights of Women in Africa (Maputo Protocol) (article 14);
- (j) Charter of Fundamental Social Rights in the SADC (article 10); and
- (k) SADC Protocol on Gender and Development (article 19).

CHAPTER 5: BEST PRACTICES IN THE PROVISION OF MATERNITY AND PARENTAL BENEFITS TO INFORMAL ECONOMY WORKERS

A Introduction

1. The subject of extending social protection cover to vulnerable workers in the informal and rural sectors of the economy has increasingly been gaining traction in many countries of the world as an effective mechanism to fight poverty, unemployment, inequality and illnesses. It has featured in policy debates, development plans and strategies of government and non-government organizations alike, including bilateral and multi-lateral organizations such as the ILO, UNICEF, United Nations and many others.¹

2. At the international level, the Convention on the Rights of the Child makes provision for a wide range of children's social security and related rights. These include the right of every child to benefit from social security, including social insurance,² to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.³ Article 18 of the Convention provides that both parents shall share the responsibility of bringing up the child and to consider what is best for the child.

3. A new development agenda in the form of Sustainable Development Goals Vision 2030 was launched by the United Nations in September 2015. Since many countries could not achieve goals 4 and 5 of the Millennium Development Goals,⁴ Goal 3 of the SDGs talks

¹ Nhongo TM, "Social Protection and Informal Workers in Africa" (2013) 1. See also Hailu D and Soares V, "Cash transfers Lessons from Africa and Latin America" *Poverty in Focus* 2.

² Article 26 of the Convention on the Rights of the Child (1990)

³ *Ibid*, article 24.

⁴ Goal 4 of the MDG is reduce child mortality, Goal 5 is improve maternal health. The Ministry of Health, Government of Kenya, confirms that the MDG goals relating to maternal and child health were not achieved, RMNCAH *Op cit*, 7.

to good health and well-being, and Goal 5 talks to achieving gender equality and empowering all women and girls.⁵

4. In 2011, the African Union (AU) adopted the Programme of Upgrading the Informal Economy and the Social Protection Plan for the Informal Economy and Rural Workers. At its 104th session held on 1 June 2015, the ILO adopted Recommendation 204 Concerning the Transition from the Informal to the Formal Economy. In the same year, the AU adopted the Africa Agenda 2063 as well as the Plan of Action on Employment, Poverty Eradication and Inclusive Development, both of which call for the extension of social protection to everybody in the African continent.⁶

5. The Social Security (Minimum Standards) Convention 102 of 1952 is an internationally based instrument that establishes worldwide-agreed minimum standards for all the nine branches of social security. Maternity benefits; medical care and family benefits are three of such branches.⁷ This international instrument provides that maternity benefits must be provided for pregnancy, confinement and their consequences, and for suspension of earnings due to maternity leave.⁸ The Maternity Convention, 2000 (No.183) which revises the Maternity Protection Convention, 1952 (No103), potentially protects all women including those in atypical forms of dependent work.⁹

⁵ The UNDP reports that at least 400 million people have no basic health care, 40% lack social protection, information available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-3-good-health-and-well-being.html> (accessed on 30 September 2020).

⁶ African Union, “Concept Note on the meeting of the Technical Working Group on Labour Market Information and Informal Economy” available at <https://au.int/en> (accessed on 30 September 2020).

⁷ Mpedi G and Nyenti T, “Key International, Regional and National Instruments Regulating Social Security in the SADC: A General Perspective” *FES* (2015) 21. The other branches of social security according to the authors are sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; invalidity benefit; and survivors benefit.

⁸ *Ibid*, 31.

⁹ Article 2 of Convention No 183 of 2000 states that “each Member which ratifies this Convention may, after consulting the representative organisations of employers and workers concerned, exclude wholly or partly from the scope of the Convention limited categories of workers when its application to them would raise special problems of a substantial nature.”

6. The SADC Code on Social Security extends the right to social protection, which includes social assistance, social insurance and health insurance, to everybody in the region. According to Mpedi and Nyenti, the social security refers to public and private measures designed to protect individuals and families against income insecurity caused by contingencies such as maternity, sickness and others.¹⁰

7. In many African countries, social protection programmes are implemented by the government with assistance from development partners and larger non-government organizations.¹¹ Some of these programmes are already elaborate and comprehensive. They include mechanisms such as cash transfers, social grants, public works programmes, fee waivers, subsidies and allowances that are targeting the poor and vulnerable people.¹² However, these programmes have been criticized for treating informal workers as a residual category by creating special measures that function outside mainstream labour, financial and insurance institution. For social protection to work for female informal workers, women need to be acknowledged as workers in programmes.¹³

8. The level of informality is high in developing countries. According to Ulrichs, *et al*, a total of 74.2% of women in wage employment in Sub-Saharan Africa, and 63.2% in Southern Asia are concentrated in informal employment and are currently not contributing to social protection.¹⁴

9. The majority of female self-employed and own-account workers in the informal sector are not eligible for social insurance (maternity cash benefits) because of the eligibility requirements that are tied to the formal employment status. Ulrich, *et al*, point out that “[f]ormal schemes tend to reflect the traditional family model from the late 19th century Europe and North America, which is based on a gendered division of labour between men

¹⁰ Mpedi G and Nyenti T, *op cit*, 93.

¹¹ Omilola B and Kaniki S “Social Protection in Africa: A Review of Potential Contribution and Impact on Poverty Reduction” (March 2014) *UNDP* 2.

¹² *Idem*.

¹³ Ulrichs M, *et al*, “Informality, women and social protection: identifying barriers to provide effective coverage” (April 2016) 16.

¹⁴ *Ibid*, 4.

and women.”¹⁵ This accounts for the low social security coverage for female workers in the informal sector.

10. Women are indirectly eligible for child related social assistance (grants) “in their role as mothers and are often designated recipients of the cash transfer. Child grants, and particularly conditional cash transfers, have been criticized for not acknowledging the role of women as workers but rather reinforcing their gendered care responsibilities.”¹⁶ Article 4 of the Maternity Protection Recommendation, 2000 (No.191) explicitly states that the financing of maternity benefits should be made without any distinction on the grounds of sex or gender.

11. Other barriers to accessing social protection by informal sector workers include low- and unstable-income streams (low contributory capacity); lack of knowledge and awareness of the perceived value of maternity and parental benefits; administrative procedures; and socio-cultural norms and values.

12. Failure to register for maternity benefit schemes owing to lack of funds to pay the premiums is the biggest barrier affecting female informal sector workers’ access to social security, yet they are most likely to have the highest medical expenditure. In Uganda and Tanzania, the inability to pay premiums was found to be the major factor contributing to the low uptake of community health insurance schemes.¹⁷

13. The Constitutional Court of Uganda held that “when addressing the rights of women, one should have a global perspective and be guided by internationally recognized principles.”¹⁸ CEDAW makes it an obligation on State parties to take appropriate measures to eliminate discrimination against women in the field of health care in order to ensure on a basis of equality of men and women, access to health care services.¹⁹

¹⁵ *Ibid*, 14.

¹⁶ *Ibid*, 16.

¹⁷ *Ibid*, 21.

¹⁸ *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 39.

¹⁹ Article 12 of CEDAW.

B. Configuration of maternity and parental protection regimes

14. The configuration of maternity and parental protection regimes differs from country to country, and from region to region. They are also influenced by the regulatory and economic system prevailing in the country or region in question, as well as the level of economic growth in terms of local and international gross domestic product (GDP) norms and standards.²⁰

15. Although many countries share similar problems like gender discrimination, poverty, unemployment and inequality, however, there are variations in terms of the different factors that are contributing to these problems across groups of people defined by race, gender, ethnicity, age and other variables. Despite all these variations, Adato and Basset say that State interventions can be designed to respond to these challenges.²¹

16. Unlike maternity protection regimes for employed workers whose rights and benefits are protected by a wide range of international and domestic laws, it is a daunting task to compare maternity protection regimes across countries in the absence of international standards in this regard for self-employed and own-account informal and rural sector workers or the so-called non-standard workers.

17. Accordingly, each regime's profile presents differences along key factors like the type of maternity and parental benefits provided, nature and objectives of the programme, eligibility criteria, level of financial and non-financial support provided to beneficiaries, legislative and institutional arrangements, and funding arrangements.

18. De Brauw and Peterman argue that large scale CCT can positively influence maternal health outcomes provided that they are implemented through the following six distinct pathways, namely: "(a) through an income effect, particularly if it is (b) coupled with shifts in intra-household power or autonomy favouring women; (c) lower prices, attained by removing

²⁰ The World Bank prepares annual reports providing detailed outlook for the global economy and each of the world's emerging market regions. It analyses themes vital to policy makers in emerging markets and elsewhere in the world.

²¹ Adato M and Basset L, *Social Protection and Cash Transfers to Strengthen Families Affected by HIV*, 2012, 58.

or reducing health service user fees, (d) through explicit or implicit program conditions to update their belief about the value of maternal health care: and (f) supply-side improvements in health facilities.”²² Another important factor is improvement in infrastructure like enhancement in the provision of water and sanitation.

1. Leave benefits

19. Anxo, *et al*,²³ makes two important observations regarding the participation by self-employed workers in the parental leave benefits regime. Firstly, the authors state that most self-employed workers make use of parental leave to a lesser extent compared to wage workers. They state that this is due to the fact that many self-employees are likely to experience the costs of finding a replacement worker, whereas in a standard contract of employment, the employer carries these costs. Secondly, the authors state that many self-employed women find it difficult to combine self-employment with extended periods of leave, and in most instances, they avoid self-employment before pregnancy. They state that self-employed men also reduce their parental leave by a larger proportion compared to self-employed women.

20. The terminology used to describe the various types of parental leave across the globe varies widely. According to Ray-

[T]here are three types of child-based leave: maternity, paternity and parental leave. Maternity and paternity leave refer to time reserved for one parent’s use, during pregnancy or immediately after the birth of a child. Parental leave refers to longer periods of leave for either or both parents, to be taken after maternity and paternity leave.²⁴

21. There is also adoption leave which enables parents to take time off work in order to make preparations for the arrival of a new child. Unlike maternity and parental protection for

²² De Brauw A and Peterman A, “Can conditional cash transfers improve maternal health care? Evidence from El Salvador’s *Comunidades Solidarias Rurales* program” *Health Economics* Volume 29, Issue 6 (January 2020) 701.

²³ Marcadent P, “*Maternity at Work. A Review of National Legislation*” 3.

²⁴ Ray R, *A Detailed Look at Parental Leave Policies in 21 OECD Countries*, 2008 2.

workers in the formal sector, there is lack of international standards for maternity and parental leave benefits for self-employed workers.²⁵

2. Nature and objectives of the programmes

22. A closer look at maternity and parental protection (early childhood support) programmes in Annexure A of this Discussion Paper reveals that most of the social protection programmes in the selected regions focus on alleviating hardships caused by poverty, gender discrimination and unemployment. This is particularly the case in most Latin America, Sub-Saharan Africa and Middle and South East Asia. For instance, the key objectives of Ecuador's Zero Malnutrition Program (Programa Desnutrición Zero) are to eliminate infant malnutrition and improve antenatal care. The objectives of India's Safe Motherhood Scheme (Junani Surksha Yojana) are to reduce maternal and neonatal deaths.

3. Eligibility criteria

23. Although most of the programmes use a means test to select their beneficiaries, a few of the programmes, like Bolivia's Bono Juana Azurduy, and Nepal's Safe Delivery Incentive Programme are national or universal in nature. The target groups for most of the programmes are pregnant women, including teenage girls; destitute families and households with infants; and lactating women. India's Dr Muthalakshmi Maternity Assistance Scheme excludes women in the formal sector with high income.²⁶ Mongolia's Social Assistance Maternity Benefits programme excludes women who are covered by social insurance contribution scheme.²⁷ El Salvador's *Comunidades Solidarias Rurales* (Supporting Rural Communities) targets families with children of five years old or younger and pregnant women in 100 poorest municipalities.²⁸

²⁵ Marcadent P, *Maternity at Work. A Review of National Legislation* 2010 states that no ILO standard exists concerning paternity leave, but paternity leave provisions are available in national law in a number of countries 43.

²⁶ The Department of Social Development's study *Investigating the Potential Impact of Maternity and Early Child Support in South Africa*, 2012 at Annexure 3.

²⁷ *Idem*.

²⁸ *Idem*.

24. McGuire points out that most of the CCT programmes in Latin America make use of means-based testing criteria to select the beneficiaries.²⁹ The aim is to restrict the pool of eligible beneficiaries to those that are extremely poor. The proponents of means tested CCT programmes argue that low- and middle-income countries have limited financial resources to devote to social protection programmes. As a result, such resources are most cost-effectively utilized if they are distributed to those in greatest need.³⁰ The critics of means-based testing criteria point to errors of exclusion of eligible beneficiaries which could have adverse consequences to those households and persons who are affected.

4. Benefits provided to beneficiaries

25. CCTs are by far the most common benefit provided to eligible beneficiaries. The most common conditions attached to CCTs are:

- (i) regular attendance of prenatal and postnatal care;
- (ii) attendance of educational and sensitization programme for mothers;
- (iii) delivery through a health facility; and
- (iv) obtaining advice from a health professional.

26. CCTs are found mainly in Sub-Saharan Africa, Latin America, Middle and South East Asia. Adato and Basset state that the central question concerning the provision of cash benefits to eligible women and families with young children is the issue of conditionality. The authors state that most of the cash benefit programmes in Latin America have been conditional.³¹ Kraul states that CCT programmes are offered in 19 Latin American countries.³² These include Argentina, Brazil, Colombia, Ecuador, Bolivia, Chile and Mexico to name but a few. Contrary to the regimes in Latin America, Adato and Basset state that some of the CCT programmes in Southern and Eastern Africa, which were developed against the backdrop of HIV/AIDS, have been unconditional. The authors state that the concern with

²⁹ McGuire JW, "Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality" Paper prepared for the 2013 Annual Meeting of the International Studies Association (2013) 3.

³⁰ *Idem*.

³¹ *Ibid*, at 57.

³² Kraul C, *Families in Action pays mothers to improve health* 2011 <http://articles.latimes.com/2011/jun08/> (accessed on 2 February 2016).

conditionality in Sub-Saharan Africa revolves around the question of feasibility and insufficient administrative capacity to implement conditional programs.³³ The problem of insufficient capacity of government machinery to meet the eligible beneficiaries' demand is also identified by Balasubramanian and Ravindran in India's pro-poor maternity benefit schemes.³⁴ The authors state that although CCT schemes in India have had a positive effect on a great number of women seeking institutional delivery and have increased the use of health facilities for delivery care, however, many of the poor and eligible women who needed state assistance did not receive it due to documentation required and the lengthy application process.³⁵

27. Mozambique provides a meagre \$1 cash benefit to eligible pregnant women from the date of enrolment until 6 months after childbirth.³⁶ Nigeria provides monthly cash transfer of N1500 to eligible female headed households or pregnant women with one child, N3000 to households with two-three children and N5000 to such households with more than three children. Bangladesh's Maternal Health Demand Side Financing Pilot provides vouchers to pregnant women for use to pay for transport and food costs.

28. Looking at the EU region, it would appear that the level of financial benefits provided to eligible beneficiaries is significantly higher compared to the other regions. For instance, in Australia, self-employed women are entitled to 18 weeks of paternal leave pay at the national minimum wage (currently around \$590 before tax).³⁷ Likewise, self-employed men also receive dad and partner pay at the same rate in order to take time off work to support their partners during maternity leave and to be involved in the caring of the baby. In Switzerland, self-employed women are entitled to receive 80% of replacement allowance calculated on the average salary earned prior to childbirth until the woman returns back to work but not for longer than 14 weeks.³⁸

³³ *Ibid*, at 67.

³⁴ Balasubramanian P and Ravindran S, Pro-Poor Maternity Benefit Schemes and Rural Women, 2012, 19.

³⁵ *Ibid*.

³⁶ McGuire, op cit, 17.

³⁷ Ray R, "A Detailed Look at Parental Leave Policies in 21 OECD Countries", 1.

³⁸ SwiffLife, Maternity insurance in Switzerland, <http://www.yourlivingcity.com/stockholm/work-money/> (accessed on 27 January 2016).

29. Anxo, *et al*, states that cash benefits in Sweden are based on previous earnings and that there is a work requirement of 240 days prior to childbirth.³⁹ Generally, eligible self-employed workers are entitled to 80% of previous earnings with a ceiling of SEK240 000 per annum. Self-employees contribute 2.2 of their turnovers to the Swedish Social Insurance Agency. Parents with low or no previous income receive a flat rate of SEK180 per benefit day.⁴⁰

30. Walters, *et al*, conducted a study to look at the cost of not breastfeeding in Southeast Asia, in light of the slowly increasing rates of exclusive breastfeeding.⁴¹ The authors found that “every year, over 12 400 child and maternal deaths can be attributed to inadequate breastfeeding in seven Southeast Asian countries.”⁴² The authors state that “[b]reastfeeding can prevent 50% of child deaths due to diarrhoea and pneumonia and 10% of deaths due to breast cancer.” The authors recommend that “investing in a national breastfeeding promotion strategy in Vietnam could result in preventing 200 child deaths per year and generate monetary benefits of 139% return on investment.”⁴³

5. Legislative and institutional arrangements

31. The design and implementation of maternity and early childhood protection programmes vary from country to country and is influenced by a number of considerations. These include government’s priorities; objectives of the program; target group; financial or non-financial support to be provided to beneficiaries; administrative capacity and availability of funding to implement the program; and whether to attach any conditions for the receipt of benefits.

³⁹ Marcadent P, “*Maternity at Work. A Review of National Legislation*”, 4.

⁴⁰ *Idem*.

⁴¹ Walters D, Horton S, Siregar AYM and Pitriyan P, The cost of not breastfeeding in Southeast Asia, <http://heapol.oxfordjournals.org/content/early> (accessed on 9 May 2016).

⁴² *Idem*.

⁴³ *Idem*.

32. Most of the national maternity and early childhood support programmes in the selected jurisdictions in Annexure A of this Discussion Paper are grounded in legislation. For instance, the maternity allowance for self-employed women in United Kingdom is provided for in the Maternity and Parental Leave Law and Regulations. Likewise, the Swedish flexible parental leave system is provided for in the Försäkringskassan's rules and regulations. Brazil's Bolsa Família programme was established in 2003 by Provisional Measure 132 and converted into law in 2004. New Zealand's parental leave for self-employed persons is provided for in the Parental Leave and Employment Protection Act 1987. Section 71CB of the Act defines eligible self-employed person to mean "a self-employed person who is (a) the primary carer in respect of a child, and (b) meets the parental leave payment threshold test."

33. The programmes are administered by one or other combination of government departments. Adato and Basset state that CCTs are joint undertakings by ministries of welfare or social development, health and education and require inter-sectoral collaboration.⁴⁴ For instance, Bolivia's Zero Malnutrition programme is run by a multi-sectoral team comprising the presidency and nine ministries. According to Vidal,⁴⁵ the programme is decentralized to 166 out of the 337 municipalities that have been prioritized. The Canadian Manitoba Healthy Baby Prenatal Benefit Program and Australia's Paid Parental Leave Scheme are administered by the Ministry of Social Services respectively. India's Dr Muthulakshmi Maternity Assistance Scheme is administered by the Ministry of Health and Family Welfare. According to Balasubramanian and Ravindran, eligible women have to submit their application forms to a village health nurse, together with supporting documents.⁴⁶ The village nurse has to certify the poverty status of the pregnant woman, and forward the documentation to the block medical officer through the sector and community health nurse.⁴⁷

⁴⁴ Adato, *op cit*, 68.

⁴⁵ Vidal R, *Bolivia's Zero Malnutrition Program* <http://www.be-causehealth.be/media> (accessed on 04 February 2016).

⁴⁶ Adato, *op cit*, 19.

⁴⁷ The documents to be provided are family income certificate; copy of antenatal care service card and ration card.

34. In 1990, the Honduran government created the *Programa de Asignación Familiar* (PRAF), a CCT programme aimed at compensating poor families who were adversely affected by structural economic adjustments.⁴⁸ However, the programme was funded by an external lending institution, that is, the Inter-American Development Bank (IDB), which laid down conditions that had to be complied with by the beneficiaries of the CCT. PRAF I; II and III were all funded by the IDB. Although the objective of PRAF was to focus on long term human capital accumulation among the poor rural Hondurans and to supplement the incomes of beneficiary households, however, the achievement of this objective was frustrated by the shortness of the loan terms and deadlines directed mainly on short-term objectives.⁴⁹ Moore points out that where social protection programmes are funded jointly by the government and an international donor agency, “policy makers must work to balance the short-and long-term interests of internal and external stakeholders in order to create efficient and effective programmes.”⁵⁰

35. There are also numerous pilot projects which are established for a particular objective and only last for a given period. An example is the Ethiopian Meket Livelihoods Development Project (LMDP). According to Tessema, *et al*, the beneficiaries of the project, that is, pregnant or lactating women; the elderly; and people with disabilities, received cash transfers for work done in community infrastructural activities.⁵¹ The project was funded by the Dutch government and ran from June 2004 to April 2008. The target group was the poorest people in Meket, Amhara region. The authors state that-

Rural livelihoods in the Amhara region are in a chronic state of crisis due to declining farm sizes, environmental degradation, lack of essential services and successive natural disasters. An increasing proportion of the rural population is descending into poorer wealth categories, malnutrition is endemic, and many people need food aid, even in years of good harvest.⁵²

⁴⁸ Moore C, “Why sources of funding for CCTs matter in Honduras and Nicaragua” *Poverty on Focus* (2008) 10.

⁴⁹ *Idem*.

⁵⁰ *Idem*.

⁵¹ Tessema T, Tadess B, Getahun Z and Buta M, *Meket Livelihood Development Project Evaluation Report*, 13.

⁵² *Ibid*, 8.

36. Non-government organisation (NGOs) also have an important role to play in the implementation of maternity benefits programmes. Adato and Basset state that in Nicaragua, NGOs were contracted to deliver and monitor the delivery of health services due to government's failure to meet the demand.⁵³ In India, self-employed women formed a trade union called Self-Employed Women's Association (SEWA) of India. The objective of this Association is to organize women workers for full employment and self-reliance.⁵⁴

6. Funding arrangements

37. Funding arrangements for maternity and parental protection programmes take various forms. There are basically two distinct systems, that is, public and private funding arrangements. Among the public schemes, there are voluntary and mandatory (state) social and health insurance schemes (contributory) as well as social assistance (non-contributory) schemes.

38. Among the public schemes, there are mandatory state social insurance (non-contributory) schemes well as mandatory. Most of the mandatory social insurance schemes are funded predominantly by government, with or without assistance from donor funding, whereas most of the mandatory health and medical schemes, like national health insurance schemes, are funded jointly by government or employers and employees, including self-employees.

39. A majority of the national CCT programs in Latin America, Middle and South East Asia and in Sub-Saharan Africa are funded by government. McGuire says that-

[B]etween 1989 and 2010, the governments of seventeen Latin American countries introduced conditional cash transfer programs, which involve periodic transfer of money from the state to families that meet certain conditions: often that expectant mothers get prenatal care and trained attendance at birth.⁵⁵

⁵³ Adato (fn 14), at 68.

⁵⁴ [Http://www.sewa.org/Movements_Gujarat.asp](http://www.sewa.org/Movements_Gujarat.asp) (accessed on 29 April 2014).

⁵⁵ McGuire JW, "Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality, (2013) 1.

40. Financing for the maternity cash benefit may have to adopt a different model in respect of the categories of women. Internationally, there appears to be a number of different financing models to address the situation. A social insurance scheme which benefits from shared/ solidarity contributions is of course useful in that everyone that is employed makes a contribution and in turn is able to finance a maternity cash benefit. In principle both men and women contribute to the scheme and fund maternity benefits. A shared contribution is the most widely practiced model in terms of ILO and both employers and employees contribute to the fund.⁵⁶ In Honduras and Mexico, they make use of a tri-partite funding model where the employer, employee as well as the government make a contribution to the fund that benefits women during maternity leave. The State in these countries pay a subsidized amount to ensure protection of low income and self-employed workers.⁵⁷

41. However, it is clear that the World Bank has also played a major role in the design and provision of CCT programmes in the above-mentioned regions. For instance, according to McGuire, as from 2011 funding for Bolivia's Bono Juana Azurduy programme came from the World Bank.⁵⁸ The Institute for Development Studies states that Nigeria's Care for the Poor programme came as a result of debt relief agreement between the Nigerian government and the World Bank.⁵⁹ The United Kingdom based Save the Child Project ran Ethiopia's Meket Livelihoods Development Project from June 2004 to April 2008.⁶⁰

42. A number of statutory health and medical (contributory) schemes are found in the EU region. For instance, self-employed women in the United Kingdom are required to pay Class 2 national insurance contributions towards the National Insurance Scheme in order to be eligible for maternity allowance.⁶¹ In Sweden, self-employees contribute about 2.2% of their revenue and in Switzerland self-employed women are required to contribute towards the maternity insurance.

⁵⁶ Women's Legal Centre "Submission on Maternity and Paternity Benefits for Self-Employed Workers" (26 September 2017) par 37.

⁵⁷ *Ibid* par 38.

⁵⁸ *Ibid*, 19.

⁵⁹ Institute of Development Studies <http://vulnerabilityandpoverty.blogspot.co.za> (accessed on 3 February 2016).

⁶⁰ McGuire JW, "Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality", 1.

⁶¹ Ray R "A Detailed Look at Parental Leave Policies in 21 OECD Countries", 30.

43. Likewise, private schemes also take various forms. The most common example of statutory private schemes is medical schemes. Medical schemes are found in almost all countries. They are funded predominantly by the employer or jointly by the employer and employee including self-employees.

44. In order to have a positive effect on maternal and child health outcomes, the demand-side financing interventions (DSF) must be accompanied or supplemented by supply-side interventions like improvement in the provision of quality health care services and upgrading of infrastructure.⁶² A study conducted by Hunter and Murray found that a number of DSF programmes that were implemented in order to promote maternal and child care health in a number of low and middle income countries experienced challenges if “communities faced long distances to reach participating facilities and poor access to transport, and where there was inadequate health infrastructure and human resources, shortages of medicines and problems with corruption.”⁶³ Consequently, the authors advise that it is crucial that the design of DSF programmes should take into account these barriers in order to understand how such interventions become sustainable in the broader policy context of achieving an equitable universal health coverage.

45. Hunter and Murray make an observation that DSF programmes are “yet to demonstrate positive impact of programmes on quality of care or maternal and newborn health outcomes.”⁶⁴ The authors are of the view that “the implementation of DSF programmes may reinforce existing healthcare system problems including quality of care, demands for informal fees and the systematic exclusion of vulnerable groups. Taken together, these findings suggest a need for greater attention to issues of implementation in DSF programmes and to the extent in which they are to be introduced. Where DSF programmes

⁶² The five types of DSFs identified by Hunter and Murray are the following: 1. Conditional cash transfers; 1 unconditional cash transfer; 3 short-term cash payments to offset costs; 5 vouchers for maternity care services; and 4 vouchers for merit goods. “Demand-side financing for maternal and newborn health: what do we know about factors that affect implementation of cash transfers and voucher programmes?” *BMC Pregnancy and Childbirth* (2017) 2.

⁶³ *Ibid*, 1.

⁶⁴ Hunter BM and Murray SF, “Demand-side financing for maternal and newborn health: what do we know about factors that affect implementation of cash transfers and voucher programmes?” *BMC Pregnancy and Childbirth* (2017) 21.

have improved care-seeking, the programmes have tended to include additional investment in health facilities or staff, while those without such investment have struggled.”⁶⁵

46. The following sections look at maternity protection and parental care regimes in a selected number of foreign jurisdictions in greater detail. The selected foreign jurisdictions are grouped into five regions, namely: (i) Sub-Saharan Africa; (ii) Latin America; (iii) Middle and Southeast Asia; (iv) European Union and New Zealand; and (v) North and Central America. The demand-side interventions are discussed first, followed by the supply-side interventions.

C. Demand-side financing interventions

1. Sub-Saharan Africa

47. Most of the social security programmes in the selected regions focus on alleviating poverty, gender discrimination and unemployment. The Mozambican Cabinet for the Support of Vulnerable People (Gabinete de Apoio à População) and the Ethiopian Productive Safety Net Programme aim at reducing poverty respectively. Pregnant women who are receiving monthly CCTs from Nigeria’s Care for the Poor programme have to show evidence of prenatal attendance.

(a) Namibia: Social Insurance: Maternity leave cash benefit

48. The Social Security Commission established in terms of section 3(1) of the Social Security Act, 1994 (Act 34 of 1994) administers two social security schemes. These are the Maternity, Sick Leave and Death Benefit Fund (MSD) and the Employees Compensation Fund (ECF).⁶⁶

⁶⁵ *Idem.*

⁶⁶ Friedrich Ebert Stiftung “Social Protection in Namibia: A Civil Society Perspective” (September 2016) 20.

49. Section 21 of the Social Security Act, 994 provides that-

“(5) A self-employed person registered as an employee in terms of section 20 shall pay both the contributions payable by an employer and an employee as contemplated in subsection (2).”

50. It is not compulsory for self-employed workers, like “domestic employees, as well as employees of small medium enterprises, like shebeens, hair salons, panel beaters, construction workers etcetera,” to affiliate to the MSD. Self-employed workers choose to register themselves with the MSD on a voluntary basis.⁶⁷

51. Employees and employers contribute an equal amount of 0.9% of the employee’s basic wage, which amount to a total of 1.8% of the employee’s basic wage. The minimum amount of contribution is N\$ 2.70 regardless of the employee’s income. Self-employed workers have to bear the full amount of the contribution.⁶⁸

52. According to information available from the MSD-

“There is a six-month waiting period for newly registered members. As from 1 April 2009, maternity leave benefits to female members will equal 100% of basic wage up to a ceiling of N\$7000.00 for a maximum period of 12 weeks (3 months), with a minimum of N\$300.00 per month and maximum of N\$7000.00 per month. Birth certificates or death certificates, if the child was still-born or has died within two weeks, must be submitted within 7 days after actual date of confinement on the prescribed Form 14.”⁶⁹

53. Registered members of the MSD are issued with social security cards. Claims for maternity leave cash benefit must be submitted on Form 14 to the MSD seven days prior to the expected date of birth of the child and eight weeks after birth of the child.⁷⁰

⁶⁷ Information from the Maternity Sick and Death Benefit Fund available at <http://namhr.com/pdf/Article-What-are-the-benefits-of-the-SSC-Maternity-Sick-and-Death-Benefit-Fund.pdf> (accessed on 8 September 2020).

⁶⁸ ILO “Maternity cash benefits for workers in the informal economy” (November 2016) 4.

⁶⁹ Information from the Maternity Sick and Death Benefit Fund available at <http://namhr.com/pdf/Article-What-are-the-benefits-of-the-SSC-Maternity-Sick-and-Death-Benefit-Fund.pdf> (accessed on 8 September 2020).

⁷⁰ *Idem*.

(b) Tanzania: Social Assistance: Productive Social Safety Net (Cash Plus Model)

54. The Productive Social Safety Net (PSSN) was launched in 2012 as the flagship social protection programme of Tanzania focused in improving capacity of social service delivery and reducing poverty among the food insecure households. The programme is being implemented by the Tanzania Social Action Fund (TASAF). TASAF disburses cash benefits to participating households on a bimonthly basis.⁷¹

55. The programme was rolled out in three phases. Phase I (2000-2005), focused on improving capacity and social service delivery. Phase II, (2005-2013) expanded the first phase's commitment to improving capacity and to address shortages in the delivery of social services, Phase III (2013 to date) looks at a national programme geared toward putting in place building blocks for a permanent national social protection system of Tanzania.⁷²

56. An unconditional cash transfer amounting to Tsh 10, 000 is disbursed to all registered households, plus an additional Tsh 4, 000 for households with children under 18 years of age. A conditional maternity cash benefit amounting to Tsh 4, 000 is disbursed to pregnant women under the condition that they attend at least four antenatal medical check-ups or health and nutrition services depending upon the availability of services.⁷³

⁷¹ Information available on <https://transfer.cpc.unc.edu/countries-2/tanzania-2/> (accessed on 9 September 2020).

⁷² Information available at <https://transfer.cpc.unc.edu/countries-2/tanzania-2/> (accessed on 9 September 2020).

⁷³ Watson C and Palermo T, "Options for a Cash Plus intervention to enhance adolescent well-being in Tanzania" (February 2016) 8.

57. Watson and Palermo describe the emerging cash plus model as the “programme option of combining cash transfers with other sorts of support. The rationale is that cash alone is not always sufficient as a means to reduce the broad-based and interrelated social and economic risks and vulnerabilities that the targeted beneficiary populations face, and that additional support is needed.”⁷⁴

58. The authors also point out that there is growing evidence base demonstrating that cash transfer programmes have the potential to facilitate youth (adolescents)’s safe transition to adulthood and reduce HIV-risk behaviour and gender-based violence.⁷⁵

(c) Ethiopia: Social Assistance: Productive Safety Net Programme (Food Parcels)

59. In 2005, the government of Ethiopia launched the Productive Safety Net Programme (PSNP) in response to food insecurity as a safety net to the poor and vulnerable people of Ethiopia.⁷⁶ The purpose of the programme is to protect livelihoods, improve nutrition and enhance households’ resilience to shocks.⁷⁷

60. Beneficiaries have to contribute their labour in public work programmes (PWP). They are provided with cereals and pulses or equivalent of cash on a monthly basis.⁷⁸ Pregnant women from poor and food insecure households are eligible for cash benefits from 6 months of pregnancy until 10 months after giving birth as a form of paid maternity leave.⁷⁹

⁷⁴ *Ibid*, 5.

⁷⁵ *Idem*.

⁷⁶ Information available at <https://essp.ifpri.info/productive-safety-net-program-psnp/> (accessed on 9 September 2020).

⁷⁷ Information available at <http://pubdocs.worldbank.org/en/205311575490614186/SPJCC19-SSN-D5S4-Coll-Black-PSNP.pdf> (accessed on 9 September 2020).

⁷⁸ ILO “Maternity cash benefits for workers in the informal economy” (November 2016) 5.

⁷⁹ *Idem*.

2. Latin America

(a) **Brazil: Social Assistance: Bolsa Família (CCT)**

61. The *Bolsa Família* was launched in 2003 by the Brazilian federal government under President Lula da Silva as a nationwide CCT programme. The programme is administered by the relevant local department within the federal infrastructure.⁸⁰ The objectives of the programme are to reduce poverty and inequality by providing a basic income grant for extremely poor families.⁸¹ The conditional elements attached to the cash transfer are that families must take their children to the doctor whenever the need arise; immunization for children; prenatal monitoring for pregnant women; and attendance at school by children and teenagers. *Bolsa Família* is presently the largest CCT programme in the world in terms of coverage and financing.⁸² The cash benefits are paid mostly to women.⁸³

62. It is reported that more than 30 million Brazilians escaped poverty between 2003 and 2014 on account of the *Bolsa Família* programme. Most families currently eat two meals per day instead of just one. The cash transfer plays a crucial role in rural towns where money hardly circulated.⁸⁴

63. Shei, *et al*, state that “[e]vidence from other countries suggests that CCT programs have improved the lives of people in poverty. Reported benefits include increased consumption among the poor, decreased poverty, protection from income shocks such as

⁸⁰ The programme “operates in all the 5,570 municipalities in Brazil through a network of 176,000 local operators, making the programme accessible across all of Brazil” the information available at <https://www.centreforpublicimpact.org/case-study/bolsa-familia-in-brazil> (accessed on 3 October 2020).

⁸¹ Shei A, et al, “The impact of Brazil’s *Bolsa Família* conditional cash transfer program on children’s health care utilisation and health outcomes” (April 2014) BMC International Health and Human Rights available at <https://www.ncbi.nlm.nih.gov/pmc/article/> (accessed on 3 October 2020).

⁸² It is reported that the programme covers over 13 million families in Brazil and has spent well over US\$76 billion during the last eight years of its existence, *idem*.

⁸³ A household with per capita monthly income of up to BRL70 are entitled to a fixed household transfer of BRL70 plus an additional amount of BRL32 for each child up to 15 years of age, information available at <https://www.centreforpublicimpact.org/case-study/bolsa-familia-in-brazil> (accessed on 3 October 2020).

⁸⁴ The Americas “Left behind *Bolsa Família*, Brazil’s admired anti-poverty programme, is flailing” (January 2020) available at <http://www.economist.com/the-americas/2020/01/30/bolsa-familia-brazils-admired-anti-poverty-programme-is-flailing> (accessed on 1 October 2020).

unemployment and catastrophic illness, and increased bargaining power of women. In terms of health, CCT programs have increased the use of preventive health services and improved some child and adult health outcomes.”⁸⁵

(b) Bolivia: Social Assistance: Bono Juana Azurduy (stipend)

64. The *Bono Juana Azurduy* was launched in May in 2009 by executive decree during the 2009 campaign for general elections in which president Evo Morales of the MAS was re-elected.⁸⁶ The conditional stipend is provided to expectant and new mothers for making use of maternal and infant health care services. The conditions to the stipend are the following: (i) four prenatal visits; (ii) giving birth attended by trained personnel plus certification of the birth; (iii) twelve checkups for the baby, that is, every two months for the baby’s first twenty-four months.⁸⁷

65. The objective of the programme is to increase utilization of health care services for pregnant women and children less than two years, and to reduce prolonged malnutrition among children with severe food insecurity.⁸⁸ The *Bono Juana Azurduy* is not means-tested in its coverage of expectant and new mothers and children under two year of age. However, expectant and new mothers who are covered by contributory health insurance are ineligible for the stipend.⁸⁹ Beneficiaries are required to show a national identity card and to produce the child’s birth certificate.

66. McGuire reports that the programme experienced implementation challenges in that it could not handle the expected influx of new patients efficiently and effectively.⁹⁰ Although doctors were recruited by government in 2009, however, by 2012 seven of the nine departments were still without doctors and coordinators. The program could not meet its

⁸⁵ Shei A, et al, “The impact of Brazil’s *Bolsa Família* conditional cash transfer program on children’s health care utilisation and health outcomes” (April 2014) BMC International Health and Human Rights available at <https://www.ncbi.nlm.nih.gov/pmc/article/> (accessed on 3 October 2020).

⁸⁶ McGuire JW, “Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality” Paper prepared for the 2013 Annual Meeting of the International Studies Association (2013) 17.

⁸⁷ *Idem*.

⁸⁸ *Ibid*, 20.

⁸⁹ *Idem*.

⁹⁰ *Ibid*, 21.

coverage targets in four of the nine departments in Bolivia due the scarcity of doctors who were dropping out because of failure by the government to pay their salaries.⁹¹

3. Middle and Southeast Asia

**(a) India: Social insurance: Indira Gandhi Matritva Sahyog Yojana
(conditional maternity leave cash benefit)**

67. The Unorganised Workers' Social Security Act, 2008 (India) makes provision for the establishment of a National Social Security Board for the unorganized sector workers.⁹² Section 6 of the Act also empowers every state government to establish a State Social Security Board for the same workers.

68. Section 2 of the Act defines a “**self-employed worker**” to mean “any person who is not employed by an employer, but engages himself or herself in any occupation in the unorganized sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government from time to time or holds cultivable land subject to such ceiling as may be notified by the State Government.”

69. Section 10 of the Act makes provision for the registration of unorganized sector workers and for their issuing with identity cards. Subsections (4) and (5) provides as follows:

- “(4) If a scheme requires a registered unorganized worker to make a contribution, he or she shall be eligible for social security benefits under the scheme only upon payment of such contribution.
- (5) Where a scheme requires the Central or State Government to make a contribution, the Central or State Government, as the case may be, shall make the contribution regularly in terms of the scheme.”

⁹¹ *Idem.*

⁹² Section 5 of the Unorganised Workers' Social Security Act, 2008 (India).

70. The Indira Gandhi Matritva Sahyog Yojana (IGMSY) is a conditional maternity cash benefit scheme that was launched by the government of India, Ministry of Women and Child Development, for pregnant and breastfeeding women and nursing mothers in 2010.⁹³ The purpose of this social assistance program is to provide partial compensation for the loss of wages due to maternity leave.

71. A CCT of Rs. 6000 (US\$67.20) is payable directly to pregnant and breastfeeding women 19 years old and above for the first two live births.⁹⁴ The CCT is payable in three instalments between the second trimesters of pregnancy until the baby completes 6 months of age. The beneficiaries must comply with specific conditions relating to maternal child health and nutrition. These include medical check-ups for the mother and child, exclusive breastfeeding, vaccinations and attendance at health counselling sessions.⁹⁵

72. The beneficiaries of the Janani Suraksha Yojana have to register with a health worker at the nearest village health care center.⁹⁶ They are issued with a card as proof of registration and for purposes of disbursement of the conditional cash grant. An additional amount of Rs 1500 is made available for hiring professional practitioners to perform caesarean deliveries in a private or public health facility.⁹⁷

⁹³ Information available at <https://www.yojanasarkari.com/2018/08/indiragandhi-matritva-sahyog-yojana.html> (accessed on 9 September 2020).

⁹⁴ *Idem.*

⁹⁵ *Idem.* ILO “Maternity cash benefits for workers in the informal economy” (November 2016) 6.

⁹⁶ There are a number of maternity benefit schemes that have been introduced by the government of India for the unorganised sector workers over the past couple of decades. The Janani Suraksha Yojana was launched in April 2005 by the former Prime Minister of India under the National Health Mission with the purpose of preventing infant mortality and any problems occurring during childbirth. The latter scheme replaced the older National Maternity Benefit Scheme. <https://timesnext.com/janani-suraksha-yojana-initiative-to-prevent-infant-mortality/> (accessed on 18 September 2020).

⁹⁷ *Idem.*

(b) Lao People's Democratic Republic: Social insurance (maternity leave cash benefit)

73. Laos⁹⁸ is a member of the Association of Southeast Asian Nations (ASEAN). In October 2013, the ASEAN ministers of Social Welfare and Development signed the Declaration on Strengthening Social Protection. The Declaration is informed by ILO Recommendation 202 of 2012 which defines a nation's social protection floor as "nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion."⁹⁹

74. The Social Security Act, 2013 makes provision for informal sector workers to affiliate to the National Social Security Fund (NSSF) on a voluntary basis.¹⁰⁰ Self-employed workers contribute 2.5% of gross insurable monthly earnings. The minimum basic legal monthly wage of 900,000 kip is used to calculate monthly contributions to the NSSF.¹⁰¹

75. To qualify for maternity cash benefits, insured workers need to have paid at least six months contributions within the last period of twelve months. A total of 80% of the average reference wage during the last six months is payable as maternity leave cash benefit for a maximum period of ninety days.¹⁰² It is reported that in 2015, only about 1599 of the estimated total percentage of 2.48 million informal sector workers in the country participated in the state maternity benefit scheme on a voluntary basis.¹⁰³

(c) Bangladesh: Social Assistance: (maternal health voucher scheme)

76. The Maternal Health Voucher Scheme is implemented by the Ministry of Health and Family Welfare of the government of Bangladesh, with technical and financial support from

⁹⁸ Laos People Democratic Republic is situated in Southeast Asia, bordered by Myanmar and China to the northwest, and Vietnam to the east.

⁹⁹ Social Protection and Sustainable Livelihoods "Social Protection in La PDR" (2015) 7.

¹⁰⁰ ILO "Maternity cash benefits for workers in the informal economy" (November 2016) 4. See also information available at <https://www.ssa.gov/policy/docs/progdesc/ssptw/2016-2017/asia/laos.html> (accessed on 09 September 2020)

¹⁰¹ *Idem.*

¹⁰² ILO "Maternity cash benefits for workers in the informal economy" (November 2016) 5.

¹⁰³ *Idem.*

the World Health Organisation.¹⁰⁴ The scheme applies universally to all pregnant women in the nine districts that are categorized as extremely poor. In the remaining 24 districts, a means test is used to identify the beneficiaries.¹⁰⁵ The following criteria are used to select the beneficiaries: the pregnant woman resident in the sub-district is her first or the second pregnancy, functionally landless, household earning less than US\$38.50 per month and lack ownership of other productive assets.¹⁰⁶

77. The benefits that are provided are the following:

- (a) Three antenatal care (ANC) check-ups;
- (b) Safe delivery at a facility or at home by skilled birth attendant;
- (c) One postnatal (PNC) check-up within 6 weeks of delivery;
- (d) Management of complications including caesarean section from designated providers;
- (e) Transportation costs which include US\$4.60 for 3 ANC visits, US\$1.55 for institutional delivery and US\$1.55 for one PNC visit; and
- (f) US\$31 nutrition allowance.¹⁰⁷

78. Community health workers identify pregnant women in their catchment areas who are within the first trimester. They will register the expectant mother using a form designed for this purpose. A sub-district committee at a municipal level is responsible for distributing the vouchers to eligible women. This committee is also responsible for monitoring and supervision of the scheme and reports to the national Ministry of Health and Family Welfare.¹⁰⁸

79. According to Ahmed and Khan, among the factors affecting the efficiency and performance of the programme include the delay in the release of voucher funds and the selection criteria used for registering pregnant women in the maternal health voucher

¹⁰⁴ Ahmed and Khan M "A maternal health voucher scheme: what have we learned from demand-side financing scheme in Bangladesh?" *Health and Policy Planning* (2011) 26.

¹⁰⁵ *Idem.*

¹⁰⁶ *Idem.*

¹⁰⁷ *Ibid*, 27

¹⁰⁸ *Idem.*

scheme.¹⁰⁹ It would appear that although the purpose of the programme was to encourage competition among the health care providers, however, insufficient resources made available through the scheme failed to attract private providers to the extent that public providers remained the only available providers for the scheme.

(d) *Mongolia: Social Insurance and Social Assistance (maternity allowance; and child money programme) Schemes*

80. Informal sector self-employed workers in Mongolia can participate in the social insurance programme for the formal sector on a voluntary basis and “receive maternity cash benefits for four months at a replacement rate of 70% of their selected reference wage after twelve months of contributions.”¹¹⁰ The benefit is payable from the fifth month of pregnancy for a period of twelve months.

81. Pregnant women and mothers of infants are also eligible for maternity allowance amounting to US\$20 per month under the Social Welfare Scheme regardless of their contribution to the Social Insurance Scheme, employment status or nationality.¹¹¹

82. The universal Child Money Programme (CMP) is one of the flagships programmes under the state social protection system. The programme offers a child allowance of about

83. US\$10 per month to children aged 0 to 17.¹¹² Children are automatically eligible for the transfer at the time of registration with the State Registration General Office.¹¹³ Children of migrant workers are, however, excluded. The programme is funded through a special fund called Human Development Fund (HDF). The main source of revenue for the HDF is mineral resources taxes. ILO states that “[t]he CMP is perceived as a mechanism for redistributing wealth from the mining sector across the population in an equitable and efficient manner.”¹¹⁴

¹⁰⁹ *Ibid*, 25.

¹¹⁰ ILO “Child Money Programme” (November 2016) 3.

¹¹¹ *Idem*.

¹¹² ILO “Child Money Programme” (November 2016) 1.

¹¹³ *Ibid*, 2.

¹¹⁴ *Idem*.

4. European Union and New Zealand

(a) *United Kingdom: Social Insurance: Maternity Allowance*

84. Self-employed women are entitled to claim Maternity Allowance if the mother has been self-employed for at least 26 weeks of the 66 weeks prior to the date of birth of the child. Self-employed women must register with the Her Majesty's Revenue and Customs (HMRC), make a contribution towards the National Insurance Contributions (NIC), and submit a self-assessment tax return as prescribed.¹¹⁵

85. Expectant mothers who claim maternity allowance on the basis of self-employment are treated as earning £150.20 a week (April 2020-April 2021) and are entitled to a standard rate of £150.20 per week. However, if the profits are below the small profit's threshold, the mother will be treated as earning £30 a week and will be entitled to a maternity allowance of £27 per week. A higher allowance is payable provided that the mother can add any employed earnings or make a Class 2 NIC voluntarily.¹¹⁶

(b) *Sweden: Social Security: Parental Leave*

86. The Swedish parental leave dispensation is one of the most generous regimes in the world. The flexible parental leave regime in Sweden allows both parents eight months leave each, whereas six of the eight months may be reallocated to the other parent.¹¹⁷

87. The leave is paid for by the social security agency called Försäkringskassan.¹¹⁸ Expectant mothers or their partners, can expect to receive up to 80% of their monthly salary for the first 420 days.¹¹⁹ Beneficiaries must be insured in Sweden, Switzerland, or the EU.¹²⁰

¹¹⁵ Information available at <https://maternityaction.org.uk/advice/maternity-pay-questions/#maternity-allowance> (accessed on 6 October 2020).

¹¹⁶ *Idem*.

¹¹⁷ Anxo D, Ericson T and Mangs A "How does self-employment influence the use of parental leave in Sweden?" (2013) 4.

¹¹⁸ Information available at <https://everythingsweden.com/parental-leave-in-sweden/> (accessed on 8 October 2020).

¹¹⁹ *Idem*.

¹²⁰ Information available at https://www.forsakringskassan.se/privatpers/foralder/nar_barnet_ar_fott/foraldrapenning/ (accessed on 8 October 2020).

Although self-employees are covered by the Swedish parental leave system, however, Anxo, *et al*, state that female self-employees on average reduce their parental leave by 40 days compared to wage earners, while male self-employees on average reduce their parental leave by 13 days.¹²¹ The authors state that many self-employees are likely to experience additional costs of finding a replacement worker while in a standard wage employment contract the employer bears this cost.¹²²

(c) Switzerland: Social Insurance: Compulsory Maternity Insurance

88. Switzerland has a compulsory maternity insurance scheme that is provided for in the Federal Law (Income Compensation Law, EOG) and its implementing ordinance (EOV).¹²³ Self-employed women; unemployed women; and women who work for the business of their spouses, partners or family members are all covered by the compulsory maternity insurance. Beneficiaries receive 80% of the average salary earned prior to the date of birth of the child subject to social security (AHV) contributions. Self-employed women submit their claims directly to AHV administration office.¹²⁴

(d) Australia: Social Assistance: Paid Parental Leave (Dad and Partner Pay)

89. In 2008, the Australian government mandated the Productivity Commission to investigate whether Australia could benefit from a paid parental leave regime and what model would work best.¹²⁵ Following the investigation and the report by the Productivity Commission, a paid parental leave regime was implemented with effect from 1 January 2013. In terms of the Dad and Partner Pay, fathers and eligible partners receive two weeks

¹²¹ Anxo D, Ericson T and Mangs A “How does self-employment influence the use of parental leave in Sweden?” (2013) 1.

¹²² *Ibid*, 2.

¹²³ SwissLife “Maternity insurance in Switzerland” available at <https://www.swisslife.com/en/home.html> (accessed on 27 January 2016).

¹²⁴ *Idem*.

¹²⁵ Department of Social Services, Australian Government “Paid Parental Leave: Dad and Partner Pay” available at <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-service/paid> (accessed on 22 January 2016).

paid leave “to help them take time off work to support new mothers in their caring role and to be involved in the care of their newborn baby right from the start.”¹²⁶

90. Eligible men must comply with the following requirements: “(i) be Australian resident; (ii) be providing care for a child born or adopted after 1 January 2013; (iii) have worked continuously for at least 10 out of the 13 months prior to the start of the Dad and Partner Pay; (iv) have an individual adjusted taxable income of US\$150 000 or less prior to the date of birth or adoption or the date of their claim, whichever is earlier.”

91. Accordingly, self-employed men,¹²⁷ including adopting parents and parents in same-sex relationships, receive parental leave pay at the rate of the National Minimum Wage (equivalent of US\$590 in 2016). The cash benefit is available to “eligible full-time, part-time, casual, seasonal, contract and self-employed men.”¹²⁸

**(e) Germany: Social Insurance: maternity leave benefits (“Mutterschutz”);
Social Assistance: Child allowance (“Kindergeld”)**

92. In 2010, the EU Parliament and Council passed the Directive on the Equal Treatment of Men and Women (2010/41/EU) with the purpose of strengthening social protection for self-employed workers. This directive paved the way for the extension of maternity allowance for self-employed workers at the level of the EU region. In terms of article 8.1 of the above-mentioned directive, the duration of the maternity leave is a minimum of fourteen consecutive weeks,¹²⁹ which implies that the maternity leave benefits standard for self-employed workers is equal to that of standard workers.

93. German citizens and permanent residents are obliged to enrol with either the public health or any private insurance scheme. Self-employed and unemployed women who register with the public health insurance scheme are entitled to receive maternity leave benefits. Self-employed workers are entitled to a minimum of €300 and up to €1800 parental

¹²⁶ *Idem.*

¹²⁷ The Dad and Partner Pay is not available to birth mothers. Mothers claim up to 18 weeks Parental Leave or the Baby Bonus, *idem.*

¹²⁸ *Idem.*

¹²⁹ European Union “Eurofound report” (2010) available at https://europa.eu/european-union/about-eu/agencies/eurofound_en (accessed on 14 October 2020).

leave benefits per month. Generally, the parental leave benefits can be up to 67% of the income generated in the year of the previous tax assessment.

94. Parents are entitled to receive “*kindergeld*” which is payable to one parent from age zero until the child turns 18. The child allowance amounts to between €210 and €235 per month. German taxpayers, including refugees and asylum seekers, are entitled to the monthly cash transfer as long as there is a child in the household.

(f) New Zealand: Social Assistance: Paid Parental Leave

95. In New Zealand, the Paid Parental Leave (PPL) is payable to self-employed workers by the government to look after a child under the age of 6.¹³⁰ According to information available on the New Zealand Government website, “there is no requirement for employers to pay statutory maternity or parental leave. Some employers choose to pay parental leave as an employment benefit.”¹³¹ Section 71CB of New Zealand’s Parental Leave and Employment Protection Act, 1987 defines eligible self-employed person to mean:

“[A] self-employed person who is (a) the primary carer of a child, and (b) meets the parental leave payment threshold test.”

96. It is interesting to note that the following persons qualify as primary carers, namely: (i) pregnant woman or new mother; (ii) the spouse or partner of the pregnant woman or new mother; (iii) an adoptive parent; (iv) a Home for Life parent; (v) a grandparent with full-time care; and (vi) a permanent guardian.¹³²

¹³⁰ Information available at New Zealand Government website <https://www.govt.nz/browse/work/parental-leave/taking-parental-leave/> (accessed on 7 October 2020).

¹³¹ *Idem.*

¹³² *Idem.*

97. A self-employed worker is entitled to receive a maximum payment to match average earnings up to US\$606.46 per week before tax, or a minimum payment of US\$189 per week before tax.¹³³ A self-employed worker must have been in employment for at least an average of 10 hours per week over any 26 of the 52 prior to the date of birth of the baby or the date when the applicant or his/her spouse or partner becomes the primary carer of the child.¹³⁴

5. North and Central America

(a) *El Salvador: Social Assistance: Comunidades Solidarias Rurales (CCT)*

98. Formerly known as the *Red Solidaria*, the *Comunidades Solidarias Rurales* is a bimonthly CCT given to mothers of school age children and infants under five.¹³⁵ It began as a pilot programme in 2005 and was fully implemented in 2009, benefiting over 75 000 households in 2013.¹³⁶ The transfer amounts to an equivalent of \$15 (USD) for eligible households, and a further \$20 (USD) for fulfilling the educational and health condition.¹³⁷

99. The beneficiaries of the programme are poor households where one of the members is pregnant or where there is a child in the household that is under 5 years of age. The conditions attached to the programme are that the child has to enrol at school. The expectant mother must attend prenatal health clinic visits and participate in monthly trainings related to health and nutrition knowledge.¹³⁸

100. The CCT is implemented through municipalities who are grouped accordingly to levels of extreme poverty. Two indicators are used to measure poverty, that is, the poverty rate and the prevalence of stunting among the first-grade school going children.

¹³³ *Idem.*

¹³⁴ *Idem.*

¹³⁵ De Brauw A and Peterman A, "Can conditional cash transfers improve maternal health care? Evidence from El Salvador's *Comunidades Solidarias Rurales* program" *Health Economics* Volume 29, Issue 6 (January 2020) 701.

¹³⁶ *Ibid*, 702.

¹³⁷ *Ibid*, 703.

¹³⁸ *Idem.*

101. Eligible children and mothers will go and collect their cash transfer at the designated location in the municipality once every two months. Their identity will be checked against a list of eligible beneficiaries taking into account the fulfilment of the conditions attached to the transfer. A penalty is imposed for failure to fulfil the stipulated condition.¹³⁹

(b) Canada: Social Assistance: Manitoba Healthy Baby Prenatal Benefit Programme

102. There are two components to the Manitoba Healthy Baby. These are the prenatal benefit and healthy baby community support programme. The prenatal benefit comprises of financial support to pregnant women to eat well during pregnancy so as to ensure that their babies get a health start in their lives.¹⁴⁰ Pregnant women and teenagers with a net family income of less US\$32,000 (lower income) are eligible for the monthly cash transfer. The stipend commences in the second trimester of the pregnancy. The purpose of the programme is to reduce poor incidence of perinatal outcomes.¹⁴¹

103. The most common public programme in the USA is food stamps. The programme provides low income families with coupons that can be exchanged for food. The problem with this programme, however, is that its intake ranges from between 50%-70%.¹⁴²

¹³⁹ *Idem.* A penalty of partial transfer is imposed on households who default on the stipulated conditions.

¹⁴⁰ Brownell MD, *et al*, "The Manitoba Health Baby Prenatal Benefit Program" Canadian Journal of Public Health (February 2007) 65.

¹⁴¹ *Idem.*

¹⁴² *Idem.*

D. Supply-side maternal health and childcare services

1. Sub-Saharan Africa

(a) *Ghana: Health Insurance: National Health Insurance Scheme*

104. Article 32(2) of the Constitution of the Republic of Ghana, 1992 provides that the state must ensure the realization of the right to good health for the people living in Ghana.¹⁴³ Ghana is the first sub-Saharan African country to introduce the National Health Insurance Scheme (NHIS). The NHIS was introduced in 2003 through an Act of Parliament (Act 650, Amended Act 852).¹⁴⁴

105. A National Health Insurance Fund (NHIF) was established as a funding mechanism for the NHIS. The NHIF derives its revenue from the following sources of income:

- (i) 2.5% national health insurance levy on selected goods and services;
- (ii) 2.5% of Social Security and National Insurance Trust contributions (formal sector workers);
- (iii) premium payments;
- (iv) donor funds;
- (v) donations and voluntary contributions;
- (vi) interest accrued from investments.¹⁴⁵

¹⁴³ Ministry of Health, Republic of Ghana “National Health Policy” (January 2020) 16.

¹⁴⁴ Alhassa RB, *et al*, “A review of the National Health Insurance Scheme in Ghana: What are the sustainability threats and prospects?” (November 2016) 2 available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0165151> (accessed on 22 September 2020).

¹⁴⁵ *Idem*.

106. The national health insurance levy constitutes the biggest source of income for the NHIF (about 70% of the revenue), followed by contributions from the statutory social security agencies by formal sector workers (about 17.4% of revenue).¹⁴⁶

107. More than 60% of active members of the NHIS are exempted from paying premiums.¹⁴⁷ These are mainly indigent people and pregnant women. It is reported that the free NHIS policy for pregnant women has contributed to achieving the following goals:

- (i) improved maternal health care coverage;
- (ii) increased number of women deliveries in hospitals, health care centres and maternity homes;
- (iii) increased the number of babies born in health facilities;
- (iv) increased the number of women who receive pre-natal care;
- (v) increased number of deliveries attended by trained health professionals;
- (vi) decreased number of birth complications; and
- (vii) decreased number of infant and maternal mortalities.¹⁴⁸

108. Although Alhassan, *et al*, are of the view that the NHIS is an effective tool for improving access to health care and health outcomes, the scheme is however not without challenges. The authors point to a number of factors that continue to threaten the financial and operational capability of the NHIS. These factors include cost escalation, inadequate technical capacity, inadequate monitoring mechanism, broad benefits package, large exemption groups, inadequate client education and limited community engagement.¹⁴⁹

(b) Rwanda: Health Insurance: Community-based health insurance

109. Health insurance system in Rwanda is divided into two broad categories, that is, the one for the formal sector, and another for the informal sector.¹⁵⁰ The informal sector is

¹⁴⁶ *Idem*.

¹⁴⁷ *Ibid*, 4.

¹⁴⁸ *Idem*.

¹⁴⁹ *Ibid*, 1.

¹⁵⁰ The formal sector health system is in turn subdivided into three groups, that is, civil servants are covered by the Rwanda Health Insurance Scheme; members of the armed forces are

catered for by the Community-Based Health Insurance Scheme (CBHI) which was established in 2008 by the government of Rwanda through law No.62/2007 of 30 December 2007 as a stepping stone towards universal health coverage. It is reported that the CBHI is an alternative financial mechanism to cover workers in the informal sector.¹⁵¹ By 2010, the CBHI had already been institutionalized in all the 30 districts of the country.¹⁵²

110. The CBHI is implemented by government in partnership with communities who are highly involved in the management of the scheme. The scheme is financed through government subsidies, contributions from private health insurance providers, development partners and user fees.

111. Membership is on family basis. Members are classified into three broad categories, namely: CBHI categories 1; 2; and 3. Members in category 1 comprise mainly the indigent members of the population. They are fully subsidized by government and development partners. By law, these members have to contribute RWF 2,000 (\$2.76) annually towards the administration of the scheme.

112. Members in the second and third categories contribute RWF 3,000 (\$4.14) and RWF 7,000 (\$9.65) respectively.¹⁵³ In addition, a flat co-payment fee of RWF 200 is payable for each visit at a public health center, and another 10% of the hospital fee is payable by the patient, with the exception of CBHI category 1 members.¹⁵⁴

113. Members are entitled to defined health care services that are provided at public health care centers, excluding services that are provided at private health care facilities.¹⁵⁵ The University of Rwanda's College of Medicine and Health Sciences School of Public Health

covered by the Military Medical Insurance; and others formal sector workers are covered by private medical insurance, UNDP "Social Protection in Africa: A Review of Potential Contribution and Impact on Poverty Reduction" (March 2014) 16.

¹⁵¹ University of Rwanda's College of Medicine and Health Sciences School of Public Health "The Development of Community-Based Health Insurance in Rwanda: Experiences and Lessons" (March 2016) 11.

¹⁵² *Ibid*, 25.

¹⁵³ *Ibid*, 30.

¹⁵⁴ *Ibid*, 38.

¹⁵⁵ *Ibid*, 36.

however cautions against systemic challenges of the CBHI. These include lack of clear criteria for identification of poor beneficiaries which limits their access to free public health care services; weak financial pooling mechanism and financial viability of the scheme.¹⁵⁶

E. Conclusion

114. A review of comparative international and foreign law and policy on maternity protection for self-employed workers reveals that CCTs are by far the most common benefit provided by many jurisdictions to target groups, who are mainly pregnant women, including teenage girls, destitute families and households with infants. The most common conditions attached to CCTs are regular attendance of prenatal and postnatal care, attendance of educational and sensitization programmes for mothers, delivery through health facility and obtaining advice from a health professional.

115. Among the few selected European Union (EU) countries in Annexure B of this Discussion Paper, self-employed women and men do have leave benefits. For instance, the Swedish parental leave system is regarded as the most generous and flexible system in the EU region where parents have 480 days (about four months) of parental leave for each child which they share between them.¹⁵⁷ Self-employed men are also entitled to 10 days leave during the first three months of childbirth. In Australia, Switzerland and United Kingdom, cash benefits are used to enable self-employed workers, among others, to take time off work to care for the baby and the mother.¹⁵⁸

116. Social insurance (contributory) schemes that apply to self-employed workers are mostly found in the European Union and New Zealand. For instance, the United Kingdom's maternity allowance (hereinafter "MA") and statutory paternity pay (hereinafter "SPP"); Australia's paid parental leave scheme; the Swedish parental leave system, and New

¹⁵⁶ *Ibid*, 29.

¹⁵⁷ Anxo D, Ericson T and Mangs A, *How does self-employment influence the use of parental leave in Sweden?* 2013 5.

¹⁵⁸ The Australian Department of Social Services' website states that this additional financial assistance will be especially important for fathers who find it difficult to balance the family budget when their baby is born, such as ...self-employed people like tradespeople, small business owners and those working in a family business or farm <https://www.dss.gov.au/our-responsibilities/> (accessed on 2 February 2016).

Zealand's paid parental leave scheme all cover self-employed mothers, fathers and adoptive parents, whereas the Switzerland's maternity insurance (MA) applies to self-employed women. The United Kingdom's MA and SPP are provided for in Maternity and Parental Leave Law and Regulations. The Swedish flexible parental leave system is provided for in the Försäkringskassan's rules and regulations.

117. A study conducted by the ILO shows that the social insurance mechanisms can play a significant role in extending maternity protection coverage to those categories of workers in the informal economy who have some contributory capacities.¹⁵⁹ The study recommends that for those with limited contributory capacities, it is necessary to consider alternative options. Governments must subsidize (fully or partially) contributions for categories of workers with limited contributory capacities or combine contributory and non-contributory mechanisms to reach universal coverage.

118. The most crucial step in the extension of contributory social insurance to the informal economy is to extend the social and labour rights to these workers through a mix of enforcement and simplification measures like we have seen with Brazil and the inclusion of self-employed workers in social insurance schemes through adapted mechanisms like we have seen in countries under the European Union and New Zealand. The simplified registration, tax and contribution payment mechanisms must be adopted, including the adaptation of contribution calculation and payment modalities that suit the characteristics of workers and employers in the informal economy.

119. Funding arrangements for maternity and parental protection programmes take various forms. There are basically two distinct systems, that is, public and private funding arrangements. Among the public schemes, there are voluntary and mandatory (state) social and health insurance schemes (contributory) as well as social assistance (non-contributory) schemes.

¹⁵⁹ ILO (2016), 'Maternity cash benefits for workers in the informal economy', Social Protection for All Issue Brief, 5.

CHAPTER 6: BENEFITS TO BE EXTENDED AND TO WHOM

A Introduction

1. The objective of this investigation is to determine the following:
 - (a) Who should be included in the definition of “self-employed worker” in the informal sector of the economy? In other words, who should be the target group for whom parental protection should be extended? and
 - (b) What is the nature and extent of the state maternity and parental benefits that could be offered to self-employed workers in the informal sector of the economy?
2. Section B of this Chapter identifies the target group to whom parental protection should be extended. Section C identifies the nature and content of parental protection interventions that is recommended to be implemented by government.

B Who is a “self-employed” worker?

1 Legislative proposals for defining “self-employed worker”

3. According to the Solidarity Centre, workers who on paper appear to be self-employed but in reality work under the control and supervision of their employers are vulnerable to exclusion from maternity protection.¹ The Centre proposes that the definition of a “self-employed worker,” which includes own account as well as wage workers, be integrated into the definition of “employee” and in other relevant provisions of employment and labour legislation.

¹ The Solidarity Centre “Maternity Protection for Self-Employed Workers” (September 2016) 15.

4. **Recommendation 1:** It is recommended that a definition of “self-employed worker,” which includes own account as well as wage workers, be integrated into the definition of “employee”² in all the relevant provisions of employment and labour legislation as follows:

1. Unemployment Insurance Act, 2001

5. That the Unemployment Insurance Act, 2001 (Act No.63 of 2001) be amended as follows:

(d) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of Parts D (maternity benefits); DA (parental benefits); E (adoption benefits) and EA (commissioning parental benefits) of this Act, any natural person who receives remuneration or to whom any remuneration accrues in respect of services rendered or to be rendered by that person, [**but excludes any independent contractor**] including a self-employed worker.”

(e) by the insertion after the definition of “remuneration” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or

² Following the workshop held on 17 May 2021, WIEGO poses the question as to “what is the reason for maintaining the term “employee”? It may be more appropriate to replace “employee” with the term “worker” and then define worker to include only people who are personally responsible for the work. The reasons for this approach are three-fold, namely:

- (a) This would reflect the term used in the Constitution (see section 23(2) of the Constitution;
- (b) This is the trend internationally. Italy has done so and there is a proposal before the UK Parliament at the present moment;
- (c) The challenge is not to extend the category of employee, but to transcend labour law’s binary conception of employee/ independent contractor. To define “employee” as including an independent contractor seems conceptually difficult”

- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

- (f) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, save for **[other than]** employees employed for less than 24 hours a month with a particular employer **[, and their employers]**.”

2. Unemployment Insurance Contributions Act, 2002

- 6. That the Unemployment Insurance Contributions Act, 2002 (Act No.4 of 2002) be amended as follows:

- (d) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of this Act any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, **[but excludes an independent contractor]** including a self-employed worker;”

- (e) by the insertion after the definition of “Tax Administration Act” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

- (f) by the substitution for section 4(1) of the following section 4(1):

“(1) This Act applies to all employers, **[and]** employees, and self-employed workers, other than-...”

3. Basic Conditions of Employment Act, 1997

7. That the Basic Conditions of Employment Act, (Act 75 of 1997) be amended as follows:

(b) by the substitution for the definition of employee in section 1 of the following definition of employee:

“Employee” means for the purposes of sections 25 (maternity leave); 25A (parental leave); 25B (adoption leave); and 25C (commissioning parental leave) of this Act any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, [but excludes any independent contractor] including a self-employed worker;”

(c) by the insertion after the definition of “sectoral determination” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (a) has created her or his own employment opportunities and is not accountable to an employer;
- (b) works for a company or entity that is not incorporated and not registered for taxation; or
- (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

(d) by the substitution for section 3(1) of the following section 3(1):

“(1) This Act applies to all employees, **[and]** employers, and self-employed workers, except-...”

2. Intended beneficiaries

(a) *Women informal workers*

8. According to WIEGO, social assistance schemes target poor pregnant women and not women informal workers.³ This investigation looks at the nature of State assistance required by informal sector self-employed and own account women during pregnancy and childbirth.

9. Most of the beneficiaries of the social assistance programmes in the selected jurisdictions that were studied are women and children from poor and vulnerable families. According to McGuire, this is “because of the belief that mothers are more likely than fathers to spend the transfer in a family-friendly way.”⁴ This also makes women “less dependent on husbands, adult children, employers and state officials.”⁵ De Brauw and Peterman argue that the cash transfer must be directed to women in order that the share of the household income controlled by women and the demand for utilization of health services related to women’s health can increase.⁶

10. Examples of conditional cash transfers (CCTs) to women abound. For instance, in the case of El Salvador’s *Comunidades Solidarias Rurales*, a bimonthly CCT is disbursed to “mothers of school age children and infants under five.”⁷ The fact that there are two conditions to be met for eligible beneficiaries means that children also qualify as beneficiaries for the CCT independent of their mothers (regardless of whether the mother is pregnant or not).⁸ Teenage girls from low income families are eligible for the Manitoba

³ WIEGO, *op cit*, 7.

⁴ McGuire JW, “Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality” Paper prepared for the 2013 Annual Meeting of the International Studies Association (2013) 3.

⁵ Ibid, 6.

⁶ Idem.

⁷ De Brauw A and Peterman A, “Can conditional cash transfers improve maternal health care? Evidence from El Salvador’s *Comunidades Solidarias Rurales* program” *Health Economics* Volume 29, Issue 6 (January 2020) 701.

⁸ The cash transfer is split into two components, namely: \$20 (USD) for households who fulfil both the health and education conditions, and \$15 (USD) for those households who fulfil either the health or education condition.

Prenatal Benefit program in Canada. Brazil's *Bolsa Família* programme is paid mostly to women.⁹

11. McGuire states that “critics who focus on gender issues argue that CCT programs reinforce stereotypes by engaging women mainly as mothers, that already overtaxed mothers are usually the ones taking children to school and health clinics, and compulsory attendance at nutrition and health seminars adds to the already large burdens on women’s time.”¹⁰

(b) Youth

12. According to Statistics SA, the South African population as a whole is relatively young. Of the 58.8 million people as at July 2019, there were about 20.6 million youth aged 15-34 years, which translates to 35.1% of the total population.¹¹ In terms of Quarter 2 of the 2020 Quarterly Labour Force Survey, the percentage of the youth that was not in employment, education or training increased by 4.4% from 40.3% to 44.7%.¹² The rate was higher for males (4.9%) compared to females (4.0%). The report states that “in both Q2: 2019 and Q2:2020, more than four in every ten young females were not in employment, education or training.”¹³

13. It is reported that “the majority of the youth in sub-Saharan Africa have multiple sexual partners in their lives and that puts them at risk for STIs and unintended pregnancies.”¹⁴ Because of the exposure and risk to unprotected sex which starts from an early age and continues until adulthood, this result into unplanned pregnancies “which affect the health

⁹ 75% of the beneficiaries are Afro-Brazilians and 54% are women, information available at <https://www.centreforpublicimpact.org/case-study/bolsa-familia-in-brazil> (accessed on 3 October 2020).

¹⁰ McGuire JW, “Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality” Paper prepared for the 2013 Annual Meeting of the International Studies Association (2013) 6.

¹¹ Stats SA, “Determinants of health among the youth aged 15-34 years in South Africa” (March 2020) 3.

¹² Stats SA, “Quarterly Labour Force Survey Quarter 2: 2020” (September 2020) 14.

¹³ *Idem*.

¹⁴ Stats SA, “Determinants of health among the youth aged 15-34 years in South Africa” (March 2020) 4.

and wellbeing of adolescents, putting them at risk of morbidity and mortality related to unsafe abortion and childbirth.”¹⁵

14. Stats SA reports that “females in the age group 14-19 were at different stages of pregnancy during the 12 months before the general household survey of 2019. The prevalence of pregnancy increased with age, rising from 0.4% for females aged 14 years, to 12.5% for females aged 19 years.”¹⁶

15. With regard to family planning, research shows a steady increase in the use of modern contraceptive methods by women. In Africa, the rate has increased from 23.6% to 28.5%.¹⁷ The rate is lower among young women aged 15-24 years compared to adult women in the developing countries. In South Africa, “estimates of the proportion of women of reproductive age using modern contraceptive methods have increased steadily from 26.3% in 2002/2003 to 37.3% in 2013/2014.”¹⁸

16. Youth under 20 years of age have higher participation rate in the informal sector because of the inability to access formal employment.¹⁹ This situation is dire for women compared to men. Since the unemployed youth fall outside of the social protection system, this leads to socio-economic problems such as poverty, dependence on social grants, drug abuse and criminality.²⁰

¹⁵ *Idem.*

¹⁶ Stats SA “General Household Survey 2019” 27.

¹⁷ *Ibid*, 5.

¹⁸ *Idem.*

¹⁹ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 13.

²⁰ *Idem.*

(c) Waste pickers

17. Waste pickers collect, sort and sell about 90% of South Africa's household waste for recycling.²¹ The different lockdown levels placed unprecedented and devastating pressure on South Africa's 215 000 waste pickers, pushing many to the brink of starvation.²²

18. In April 2020, the *bagerezi* (hustlers) of Mushroomville, Centurion, brought an application at the Gauteng High Court (Pretoria) to declare waste recyclers in the Tshwane area to be declared as essential service and be allowed to continue working during the lockdown.²³ The group, which comprises mainly of men, most of whom are foreign nationals, asked the court to be provided with personal protection equipment and be allowed to sign their own permits because they are self-employed.²⁴ The legal counsellor for the group argued that "their income is spent on food and they would cook on open fires, but they currently cannot move around to get food or wood. None of them have access to a reliable source of water and electricity. Because of the lockdown, food donations that were usually delivered to their homes have also stopped."²⁵

19. In the papers before court, the Minister of Cooperative Governance and Traditional Affairs, argued that "the National Command Centre took the decision that the *bagerezi*'s job does not entail waste and refuse removal services, but instead the collection and sale of abandoned material."²⁶ The group's application to be recognized as essential service was dismissed by the court.

²¹ Legalbrief Issue No. 52 dated 21 April 2021.

²² *Idem*.

²³ South African Lawyer, information available at <https://www.southafricanlawyer.co.za/article/2020/04/court-dismisses-waste-pickers-bid-to-work/> (accessed on 22 October 2020).

²⁴ Ellis E, "Tshwane waste pickers face starvation as court dismisses their plea for lockdown exemption" Daily Maverick 19 April 2020.

²⁵ *Idem*.

²⁶ *Idem*.

20. The workshop on the implementation of R204 noted that waste pickers need access to public and private landfill sites, access to recyclable materials as well as sorting and storage space.²⁷

(d) Farm workers

21. Employers are required to register their employees who work for more than 24 hours per month with the UIF. The DPME points out that farm workers are employed on commercial farms in the formal sector.²⁸ Their access to social protection depends on whether they are appointed as permanent workers or seasonal workers.²⁹ Unlike permanent farm workers who are entitled to written employment contracts with their employers, the minimum wage as determined in terms of the sectoral determination for the farm worker sector from time to time and to the deduction of UIF monthly contributions, seasonal farm workers are often treated as casual workers with the result that they do not enjoy the protection provided for in the BCEA and the UIA. On the question whether farm workers will advocate proposals for a mandatory or voluntary contribution to a social security system, the DPME reports that “farm workers are already financially over-stretched and this would probably be unaffordable. Most farmworkers are highly indebted not for clothes or cellphone airtime but literally for food. They buy on tick, they lay-by school clothes-so their spending patterns indicate that they are already living on the edge.”³⁰

(e) Taxi industry workers

22. Taxi owners and taxi drivers need taxi rank arrangements and safe spots for picking up and offloading passengers.³¹ Access to the UIF was extended to taxi workers in 2002.³²

²⁷ NTT “City of Johannesburg Workshop on the implementation of ILO R204” (25-27 April 2020) 2.

²⁸ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 13.

²⁹ Idem.

³⁰ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 20.

³¹ NTT “City of Johannesburg Workshop on the implementation of ILO R204” (25-27 April 2020) 2.

³² DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 18.

(f) Street vendors

23. Street traders need allocated working spaces, storage space, and access to water and electricity.³³ According to DPME, street vendors who were interviewed in Durban indicated willingness and ability to contribute towards a new contributory savings mechanism which would include a disability, among other benefits.³⁴ They argued in favour of flexibility in the system “with an option to pay more in good months and a grace period if they were unable to make a payment in a bad month. They also preferred a voluntary scheme to a mandatory scheme, given the unpredictability of their earnings, with incentives to participate in the form of a matching contribution or subsidy from the government.”³⁵

24. In December 2017, Project 143 Advisory Committee held workshops with informal traders in the city of Durban, KwaZulu-Natal, with the purpose of obtaining their views on the challenges that they face during pregnancy, childbirth and caring for their babies whilst running their businesses. One of the participants, Ms Zuma, had this to say:

Ms Zuma said that the time of confinement and giving birth by an informal trader who is the breadwinner and head of household is a huge problem. It happens quite often that an informal trader will give birth today and return to work three days later. She said that this happens because the family has got nothing to eat during the three days of absence from work. They do not get any support from government. They get absolutely nothing during maternity leave despite the permits they hold from local government.

Ms Zuma said that the Ethekwini Municipal Informal Economic Forum (EMIEF), on behalf of informal traders, made a request to the municipality to establish a Fund from their contributions for the benefit of informal traders. This would enable the leadership of informal traders to utilise the money in the Fund to pay for food and other necessities required by the expectant mother and her family. She said that informal traders lack representation in the relevant government structures responsible for promoting the interests of informal sector workers.

Informal traders have difficulty in providing details of their pregnancies, like whether they visited a hospital for any number of given months, that since they need treatment, they should not be working in the streets. The other problem is that they are regarded as employers of their helpers when in fact this should not be the case. She said that

³³ NTT “City of Johannesburg Workshop on the implementation of ILO R204” (25-27 April 2020) 2.

³⁴ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 20.

³⁵ *Idem*.

in terms of the conditions of their permits from the municipality, they are required to disclose the names of their helpers in the permits failing which they cannot bring any other person to help them in their stall, regardless of whether such other person is a family member. As a result, if the permit is silent on the name of the helper, no other person can assist them in their stalls even during the time of confinement and giving birth. Ms Zuma said that this is a serious problem that women informal traders are faced with.

Ms Zuma said that if they include a helper in their permits, the DEL requires that they should pay UIF contributions in favour of such helper. She said that this means that they should be making two contributions at the same time, that is, for themselves and for their helpers. According to Ms Zuma, this is a very oppressive situation for women informal traders. It is a serious problem for informal traders since they do not bring any capital with them to start a business in the first place. She said that the main source of capital for informal traders is social grants. Those who do not get social grants from government borrow from those who do to enable them to buy stock.

Ms Zuma said that as informal workers they are required to pay rental for their stalls to the municipality even before they start working. In terms of their permits they are required to pay for occupation of their stalls in advance (say for six or twelve months in advance). The interest earned is for the benefit of the municipality, not informal traders. She said that the municipality is able to access this income from informal traders and utilise it for its purpose, yet they do not have the same access to their money, but the municipality has.

25. The Public Servants Association submits that the majority of market vendors and the self-employed workers lack knowledge or education to access relevant authorities such as the DEL to register and make contributions to the social security system.³⁶ During unforeseen circumstances, such category of workers become vulnerable and difficult to provide for themselves and families, for instance during maternity and paternity leave.

(g) *Home-based workers*

26. Home based workers like artisans, mechanics, and outdoor hairdressers need access to affordable minimum infrastructure and space to work.³⁷ It is important to distinguish between home-based workers and domestic workers. Home-based workers are those

³⁶ Public Servants Association "Submissions on Research Proposal Paper: Project 143" 2.

³⁷ NTT "City of Johannesburg Workshop on the implementation of ILO R204" (25-27 April 2020) 2.

workers that are self-employed or sub-contracted and they conduct work from home whereas domestic workers get paid for doing domestic work.³⁸

(h) *Caterers and decorators*

27. Caterers are responsible for purchasing stock, menu planning, food preparation, and managing orders. In addition to the role of a chef, they may also take on the role of a decorator and a marketer.

(i) *Fishers*

28. A self-employed fisher would need to own or lease the boat to make the allowable catch, have the necessary gear and hold a species license issued by the Department of Environment, Forestry and Fisheries (DEFF). The worker also needs access to fishing spaces that include landing-stages and harbours.³⁹

(j) *Freelance artists*

29. The South African Guild of Actors (SAGA) proposes that the investigation should include the legal status of independent contractors.⁴⁰ Freelance performers of all natures should be included under the definition of self-employed workers. Freelance workers are currently excluded from the mainstream economy as they are not employees and are self-employed. Due to this fact, Freelancers cannot access any social benefits including maternity and parental benefits.⁴¹

³⁸ Haspels N and Matsuura A (2015), "Home-based workers: Decent work and social protection through organization and empowerment, Experiences, good practices and lessons from home-based workers and their organizations/International" Labour Office – Jakarta: ILO, ix.

³⁹ NTT "City of Johannesburg Workshop on the implementation of ILO R204" (25-27 April 2020) 2. Home-based workers are not be confused with domestic workers as defined in section 1 of the UIA.

⁴⁰ South African Guild of Actors "Submission on Maternity and Paternity Benefits for Self-Employed Workers."

⁴¹ *Idem*.

(k) Informal childcare workers

30. Unlike formal childcare which is government-regulated and can either be made available free of charge or subsidised at an ECD centre by trained childcare workers or paid for fully by the parents, informal childcare is not regulated and is provided by non-parent family members, relatives, friends, neighbours, or by paid childminders, nannies or babysitters.⁴² A study conducted by the Nuffield Foundation in UK found that informal childcare accounted for 42% of the total hours children in working families spent in childcare.⁴³ These figures underlined the importance of informal childcare in many families.⁴⁴

C Nature and content of the benefits to be provided

1 Social insurance programmes

31. Social insurance for maternity and parental protection is delivered through the statutory UIF. The Fund provides the necessary financial support to workers who have lost income due to maternity and parental leave. The DPME states that:

Currently, social insurance in South Africa is biased towards formally employed workers. Several options could be considered for extending social insurance to informal and low-income workers, covering a range of contingencies and delivering a range of benefits. Some approaches imply moving towards an integrated social security system, while other options require making special provision for categories of workers whose circumstances exclude them from existing institutional arrangements⁴⁵

⁴² Nuffield Foundation “The role of informal child care: understanding the research evidence” (2008) available at https://www.nuffieldfoundation.org/sites/default/files/files_ (accessed on 21 May 2021).

⁴³ *Ibid*, 3.

⁴⁴ *Idem*.

⁴⁵ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 17.

32. Social insurance mechanisms play a significant role in extending maternity protection coverage to workers in the informal economy.⁴⁶ Workers in the informal economy have limited contributory capacities and the government needs to subsidize fully or partially their contributions or combine mandatory contributory and voluntary contributory mechanisms so that the benefits can be extend to these workers.

(a) *Maternity cash benefit for self-employed workers*

33. The purpose of maternity cash benefits is to ensure financial security for the mother whilst on maternity leave.⁴⁷ The four major components of a maternity protection programme are the following:

- (a) adequate prenatal (ANC) care;
- (b) skilled attendance at birth;
- (c) birth in a health facility; and
- (d) postnatal (PNC) care.

34. The above key maternal health outcomes are defined as follows:

Adequate prenatal care is defined as at least five visits over the pregnancy period as recommended. Skilled attendance at birth is defined as attendance by general doctors, obstetricians/ gynaecologists, and nurses as recommended by government guidelines. Birth in facilities is defined as birth in a government or private hospital.⁴⁸

35. The IDTT states that:

A simplified contribution arrangement for self-employed individuals and informal workers will also be established.⁴⁹

⁴⁶ ILO (2016), 'Maternity cash benefits for workers in the informal economy', Social Protection for All Issue Brief, 5.

⁴⁷ Field CG, et al, "Parental leave rights: Have fathers been forgotten and does it matter?" *SAJLR* Vol 36 No 2 (2012) 33.

⁴⁸ De Brauw A and Peterman A, "Can conditional cash transfers improve maternal health care? Evidence from El Salvador's *Comunidades Solidarias Rurales* program" *Health Economics* Vol 29, Issue 6, (January 2020) 704.

⁴⁹ Inter-departmental Task Team on Social Security and Retirement Reform "Comprehensive Social Security in South Africa: Discussion Document" (March 2012) 5.

36. The Women's Legal Centre states that the majority of countries who have ratified the Maternity Protection Convention, 2000 (No.183) provide both cash benefit incentives as well as maternity leave which allows for an absence from work while earning a salary. We would submit that because South Africa's current framework recognizes both benefits that this be extended so as to avoid extending current discriminatory practices into a new framework.

37. According to ILO, mechanisms to extend social insurance cover to informal sector workers have been successful if they include adaptation of benefits, contributions and operations to suit the characteristics of the intended categories of informal sector workers.⁵⁰ These include the following:

- (a) giving beneficiaries a choice whether to affiliate to all branches, according to their needs and contributory capacity;
- (b) more flexible contribution payments to take into account income fluctuations or seasonal revenues (for workers in agriculture for example);
- (c) introducing specific mechanisms to determine contribution levels for employees and self-employed workers where all real incomes are difficult to assess;
- (d) reducing the costs of registration;⁵¹ and
- (e) promotion of gender equality and non-discrimination.⁵²

(i) *Mandatory contributions*

38. The current social insurance in South Africa covers wage and salaried workers in formal work arrangements, domestic and workers. The contribution to the scheme is compulsory in order to access the benefits. The Unemployment Insurance Act provides for the payment from the Fund of unemployment benefits to workers and for the payment of illness, adoption, maternity, and dependent's benefits related to the unemployment of a worker that is contributing to the Fund.

⁵⁰ ILO "Decent Work and the Informal Economy" (undated) 8.

⁵¹ *Idem*.

⁵² ILO "Transition from the Informal to the Formal Economy Recommendation: Workers Guide" (2015) 15.

39. The extension of social insurance coverage could be done on a mandatory and voluntary basis. One of the key social reform initiatives proposed by the IDTT is establishment of a NSSF. The NSSF will be financed from “mandatory” contributions from all workers earning income above a certain specified threshold to be determined by the mechanism.⁵³ A simplified contribution arrangement for self-employed workers in the informal economy could be established. A number of social insurance branches, like unemployment; illness; maternity; parental; invalidity; workplace injury; death; health care and family responsibilities could all be rationalized and harmonized under the NSSF. The scheme could be run “as a pay-as-you-go defined benefit scheme, with every registered worker” making a contribution to the scheme for the selected defined benefit.⁵⁴ The system should be one of complementarity, rather than one or the other, with the means test determining whether workers are in need of additional support.

40. According to the DPME:

The NSSF proposal is aligned with efforts by governments around the world to extend or adapt existing social insurance schemes, in order to accommodate workers who are excluded because they are self-employed, they are employed in the informal economy, or they are employed in the formal economy but without a formal contract.⁵⁵

41. The proposed mechanism (maternity and parental benefit system for self-employed workers) should be integrated with the existing UIF system. This will enable cross-subsidisation from the formal the formal economy. In order to be successful, the proposed mechanism will have to be flexible enough so as to accommodate a number of contingencies pertaining to self-employed workers in the informal economy. The adaptations may include the following:

- (a) Modification of benefits, contributions and operations so as to fit the characteristics of informal sector workers;

⁵³ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

⁵⁴ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

⁵⁵ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

- (b) Choice to be provided to beneficiaries whether they want to affiliate to some or all of the social security branches according to their needs and affordability;
- (c) Flexible contribution payments to be informed by fluctuations in income;
- (d) Punitive provisions like disqualifications for failure to make regular contributions or skipping of contributions to be avoided;
- (e) Direct representation of self-employed workers at NEDLAC
- (f) Minimum and maximum contribution thresholds to be determined;
- (g) Minimum and maximum cash benefit levels to be determined;
- (h) Self-employed workers to contribute 1% and the State should subsidize the 1% “employer’s” portion, instead of the workers bearing the burden of both contributions;
- (i) Maternity cash benefit to be pegged at 100% of the reference wage. The cash benefit should be subsidised by the UIF if the reference wage does not allow a woman to maintain herself and her child in proper conditions of health and with a suitable standard of living;⁵⁶
- (j) Costs of registration to be reduced;⁵⁷ and
- (k) Gender equality and non-discrimination to be promoted.

42. The question whether registration by self-employed workers for the UIF system should be voluntary or mandatory is a crucial issue. The concern is that if the registration is voluntary, self-employed workers can opt out of maternity benefits and this will undermine the solidarity of all workers and shared responsibility for the societal contribution of women’s bearing of children. Since section 9(3) of the Constitution prohibits unfair discrimination by the State on any grounds including pregnancy, it follows that the same approach of making registration by employees in the formal economy mandatory will have to adopted also in the context of self-employed workers in the informal economy.

43. In designing a more inclusive social insurance scheme, the ILO points out that states should take into account the various barriers that informal sector workers experience, such as “limited contributory capacities, irregular and unpredictable income, low visibility and

⁵⁶ See article 6(2) of the Maternity Protection Convention, 2000 (No.183)

⁵⁷ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

voice in policy making and collective bargaining processes and geographical and time constraints in registering and paying contributions.”⁵⁸

(ii) *Voluntary contributions*

44. Another option that is proposed is establishment of a separate Fund outside the mandatory social security system to be dedicated to informal sector workers on a voluntary basis. However, the disadvantages of this option are that if contributions are voluntary for employees, employers will have no legal obligation to make the contribution. This means that employees will have to pay the whole amount of the contribution without any assistance from their employers. This will be unaffordable for most workers in the informal sector. The advantages of a voluntary scheme are the following:

- “(a) flexible contributions based on minimum payment not percentage of income;
- (b) flexible rather than fixed frequency of contributions;
- (c) a contribution subsidy from government to incentivize participation;
- (d) multiple options for collecting contributions (direct deposits into bank accounts, mobile or telephone banking, levy on goods purchased by traders from wholesalers, or levy on goods and services;
- (e) The scheme will be managed by government alongside existing mandatory social security schemes, to facilitate risk-pooling and cross-subsidization of administrative costs.”⁵⁹

45. Since cellphone subscriptions are more than twice the number of bank account subscriptions, it is recommended that cellphones be used as one of the principal delivery mechanisms for the provision of services (registration, administration and disbursement of cash benefits).

46. WIEGO argues that the Commission needs to “recognise that (a) some informal workers are wage workers (that is, not self-employed), and (b) some informal self-employed workers employ others as wage workers. We recognise that informal wage workers do not benefit from maternity protection even though legal provisions exist. This is because their

⁵⁸ ILO “Maternity cash benefits for workers in the informal economy” (November 2016) 6.

⁵⁹ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 22.

employers do not make contributions to the UIF.”⁶⁰ Informal wage workers are indeed included in the ILO’s definition of “informal economy” in the sense that they are “not covered or are insufficiently covered by formal arrangements” and are thus included in the scope of this investigation.

47. One of the criticisms of maternity benefits in the form of social assistance is that they are of too low value to effectively cover a worker’s income before and just after the birth of a child. The question is how will this legal reform complement existing and proposed social assistance measures?⁶¹ The income and earnings of self-employed and own account workers need to be considered when determining the value of a maternity benefit that can sufficiently offset a worker’s income during a period of maternity and parental leave.⁶²

48. CCT have been criticized for making use of conditionality. Critics argue that CCTs “saddle beneficiaries with duties that are paternalistic, time-consuming, and costly to enforce, while doing no more than unconditional transfers to promote the uptake of education and health services.”⁶³ However, it would appear that from impact evaluations conducted on the implementation of CCT in Latin America and the USA, “the balance of evidence suggests that the conditions in CCT programs, although costly to enforce and burdensome to comply with, really do influence behaviour.”⁶⁴ The conditions attached have enhanced the uptake of education and health services beyond what would have been expected from the unconditional cash transfer alone.⁶⁵

49. A number of the countries that have extended social insurance to workers in the informal economy have allowed them to make voluntary contributions to the scheme. In Lao People’s Democratic Republic, for example, workers in the informal economy are allowed to join the National Social Security Fund (NSSF) voluntarily under the 2014 Social Security

⁶⁰ WIEGO “Comments to the SALRC Research Proposal Paper on Maternity and Paternity Benefits” 2.

⁶¹ *Ibid*, 7.

⁶² *Ibid*, 8.

⁶³ McGuire JW, “Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality” Paper prepared for the 2013 Annual Meeting of the International Studies Association (2013) 5.

⁶⁴ McGuire JW, “Conditional Cash Transfers in Bolivia: Origins, Impact, and Universality” Paper prepared for the 2013 Annual Meeting of the International Studies Association (2013) 5.

⁶⁵ *Idem*.

Law.⁶⁶ The contribution is calculated at a rate of 9% of their chosen reference wage. The worker then gets cash benefit of 80% of the average reference wage they received in the last six months before the claim and is paid for a maximum of 90 days.⁶⁷ There have been concerns though that the voluntary cover for informal workers is limited as many of them do not take up the voluntary offer to contribute.

50. Looking at a combination of compulsory contributory and voluntary contributory to social insurance can help to ensure universal maternity protection extends to women in the informal economy. The nature of the environment that informal workers work under is precarious, as such they face various barriers that limit their capacity to make contributions like irregular and unpredictable income, and time constraints in registering and paying contributions.

51. Mongolia provides an interesting example. It offers universal maternity protection coverage through a combination of different schemes. The formally employed workers are covered by social insurance on a mandatory basis and they receive a cash payment at a rate of 100% of their covered wage for four months.⁶⁸ Workers in the informal economy and those who are self-employed can join the scheme voluntarily, and receive maternity cash benefits for four months at a replacement rate of 70% of their selected reference wage after 12 months of contributions. Furthermore, maternity cash benefits under the Social Welfare Scheme are provided to all pregnant women and mothers of infants regardless of their contribution to the social insurance scheme, status in employment, or nationality.⁶⁹

52. The private insurance industry must cater for maternity insurance in order to accommodate pregnant women. The said maternity insurance should cover all costs linked to pregnancy and confinement during mother's pre- and post-natal or father's adoption process or during the course of father's paternity.

⁶⁶ Social Protection and Sustainable Livelihoods "Social Protection in La PDR" (2015) 7.

⁶⁷ *Idem.*

⁶⁸ ILO *op cit.*

⁶⁹ *Idem.*

53. **Recommendation 2:** It is recommended that the existing Unemployment Insurance Fund system be extended by the Department of Employment and Labour to self-employed workers in the informal economy, so as to make provision for the extension of maternity and parental benefits outlined in the UIF Act and BCEA to all workers. This will bring informal economy self-employed workers into a social security system as envisaged in section 27(2) of the Constitution. Implementation of the proposed maternity and parental benefits contribution scheme for informal economy self-employed workers will promote fulfilment of the State's obligation in terms of the international instruments that are binding upon the RSA as discussed in Chapter 5 of this Discussion Paper.

54. The informal economy workers' contribution scheme must be designed taking into account the following factors:

- (a) that maternity cash benefits equal to the benefits as prescribed under section 12(3)(c) of the Unemployment Insurance Act, 2001 (that is, 66% fixed rate of the contributor's earnings as at the date of application, subject to the prescribed maximum income threshold) are extended to informal sector workers so as to avoid extending current discriminatory practices into the legislative framework;
- (b) that the proposed maternity benefit scheme includes adaptation of benefits, contributions and operations to suit the characteristics of the intended categories of informal economy workers as follows-
 - (i) that beneficiaries be given a choice whether they want to affiliate to some or all of the social security branches according to their needs and affordability;⁷⁰
 - (ii) that flexible contribution payments to be informed by fluctuations in income or seasonal revenues (for workers in agriculture for example);
 - (iii) that punitive provisions like disqualifications for failure to make regular contributions or skipping of contributions are avoided;

⁷⁰ The view expressed at the workshop held on 17 May 2021 is that providing a choice to self-employed workers to pick and choose the social security benefits they would like to contribute to would be problematic as it is likely that men would opt out of contributing to maternity protection. Self-employed workers can contribute to the scheme and benefit from a harmonised and rationalised set of benefits including unemployment; illness; maternity; parental; invalidity; workplace injury; death; health care and family responsibilities under the NSSF.

- (iv) Limited grace period ahead of stricter labour inspection for self-employed workers to register to the UIF;
- (v) Direct representation of self-employed workers at NEDLAC;
- (vi) Full subsidisation of self-employed workers if they are earning below the predetermined minimum contribution threshold;
- (vii) minimum and maximum contribution thresholds be determined by the Minister;
- (viii) minimum and maximum cash benefit levels be determined by the Minister;
- (ix) self-employed workers to contribute 1% and the State should subsidize the 1% “employer’s” portion, instead of the workers bearing the burden of both contributions;
- (x) Costs of registration to be reduced;⁷¹
- (xi) Gender equality and non-discrimination to be promoted; and
- (xii) Raising awareness to self-employed workers as to why registering to the UIF gives them access to other work-related benefits beyond the maternity benefit. The UIF maternity benefit can act as a top up to the maternity cash transfer that they may also be eligible for from SASSA.

55. It is to be noted that article 6(2) of Convention No.183 provides that cash benefits “shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.” It is common knowledge that the income of a majority of self-employed workers fluctuates for a number of reasons and therefore may not be the same amount throughout a given period. Equally, in many instances, such income is marginal. Extending the existing mechanism (66% of previous earnings) to self-employed workers may not serve the purpose if the amount of the benefit will not meet the standard set in article 6(2) of the Maternity Convention. In Namibia, maternity leave benefits are set at 100% of the basic wage up to a given ceiling, which is reviewed from time to time by the relevant authority. In some Latin American countries, the replacement amount is 70 % (Mongolia) or 80% (Laos) of the selected reference wage over a given period.

⁷¹ DPME “Policy options for extending social protection to informal workers in South Africa: An issue paper for the National Planning Commission” (undated) 19.

56. The first question is, whether the maternity cash benefit should be set at 100% of the reference wage for self-employed workers, if not for all workers generally. Secondly, in the event that the existing mechanism is lower than the “level which ensures that the woman can maintain herself and her child in proper conditions of health with a suitable standard of living,” should the UIF not be obliged to subsidize the shortfall, regardless of the amount of the shortfall? The third question is, whether there be an established minimum threshold for the maternity benefit? If so, should this threshold be determined nationally by the Minister of Labour and Employment, or should it be negotiated sectorally by the relevant stakeholders?

57. At the AC virtual workshop held on 17 May 2021, participants were of the view that maternity cash benefits for self-employed workers be pegged at 100% of the reference wage in line with best practice. The cash benefit should be subsidised by the UIF if the reference wage does not allow a woman to maintain herself and her child in proper conditions of health and with a suitable standard of living.⁷²

58. **Recommendation 3:** Alternatively, it is recommended that maternity cash benefits for self-employed workers be set at 100% of the reference wage. The cash benefit should be subsidised by the UIF if the reference wage does not allow a woman to maintain herself and her child in proper conditions of health and with a suitable standard of living.

59. In *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd*,⁷³ it was however noted that “the BCEA fell short of international standards in that Article 6(2) of the International Labour Organization’s Maternity Protection Recommendation states that where there is no suitable, alternative employment, the employee must be placed on paid maternity leave.”⁷⁴ It is submitted that “legislation should provide that women should be given paid maternity leave where there are no alternative positions as provided for by the International Labour Organization’s Maternity Protection Recommendation.”⁷⁵ In order to give effect to this

⁷² See article 6(2) of the Maternity Protection Convention, 2000 (No.183).

⁷³ (JS706/14) [2017] ZALCJHB 404.

⁷⁴ See http://www.schindlers.co.za/2017/manyetsa_vs_newkleinfontein/ (accessed on 6 February 2020).

⁷⁵ *Idem*.

proposal, it is recommended that section 26 of the BCEA be amended by the addition of the following paragraph 3:

- (6) In the event that no suitable, alternative employment may be offered to a pregnant employee who is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child, the employer must offer a pregnant employee paid maternity leave for a period of six months after the birth of her child.⁷⁶

60. Section 30 of the UIA deals with the Right to dependant's benefits. This section provides as follows:

30. Right to dependant's benefits

- (1) *The surviving spouse or a life partner of a deceased contributor is entitled to the dependant's benefits contemplated in this Part, if application is made-*
- (a) *in accordance with prescribed requirements and the provisions of this Part; and*
 - (b) *within 18 months of the death of the contributor except that, on just cause shown, the Commissioner may accept an application after the 18-month period.*
- (2) *Any dependant child of a deceased contributor is entitled to the dependant's benefits contemplated in this Part if application is made in accordance with the provisions of this Part and-*
- (a) *there is no surviving spouse or life partner; or*
 - (b) *the surviving spouse or life partner has not made an application for the benefits within (18) months of the contributor's death.*
- (2A)
- (a) *Any nominated beneficiary of the deceased contributor may claim dependant's benefits subject to paragraph (b).*
 - (b) *A nominated beneficiary will qualify for benefits if there is no surviving spouse, life partner or dependant children of the deceased contributor.*

⁷⁶ See also the NIECDP, (2015) 54.

- (3) *The benefit payable to the dependant is the unemployment benefit referred to in Part B of this Chapter that would have been payable to the deceased contributor if the contributor had been alive.*

61. The above-mentioned section does not make provision for the devolution of maternity benefits to a surviving spouse or life partner upon the death of a contributor. The only benefit that devolves is the unemployment benefit. It is also recommended that in the event that the surviving spouse or life partner is not the primary caregiver, that the benefits must devolve to the primary caregiver.

62. **Recommendation 4:** It is recommended that section 30(3) of the UIA be amended as follows:

- (3) *The benefit payable to the dependant is the unemployment benefit referred to in Part B of this Chapter and the maternity benefit referred to in Part D of this Chapter that would have been payable to the deceased contributor if the contributor had been alive.*

(b) Maternity leave benefit for self-employed workers

63. The purpose of maternity leave is “not only to protect the health of the mother and baby before and after birth but also to allow a period for adjustment and bonding.”⁷⁷ According to Field, *et al*, the South African labour legislation fails to clearly recognize the rights of working fathers.⁷⁸ The authors ask whether the right to equality entrenched in section 9 of the Constitution means that either parent “is entitled to claim maternity rights?”⁷⁹ The view is that “[i]f there is no equality in the provision of parental leave and benefits to fathers then this may constitute unfair discrimination.”⁸⁰

⁷⁷ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 33.

⁷⁸ *Ibid*, 30. This comment was made prior to the enacted of the Labour Laws Amendment Act 10 of 2018. Section 11 of the latter mentioned Act which makes provision for right to parental benefits came into operation on 1 November 2019.

⁷⁹ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 30.

⁸⁰ *Ibid*, 32.

64. The authors argue that:

While maternity leave was originally implemented for the physical healing of the mother, demands to increase maternity leave were rationalized on the basis of the importance of the mother and child relationship and childcare during this time. If childcare is a legitimate reason for maternity leave provision, then what about leave provision for the father pursuing the same activity? The current exclusion of men from this entitlement establishes a gender division and highlights a failure to acknowledge fathers as dual carers despite increasingly compelling evidence to the contrary.⁸¹

65. Chronholm points out that in 1974, the Swedish maternal leave system was changed into a system of parental insurance.⁸² According to the commentator, Sweden “was the first country in the world to introduce parental leave giving both parents the same possibilities of staying at home with their child.”⁸³ Chronholm mentions three reasons in the Swedish ideological debate urging fathers to take parental leave. These are:

equality between men and women, the child’s right to be with both parents and the possibility of changing traditional gender stereotypes. The equality debate is focused on the need for equal employment opportunities for women. Equal distribution of different domestic tasks between women and men can also be seen as a goal in itself, but it is also a condition for reaching equality in the society as a whole. Especially from a feminist point of view it has been regarded as important that fathers take parental leave so as to give mothers more equal possibilities in the society.⁸⁴

66. **Recommendation 5:** It is recommended that maternity leave benefits equal to the maternity leave benefit as provided for under section 25 of the BCEA, (that is, at least four consecutive months’ maternity leave), which allows for absence from work while earning a salary, be extended to self-employed workers so as to avoid extending current discriminatory practices into the legislative framework.⁸⁵

⁸¹ Field CG, et al, “Parental leave rights: Have fathers been forgotten and does it matter?” *SAJLR* Vol 36 No 2 (2012) 35.

⁸² Chronholm A, “Fathers’ experience of shared parental leave in Sweden” Open Edition Journals available at <https://journals.openedition.org/ras/456> (accessed on 7 October 2020).

⁸³ *Idem*.

⁸⁴ *Idem*.

⁸⁵ At its meeting held on 29 April 2021, the AC noted that from a substantive equality perspective, maternity leave cannot be looked at in isolation of the working situation pertaining to self-employed workers. Thus, this benefit will be applicable to a certain category of self-employed workers, such as wage workers, but not others, such as own-account workers. Nonetheless,

67. It is to be noted that the Johannesburg Labour Court in *Manyetsa v New Kleinfontein Gold Mine* (Pty) Ltd matter⁸⁶ held that the BCEA fell short of international standards in that Article 6(2) of the International Labour Organization's Maternity Protection Recommendation states that where there is no suitable, alternative employment, the employee must be placed on paid maternity leave. Accordingly, it is recommended that women workers who perform hazardous work and whose employers cannot provide suitable alternative employment for them should be placed on compulsory paid maternity leave as soon as they report the pregnancy.

(c) Parental cash benefit for self-employed workers

68. Section 26A of the Basic Conditions of Employment Act, 1997 makes provision for the right of fathers to parental benefits. Section 26A(1) of the Act provides that "a contributor who is the parent of a child is entitled to the parental benefits...if the contributor has been registered as the father of the child in terms of the Births and Deaths Registration Act, 1992 (Act No.51 of 1992)."

69. **Recommendation 6:** It is recommended that parental cash benefits equal to the parental cash benefits as provided for under section 12(3)(cA) of the Unemployment Insurance Act, 2001 (that is, 66% fixed rate of the contributor's earnings as at the date of application, subject to the prescribed maximum income threshold) be extended to self-employed workers so as to avoid extending current discriminatory practices into the legislative framework.⁸⁷

(d) Parental leave benefit for self-employed workers

70. Sections 25A(1); 25(B)1 and 25(C)1 respectively of the Basic Conditions of Employment Act, 1997 provide that an employee, who is a parent; adoptive parent or a commissioning parent of a child, as the case may be, is entitled to parental leave (that is, 10

the recommendation will be couched in broad terms so as to give wide option to the workers to choose whether to make use of the benefit or not.

⁸⁶ (JS706/14) [2017] ZALCJHB 404.

⁸⁷ Paragraph cA was added by section 8 of the Labour Laws Amendment Act, 2018 (Act 10 of 2018). The section will come into operation on a date to be fixed by President by notice in the *Gazette*.

consecutive days parental leave); adoption leave (that is, ten consecutive weeks adoption leave) or commissioning parental leave (that is, ten consecutive weeks commissioning parental leave). These are gender-free provisions in the legislation which envisage that either parent will apply for the benefits. These provisions also accommodate parents, adoptive parents and commissioning parents in same-sex relationships.

71. In its submission to the Commission, WIEGO raises the question whether the objective of this research (be it primary or secondary objective) is to provide paternity leave on a more equal footing with maternity leave.⁸⁸ WIEGO recommends that “whatever form of legal reforms to extend protection to the self-employed workers will take, the reforms (must) be comprehensive enough to ensure that all men (both self-employed and employees) are entitled to “parental” leave.”⁸⁹

72. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 applies to all people except those covered by the Employment Equality Act 55 of 1998. Apart from the biologically determined roles of pregnancy and childbirth, CEDAW recognizes the common responsibility of men and women in the upbringing and development of children. The view that maternity is a right to be enjoyed solely by female employees was held to be misplaced by the Durban Labour Court in the *MIA v State Information Technology* matter.⁹⁰ The court held that this approach ignores the fact the right to maternity leave created in the Basic Conditions of Employment Act in the current circumstances (of same sex union) is an entitlement not linked solely to the welfare and health of the child’s mother but must of necessity be interpreted to take into account the best interests of the child.

73. According to the Women’s Legal Centre, the nature and extent of the benefit should be based on a clear approach that seeks to address gender discrimination and imbalance within the workforce as well as home life.⁹¹ In order to address some of these challenges the Commission’s approach should seek to change traditional social attitudes and

⁸⁸ WIEGO “Comments to the SALRC Research Proposal Paper on Maternity and Paternity Benefits” 3.

⁸⁹ *Idem*.

⁹⁰ *MIA v State Information Technology* (D312/2012) [2015] ZALCD.

⁹¹ Women’s Legal Centre “Submission on Maternity and Paternity Benefits for Self-Employed Workers.”

behaviours by recognising men's obligation to parenthood activities encouraging a shift towards a model in which men act as active co-parents rather than helpers in care work duties. The Centre cautions against providing men with benefits at the expense of existing benefits for women, and would advocate for a position that men have obligations equal to women and that benefits accruing to men should be based on their positive obligation to equally participate in what is perceived as women's work.⁹²

74. The research into parental benefits for self-employed men seeks to address the matter of unequal treatment between men and women as well as the gendered division of labour and the patriarchal belief that women are the natural care-givers in the home.⁹³ This will enable the Commission to address the issue of the shared responsibility for care-giving, child care and household chores between men and women and thus foster greater empowerment of women especially towards their active participation in the economy.

75. The research needs to explore the issue of parental benefits in relation to absentee fathers.⁹⁴ This is a huge matter of concern in the country and the social research part of this endeavour should explore what the implications of this are in terms of men taking parental benefits but not actually supporting the mother during this period.⁹⁵

76. In addition, the social research must explore the currently often stated notion that there are many women who do not actually prefer the father of their new-born baby to be around them at this stage.⁹⁶ Women have been known to raise concern with issues of men's increased drunkenness during these paternity leave days as well as increased levels of domestic violence and abuse against women. Thus, the survey resulting from this research should seek to find out data and information in this regard-which will also assist in other policy imperatives and policy directions.⁹⁷

⁹² *Idem.*

⁹³ Department of Women "Response to the SALRC Research Proposal Paper: Project 143: Maternity and Paternity Benefits for Self-Employed Workers" 3.

⁹⁴ Department of Women "Response to the SALRC Research Proposal Paper: Project 143: Maternity and Paternity Benefits for Self-Employed Workers" 3.

⁹⁵ *Idem.*

⁹⁶ Department of Women "Response to the SALRC Research Proposal Paper: Project 143: Maternity and Paternity Benefits for Self-Employed Workers" 4.

⁹⁷ *Ibid.*

77. **Recommendation 7:** It is recommended that parental leave benefits equal to the parental leave benefit as provided for under section 25A of the BCEA, (that is, at least ten consecutive days parental leave); adoption leave equal to the adoption leave benefit as provided for under section 25B of the BCEA (that is, ten consecutive weeks adoption leave); and commissioning parental leave equal to the commissioning parental leave benefit as provided for under section 25C of the BCEA (that is, ten consecutive weeks commissioning parental leave) be extended to self-employed workers so as to avoid extending current discriminatory practices into the legislative framework.

2 Social assistance programmes

78. In terms of convention No.183 of 2000, there are at least seven components to maternity protection. These are the following:

- (a) health protection (article 3);
- (b) maternity leave (article 4);
- (c) cash benefits (article 6.1-6.6);
- (d) medical benefits (article 6.7);
- (e) employment protection (article 8);
- (f) non-discrimination (article 8); and
- (g) breastfeeding (article 10);

79. The eighth component is childcare arrangements at work.⁹⁸ It has been stated above that a comprehensive package of maternal health services including antenatal care, micronutrient supplementation, delivery, emergency obstetric care, prevention of mother-to-child transmission, antiretroviral therapy for HIV and postnatal care, is available in South Africa.⁹⁹

⁹⁸ Living and loving staff “How South Africa’s maternity leave compares internationally” <https://www.livingandloving.co.za/pregnancy-blogs/south-africas-maternity-leave-compares-internationally> (accessed on 27 October 2020).

⁹⁹ CHP *op cit*, 13.

(a) Extension of CSG (maternity support grant)

80. A maternity support grant is not specifically provided for in the Social Assistance Act, 2004. Hence it is not being implemented. In 2012, the Centre for Health Policy (CHP) undertook a study on behalf of the DSD to, among others, “investigate the feasibility of expanding either the social assistance programme in cash, or in-kind through nutrition or vouchers for poor and vulnerable pregnant women, and to design a workable proposal.”¹⁰⁰ The study found that of about 1.2 million women who fall pregnant annually in South Africa, half of them are single women who live in female-headed households.¹⁰¹ Due to the absence of State maternity benefits, “the earning potential of women in lower socio-economic groups is markedly curtailed.”¹⁰² Gender-based violence which occurs frequently during pregnancy, coupled with a lack of income and reliance on male partners for financial support could threaten the health and safety of the expectant mother and preparations for the birth of the baby.

81. Table 4.1 below provides a breakdown of women aged 20-50 who were pregnant in the informal sector between 2015 and 2018.¹⁰³ According to the information supplied to the Commission by Stats SA, of the total of 1.07 million female workers in the informal sector in 2015, only 6.6% fell pregnant. This figure went down to 6.3% in 2018.

Table 4.1: Women aged 20-50 who were pregnant by employment status

Informal sector	Pregnant	Not pregnant	Total
2015	71 624	1 007 547	1 079 171
2016	60 967	970 487	1 031 454
2017	48 200	1 019 799	1 068 000
2018	67 095	1 000 711	1 067 806

¹⁰⁰ Centre for Health Policy, University of Witwatersrand “Investigating the Potential Impact of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 6.

¹⁰¹ *Idem.* See also Mokomane Z “Work-family conflict and gender equality in South Africa” (September –October 2009) Human Sciences Research Council 9.

¹⁰² *Idem.*

¹⁰³ Information supplied to the SALRC by Stats SA on 07 April 2021.

Informal sector	Pregnant	Not pregnant	Total
2015	6.6	93.4	100.0
2016	5.9	94.1	100.0
2017	4.5	95.5	100.0
2018	6.3	93.7	100.0

80. The number of teenagers who fell pregnant during the same period was more than double that of adult women, as per the information provided in Table 4.2 below.

Table 4.2: breakdown of teenage pregnancies between the ages of 13-19 from 2015 to 2019.¹⁰⁴

Teenagers	Pregnant	Not pregnant	Total
2015	154 351	2 881 710	3 036 061
2016	146 662	2 863 400	3 010 062
2017	133 205	2 878 175	3 011 380
2018	134 505	2 888 740	3 023 245
2019	161 370	3 177 917	3 339 287
Teenagers	Pregnant	Not pregnant	Total
2015	5.1	94.9	100.0
2016	4.9	95.1	100.0
2017	4.4	95.6	100.0
2018	4.5	95.6	100.0
2019	4.8	95.2	100.0

82. A recent study conducted by the Southern Centre for Inequality Studies (SCIS), Wits, estimates the number of women in informal employment who may be eligible for the cash transfer to be 96 234.¹⁰⁵ This study, which estimates the cost, health and economic benefits of a cash transfer program aimed at increasing breastfeeding among women in informal employment, found that if the cash transfer were pegged at R1 854 per month, it would cost government a total of R713, 671 344 million over 4 months (corresponding to the duration of legally mandated maternity leave in South Africa) and R1 070 507 016 billion over six months (the period of exclusive breastfeeding recommended by the World Health

¹⁰⁴ Information supplied to the SALRC by Stats SA on 07 April 2021.

¹⁰⁵ Espi G, *et al*, "Assessment of the viability of a cash transfer to support exclusive breastfeeding in the informal economy" 3 (2019).

Organization) to implement the program, excluding the cost of administering the program.¹⁰⁶ The study concludes by asserting that “maternal and child health would be significantly improved by the introduction of a cash transfer. The economic benefits would be net-positive.”¹⁰⁷

83. According to the CHP, “evidence suggests that poor pregnant women are at risk of malnutrition, and by extension, their infants are vulnerable to nutritional and developmental deficiencies.”¹⁰⁸ The CHP recommends the introduction of a maternity and early child support grant, for poor and vulnerable pregnant women to be implemented by the DSD on a phased approach as follows:

(b) Basic package:

84. A basic package constitutes a minimal level of support to pregnant women and comprises the following four components: cash grant; in-kind support with a voucher or food parcel; transportation assistance; and an advice to call centre.¹⁰⁹ These components are discussed below.

(i) Cash grant

85. According to WIEGO, many of the qualifying recipients of the proposed maternity benefit in the form of social assistance in South Africa may also receive the CSG.¹¹⁰ The proponents of children’s rights are promoting a pregnancy grant to be given to women throughout their pregnancy. The challenges in accessing social assistance and child care services could be assessed in order to design a maternity benefit that can effectively reach informal sector women workers and protect their incomes once they have children to care for.¹¹¹ This view is supported by Government Communications who state that pregnant women or new mothers who are self-employed should be assisted with financial support by

¹⁰⁶ *Ibid*, 15.

¹⁰⁷ *Ibid*, 29.

¹⁰⁸ The Centre for Health Policy “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 3.

¹⁰⁹ The Centre for Health Policy “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 6.

¹¹⁰ WIEGO *Op cit* 7.

¹¹¹ *Idem*.

Government.¹¹² Government may re-visit the criteria for child grant in order to include pregnancy and confinement.¹¹³

86. A cash transfer is seen as the “most elementary component central to basic and more comprehensive forms of maternity and early child support.”¹¹⁴ The proposal from the CHP is that maternity and early child support may comprise of a cash grant for 6 months during pregnancy (that is, pregnancy grant or PG), and another cash grant for 12 months post-delivery (post-delivery grant or PDG).¹¹⁵ The CHP identified a number of challenges relating to the implementation of the proposed maternal and early child support. These include (a) verification of pregnancy; (b) timing of support; (c) value of support; and (d) incentivizing health behaviour through support. These administrative challenges are discussed below.

(ii) Verification of pregnancy

87. As a condition for accessing the grant, there has to be a reliable method to verify the pregnancy. What needs to be determined is “what would constitute valid proof of pregnancy, the format for how such proof would be presented and the frequency of the verification of pregnancy.”¹¹⁶ According to the CHP, verification of pregnancy may present serious challenges to SASSA officials since confirmation of pregnancy “would require links to health platforms, which may not have standardized systems and technologies for confirming pregnancy. Also, if verification needs to be done throughout the pregnancy, this would increase contact visits to SASSA offices.”¹¹⁷

(iii) Timing of support

88. Although the proposed maternity and early child support must commence immediately after conception so as to encourage early initiation of ANC visits, however, many women do not discover early enough that they are pregnant.¹¹⁸ The question is whether if a woman discovers that she is pregnant after the first trimester, will she qualify for all the three

¹¹² Government Communications “Maternity and Paternity Benefits for Self-Employed Workers” 1.

¹¹³ *Idem*.

¹¹⁴ The Centre for Health Policy “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 6.

¹¹⁵ The Centre for Health Policy “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 22.

¹¹⁶ The Centre for Health Policy “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 9.

¹¹⁷ *Idem*.

¹¹⁸ *Idem*.

trimesters or only for the remaining two trimesters? How often must the support (PG) be provided? Should it be monthly or per trimester? Must the cash transfer be linked to ANC and PNC check-ups?

(iv) *Value of support*

89. The question as to who the intended beneficiary of the proposed maternal and early child support is must be answered first prior to determining the second question, that is, what should the value of the support be. According to the CHP, absence of state maternity benefits affects the earning potential of pregnant women in the lower socio-economic groups. The question therefore is whether all pregnant women in the lower socio-economic groups should be targeted for state support in respect of maternity benefits (this will include unemployed women), or only pregnant women workers in the informal economy?

90. What about the means test? Should the means test for the PG be the same as the means test for the CSG, or should it be amended, and if so, how? The study conducted by the CHP used the means test for the CSG to determine eligibility for the PG.¹¹⁹ If the intended beneficiaries of the PG are female workers in the informal economy, how will this target group be distinguished from the beneficiaries of the CSG as defined in section 6 read with section 5 of the Social Assistance Act, 2004? If an expectant mother fulfils the requirements for the PG, but currently receives a CSG, will she be entitled to receive both the PG and the CSG or only the CSG?

91. Regarding the value of support, the question is whether the PG must be designed as a standalone support, or an extension of the existing CSG. The CHP recommends that the current value of the CSG be extended to eligible women in the “final six months of pregnancy.”¹²⁰ Food, transport, and ECD support, which are additional components of a basic package are dealt with separately.

¹¹⁹ CHP “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 25.

¹²⁰ *Ibid*, 22.

(v) *Incentivizing health behaviour through support*

92. The two health behaviours that were identified as having potential linkages with maternity and early child support are attendance at antenatal clinics and utilization of family planning services.¹²¹ The CHP study found that leveraging support to ANC attendance “will not only help with identification of needy, at risk pregnant women, but may also help improve timely and frequent attendance at antenatal clinics.”¹²² If support were to be linked to ANC attendance, the following implementation challenges will have to be thought through:

1. *Would this be a fair condition if transport is not readily available or affordable to women who are in lower socioeconomic circumstances or living in remote areas?*
2. *Does the healthcare sector have standardized and effective records of antenatal visits?*
1. *What form of proof of pregnancy or ANC visits would cause the least administrative burden on the health sector and on SASSA?*
2. *Should there be a predetermined number of ANC visits attended before support is initiated?*¹²³

93. According to the study, the proposed maternity support grant “will generate change by empowering women to “relate to childbirth as positive and normal; exercise a greater degree of management and control over their own lives; effectively nurture newborns in their first critical years; and maximize maternal health during pregnancy.”¹²⁴ Since the maternity support is conceived of as a compensation for the absence of formal maternity leave for women in informal employment, it presents one alternative to providing opportunity to self-employed women to increase breastfeeding.¹²⁵

94. The CHP’s international comparative study could not find evidence to the effect that maternity and early child support increases pregnancy rates or incentivizes teenage

¹²¹ *Ibid*, 10.

¹²² *Idem*, 10.

¹²³ *Idem*, 10.

¹²⁴ *Ibid*, 1.

¹²⁵ Espi G, *et al*, *op cit*, 6.

pregnancy.¹²⁶ To the contrary, the study found that “cash transfers would be spent on essential items, and that household food security will improve.”¹²⁷ The SCIS’ study identifies two potential unintended consequences of a cash transfer. The first one is increase in fertility because cash transfers lower the cost of investing in children. The second one is that “mothers actually use this income to buy formula and decide to not breastfeed, especially if they know that monitoring is imperfect.”¹²⁸

(vi) *In-kind support*

95. The two kinds of in-kind support are grocery vouchers and food parcels. Ahmed and Khan report that the Bangladesh demand-side maternal health voucher scheme used two different types of targeting mechanisms as follows:

“In the nine districts under universal targeting, all pregnant women are entitled to receive vouchers. In the remaining twenty-four districts, targeting is based on means testing, that is, on economic status of the beneficiaries. The service components (benefits) covered by the vouchers are three ANC check-ups, safe delivery at a facility or at home by skilled birth attendant, one postnatal care (PNC) check-up within six weeks of delivery, and management of complications including caesarean section from designated providers.”¹²⁹

96. The DSD distributes food parcels to those in need. In his address to the nation on the government’s R500bn rescue package plan, President Ramaphosa said that “we have recognized that the food distribution capacity of government is not adequate to meet the huge need that has arisen since the start of the epidemic. SASSA will within days implement a technology-based solution to roll out food assistance at scale through vouchers and cash transfers to ensure that help reaches those who need it faster and more efficiently.”¹³⁰

¹²⁶ CHP “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 1.

¹²⁷ *Idem*.

¹²⁸ Espi G, *et al*, *op cit*, 28.

¹²⁹ Ahmed S and Khan MM, “A maternal health voucher scheme: what have we learned from demand-side financing scheme in Bangladesh?” 26; 27.

¹³⁰ TimesLive “President Cyril Ramaphosa’s speech on R500bn rescue package” available at <https://www.dispatchlive.co.za/news/2020-04-21-in-full-president-cyril-ramaphosas-speech->

97. Through collaboration with social partners such as the Solidarity Fund, NGOs and community-based organisations, the DSD distributed more than 250 000 food parcels across the country during lock down.¹³¹

98. Government Communications is of the view that the private health sector should also provide free services to the poor or unemployed people in the provision of maternity and parental benefits. It may be regulated that certain hours or specific service should be performed by private health sector to the needy. This may be similar to *pro bono* legal services which is currently provided in South Africa to the poor by legal practitioners.¹³²

(vii) *Transport assistance*

99. Transport costs to access healthcare facilities is a major concern for pregnant women. The options identified to meet this need include voucher for public transport such as buses; trains or taxis. Ahmed and Khan point out that transportation costs provided through the Bangladesh maternal health voucher scheme were US\$7.70 which includes US\$4.60 for three ANC visits, US\$1.55 for institutional delivery and US\$1.55 for one PNC visit.¹³³ Pregnant women receive the cash transfer after completion of the visits.

(viii) *Advice to call centre*

100. The establishment of advice offices or call centres is proposed as an optional component of a basic approach.¹³⁴ It is proposed that the advice centres be located at schools, institutions of higher learning, labour centres and SASSA satellite offices.¹³⁵

101. There is a need to extend the maternity and parental protection system beyond its current framework so that it can recognize women and men in unpaid care work and women

[on-r500bn-rescue-package-and-covid-19-lockdown-ending-in-phases/](#) (accessed on 21 April 2020).

¹³¹ *Idem.*

¹³² Government Communications "Maternity and Paternity Benefits for Self-Employed Workers (Project 143) (29 September 2017) 1.

¹³³ Ahmed S and Khan MM, "A maternal health voucher scheme: what have we learned from demand-side financing scheme in Bangladesh?" 27.

¹³⁴ CHP "Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment" (August 2012) 8.

¹³⁵ *Idem.*

in subsistence wage earning. A scheme where women and men in these categories fall into a category of compulsory coverage under a social security-based scheme that is funded by government must be considered. This type of benefit would recognize women and men in the informal sector.¹³⁶ The legal services of the Department of Social Development is of the view that funding arrangements for maternity and parental programmes is grossly lacking in South Africa and that this avenue should be deliberated and explored further in this investigation.

102. The existing CSG could be extended to expectant informal sector women workers who qualify for this grant, instead of creating a new social grant. The extended CSG could be payable to qualifying women six months of their pregnancy, with the grant being registered in the name of the expectant mother. The maternity support will be converted into a CSG after the birth of the child in accordance with section 6(a) of the Social Assistance Act, 2004. This will bring informal sector self-employed women into a social security system as envisaged in section 27(2) of the Constitution.

103. It will be irrational to distinguish between unemployed poor and vulnerable pregnant women from self-employed informal economy women workers who are unable to contribute to social insurance (UIF). At the virtual workshop hosted by the AC on 17 May 2021, experts pointed out that the employment status of the woman is irrelevant. The CSG should be accorded to all eligible poor and vulnerable pregnant women without any discrimination. This concern raised the technical question of whether this recommendation falls outside of the Commission's mandate for Project 143. The experts are of the view that the best interests of the child should prevail and that the administrative burden to disprove eligibility is unnecessary. The AC resolved to split recommendation 7 into two components, that is, the one recommendation limits the proposal to extend the existing CSG to self-employed workers in the informal economy. The alternative recommendation extends the existing CSG to all eligible poor and vulnerable pregnant women including self-employed workers in the informal economy.

¹³⁶ Women's Legal Centre "Submission on Maternity and Paternity Benefits for Self-Employed Workers" (26 September 2017) par 32 par 40.

104. It will be relatively easy to extend the CSG to incorporate a PG since the Minister for Social Development is empowered by section 12A of the Social Assistance Act to prescribe additional requirements. This section provides as follows:

12A. Additional payments

- (7) *The Minister, with the concurrence of the Minister of Finance, may prescribe an additional payment linked to a social grant.*
- (8) *The Minister may, in prescribing an additional payment, differentiate on the basis of need between beneficiaries of social grants.*¹³⁷

105. **Recommendation 8:** It is recommended that the existing CSG be extended to all pregnant self-employed workers in the informal economy who fulfil the criteria for child support grant. The maternity support should be provided for nine months of pregnancy and be registered in the name of the expectant mother.¹³⁸ The maternity support should be converted into a CSG after the birth of the child in accordance with section 6(a) of the Social Assistance Act, 2004.

106. **Recommendation 9:** Alternatively, it is recommended that the existing CSG be extended to all eligible poor and vulnerable pregnant women, including self-employed workers in the informal economy, who fulfil the criteria for child support grant.¹³⁹ The maternity support should be provided for nine months of pregnancy and be registered in the name of the expectant mother. The maternity support should be converted into a CSG after the birth of the child in accordance with section 6(a) of the Social Assistance Act, 2004.

107. Implementation of the proposed maternity support will entail legal implications.¹⁴⁰ This includes amendment of the Social Assistance Act, 2004. According to the CHP:

¹³⁷ Section 12A was inserted by section 4 of the Social Assistance Amendment Act, 2020 (Act 16 of 2020). It will come into operation on a date to be fixed by President by Proclamation in the *Gazette*.

¹³⁸ The view is that women should qualify across all three trimesters and be entitled to the benefits in toto. They should get back-pay if they only register in the second or third trimester. Women should be entitled to the CSG even if the child is not subsequently born alive, as they bear particular costs and impact on their availability to work during pregnancy.

¹³⁹ The eligibility criteria for the CSG, that is, section 5 of the Social Assistance Act, 2004) is discussed below.

¹⁴⁰ CHP *op cit*, 14.

“To consider the maternity and early child support as simply an extension of the CSG rather than a new grant minimizes the need for changes to the legal framework for this support. It would also reduce the logistics of administering the grant and would simplify amendments to the Social Assistance Act. While possibly a strategic imperative, registering the grant in the name of the unborn child may not be legally possible. Instead, the grant could be registered in the name of the pregnant woman, as is currently done with the CSG, where the grant is allocated to the child’s primary caregiver.”¹⁴¹

108. **Recommendation 10:** To give effect to the Commission’s proposal for the extension of the CSG to incorporate maternity support, the Social Assistance Act, 2004 (Act No.13 of 2004) could be amended as follows:

(a) by the insertion after the definition of “regulation” in section 1 of the following definition of “self-employed worker”:

“Self-employed worker” means any person, including an independent contractor, who-

- (d) has created her or his own employment opportunities and is not accountable to an employer;
- (e) works for a company or entity that is not incorporated and not registered for taxation; or
- (f) in any manner assists in carrying on or conducting the business of an employer in the informal economy.

(b) and by the insertion of the following section 6(c) as follows:

6. Child support grant

Subject to section 5,-

- (d) a person who is the primary care giver of a child; or

¹⁴¹ *Ibid, op cit*, 15.

- (e) a child who heads a child-headed household, as contemplated in section 137 of the Children's Act, 2005 (Act No.38 of 2005), or
- (f) an expectant woman who complies with the requirements for social assistance as provided for in section 5(1)(a)-(e) of this Act,
is eligible for a child support grant.

109. Section 5 of the Social Assistance Act, 2004 provides as follows:

1. Eligibility for social assistance

- (1) *A person is entitled to the appropriate social assistance if he or she-*
 - (a) *is eligible in terms of sections 6, 7, 8, 9, 10, 11, 12 or 13;*
 - (b) *subject to section 16, is resident in the Republic;*
 - (c) *is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette,*
 - (d) *complies with any additional requirements or conditions prescribed in terms of subsection (2): and*
 - (e) *applies for social assistance in accordance with section 14(1).*
- (2) *The Minister may prescribe additional requirements or conditions in respect of-*
 - (a) *income thresholds;*
 - (b) *means testing;*
 - (c) *age limits, disabilities and care dependency;*
 - (d) *proof of and measures to establish or verify identity, gender, age, citizenship, family relationship, care dependency, disabilities, foster child and war veterans' status;*
 - (e) *forms, procedures and processes for application and payments;*
 - (f) *measures to prevent abuse.*

110. Implementation of the proposed maternity support grant will promote fulfilment of the State's obligation in terms of the Constitution and international instruments that are binding upon the RSA, as follows:

- (a) Section 27(2) of the Constitution imposes on the State the obligation to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights contained in subsection (1). The Constitutional Court of Uganda held that lack of financial resources should not be used as a blanket excuse and defence for failure to provide basic maternal health services.¹⁴²
- (b) Sections 9, 10, 11, 12, 22, 23, 24, 27 and 28 of the Constitution detail the right of everyone to equal protection under the law and the States' obligation not to unfairly discriminate directly or indirectly against anyone on any of the grounds including sex, gender, pregnancy, or employment status (section 22 of the Constitution).¹⁴³ The above mentioned sections of the Constitution, read together with the directives of section 39 of the Constitution, allow for, if not compel, the extension and implementation by government of a robust parental benefit scheme in South Africa to workers in the informal economy.
- (c) The Republic of South Africa has signed and ratified a number of protocols and conventions which compel the Republic to provide State maternity and parental benefits to all workers regardless of their employment status.¹⁴⁴ International instruments that have been approved and ratified by Parliament are legally binding on the Republic in terms of section 231(2) of the Constitution.¹⁴⁵ The following are some of the international instruments that have been approved and ratified by the RSA. They are discussed in detail in Chapter 5 of this Discussion Paper:
 - (i) The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);
 - (ii) Universal Declaration of Human Rights (UDHR);
 - (iii) United Nations Convention on the Rights of the Child;

¹⁴² *Center for Health, Human Rights and Development and Others v Attorney General of the Republic of Uganda* Constitutional Petition No.16 of 2011 in the Constitutional Court of Uganda at Kampala, 19.

¹⁴³ LRC "Survey of Relevant Law" 6.

¹⁴⁴ *Ibid*, 53.

¹⁴⁵ *Idem*.

- (iv) International Convention on the Economic Social, and Cultural Rights (ICESCR);
- (v) Convention on the Rights of Persons with Disabilities
- (vi) Sustainable Development Goals vision 2030;
- (xiii) African Charter on the Rights and Welfare of the Child (ACRWC);
- (xiv) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol);
- (xv) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol);
- (xvi) SADC Protocol on Gender and Development.

111. If approved, implementation of the proposed maternity support grant will require a corresponding increase in the budget allocation to SASSA. The question is whether the proposed maternity support grant will be affordable for government to implement?

(c) *Comprehensive package:*

112. According to the CHP, “a comprehensive approach aims to address long-run imperatives, beyond the immediate health and economic needs of women. These include remaining in education and employment. Interventions such as childcare support could achieve these aims and would complement the basic support items.”¹⁴⁶

113. Cherisch and Fonn argue that because “South Africa does not distribute a pregnancy grant means irreversible but avoidable damage to children and mothers from poor families is not addressed. Based on the experience of countries at similar levels of development we conclude that introducing pregnancy support grant to women in South Africa would improve health and nutrition during pregnancy.”¹⁴⁷

¹⁴⁶ CHP “Investigation the Potential of Maternity and Early Child Support in South Africa: An Options Assessment” (August 2012) 20

¹⁴⁷ Cherisch M and Fonn S, “South Africa’s child support grant should start in pregnancy” <https://www.wits.ac.za/news/latest-news/in-their-own-words/2012-02/> (accessed on 17 August 2020).

(i) *Access to ECD centers*

114. Children have the right to family or parental care, or to appropriate alternative care when removed from the family environment.¹⁴⁸ Target 5.4 of the SDGs calls on all governments to recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies, and the promotion of shared responsibility within the household and the family as nationally appropriate.¹⁴⁹ Moussiè and Alferts argue that “child care by family members comes with cost and disadvantages for women workers and carers.”¹⁵⁰ It is evidently clear that female workers in the informal sector need support with child care. In the context of rapid urbanization and paradigm shifts in the traditional African notions of parenthood, the current socio-economic policies exacerbate gender inequalities as women struggle to “balance their unpaid care work with their paid employment.”¹⁵¹ The commentators recommend that in order to “promote women economic empowerment and gender equality, child care should not only be seen as a critical public service, but also as a component of income security, that is, as part of social security for all workers.”¹⁵² It is on this basis that the CHP describe the proposed PG as “maternity and early child support.”¹⁵³

115. Informal sector workers are calling for changes to health delivery systems that would allow them to access health care services, such as pre-, peri- and post-natal care near their place of work or through mobile health services.¹⁵⁴ According to WIEGO:

“South Africa’s recently revised ECD policy covers the period from conception until the year before a child enters primary school. It proposes to develop and implement a national programme for the provision of centre and non-centre based support for pregnant women, mothers, fathers and infants in the first two years of life by 2024. Without public quality and accessible childcare services, the high costs of childcare to a mother may present an urgency to earn and meet these new expenses even when the child is still a newborn.”¹⁵⁵

¹⁴⁸ Section 28(1)(b) of the Constitution.

¹⁴⁹ UN “The Sustainable Development Goals” (2015).

¹⁵⁰ Moussiè R and Alferts L “Women informal workers demand childcare: Shifting narratives on women’s economic empowerment in Africa” *Agenda* (2018)

¹⁵¹ *Ibid*, 5.

¹⁵² *Ibid*, 2.

¹⁵³ CHP, *op cit* 2.

¹⁵⁴ WIEGO, *op cit* 7.

¹⁵⁵ *Ibid*, *op cit* 8.

116. According to the DSD, a national programme for the provision of centre and non-centre based support for pregnant women, mothers, fathers and infants in the first two years of life will be developed and implemented by 2024 with the following aims, among others:

- (a) to provide safe and affordable day care for children where parents are absent;
- (b) to facilitate the pre-registration of pregnant women in the third trimester of pregnancy for the CSG (verified through birth registration) to enable income-eligible mothers to have access to the grant from the first day of the child's life.¹⁵⁶

117. **Recommendation 11:** It is recommended that government must accelerate the roll-out of early childhood development centres in informal workplaces and spaces where informal workers reside, such as street trading; waste recycling; city markets; informal settlements and townships. It is also recommended that municipalities be urged to take up this recommendation in their industrial development plans as part of infrastructure provisioning.

D. Questions for public comment

- **Cost implications for the proposed maternity support grant**

1. If approved, implementation of the proposed maternity support grant will require a corresponding increase in the budget allocation to SASSA. The question is whether the proposed maternity support grant will be affordable for government to implement?

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¹⁵⁶ DSD "National Integrated Early Childhood Development Policy" 23; 54.

¹⁵⁷ WIEGO is of the view that it will be cost-effective to link the proposed maternity and early child support to the existing CSG rather than creating another administrative structure that requires means-testing. The challenge will be in identifying women who are not yet benefiting from the CSG or are benefiting from the PG during maternity but are then not the primary caregivers under the CSG once the mother returns to work, workshop held on 17 May 2021.

- **Verification of pregnancy**

2. What would constitute valid proof of pregnancy?
3. In what format must such proof of pregnancy be presented?
4. What form of proof of pregnancy or ANC visits would cause the least administrative burden on the health sector and on SASSA?

- **Timing of support**

5. If a woman discovers that she is pregnant after the first trimester, will she qualify only for the remaining two trimesters?
6. How often must the maternity and early child support grant (PG) be provided? Should it be monthly or per trimester?
7. Does the healthcare sector have standardized and effective records of antenatal visits?

- **Value of support**

8. Must the PG be designed as a standalone support, or an extension of the existing CSG?
9. Who should be the intended beneficiary of the proposed maternity and early child support?¹⁵⁸
10. Should the maternity cash benefit not be set at 100% of the reference wage for self-employed workers, if not for all workers generally.
11. In the event that the existing mechanism (66% of previous earnings) is lower than the level which ensures that the woman can maintain herself and her child in proper conditions of health with a suitable standard of living, should the UIF not be obliged to subsidize the shortfall, regardless of the amount of the shortfall?

¹⁵⁸ It is proposed that maternity and early child support grant be registered in the name of the pregnant woman, as is currently done with the CSG, where the grant is allocated to the child's primary caregiver.

12. Should there be an established minimum threshold for the maternity cash benefit? If so, should this threshold be determined nationally by the Minister of Labour and Employment, or whether it should be negotiated sectorally by the relevant stakeholders?
13. Should all pregnant women in the lower socio-economic groups be targeted for state support in respect of maternity benefits (this will include unemployed women)?¹⁵⁹
14. Should pregnant women workers in the informal economy only be the target for support?
15. What should the means test be?
16. Should the means test for the PG be the same as the means test used for the CSG, or must it be different? If so, how?
17. If the intended beneficiaries of the PG are female workers in the informal economy, how will this target group be distinguished from the beneficiaries of the CSG as defined in section 6 read with section 5 of the Social Assistance Act, 2004?

- **Incentivizing health behaviour through support**

18. Should maternity and early child support be linked to ANC and PNC check-ups?¹⁶⁰ If so,
19. Would this be a fair condition if transport is not readily available or affordable to women who are in lower socioeconomic circumstances or living in remote areas?

¹⁵⁹ At the workshop held on 17 May 2021, WIEGO expressed the view that “maternity benefit should be available to all women, regardless of employment status, that is, unemployed; inactive; or self-employed. This will guarantee greater inclusion of women informal workers who may be harder to identify, such as home-based workers; dependent contractors; contributing family workers and others.

¹⁶⁰ The view expressed at the workshop held on 17 May 2021 is that “conditionalities based on attendance on ANC appointments should be avoided as this is a barrier to access for many women informal workers who may not have access to these services near their workplaces. Conditionalities also place the onus on women to access services rather than on the State to make services more accessible. It reinforces gendered norms around women bearing the time and costs of childcare on their own, without recognition of their unpaid care work and paid work” email received from Rachel Moussié dated 24 May 2021.

20. Should there be a predetermined number of ANC visits attended before support is initiated?

- **Role of the private health sector**

21. Does the private health sector provide free health services to the poor and indigent members of the public?
22. Should the role of the private health sector in the provision of free health services be regulated in the same manner that pro bono legal services are regulated by the Legal Practice Council?

- **Role of the private insurance industry**

23. What maternity benefit products are offered by the private insurance industry?
24. Are these benefits affordable to informal sector workers?
25. How effective are they?

ANNEXURE A: LIST OF RESPONDENTS TO THE RESEARCH PROPOSAL PAPER

No.	Date of Submission	Name of Respondent
1.	07 July 2017	Public Servants Association
2.	22 August 2017	Department of Social Development
3.	August 2017	Women in Informal Employment Globalizing and Organizing
4.	07 September 2017	Legal Services, South African Police Service
5.	22 September 2017	Department of Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga province
6.	26 September 2017	Women's Legal Centre
7.	29 September 2017	Government Communications
8.	29 September 2017	South African Guild of Actors
9.	29 September 2017	Commission for Gender Equality
10.	20 April 2018	Department of Women

ANNEXURE B: INTERNATIONAL MODELS OF MATERNITY & EARLY CHILD SUPPORT

Table 1: Summary of configuration of international models of maternity protection and early child support for self-employed women¹⁶¹

Country & programme	Description of maternity benefits	Eligibility criteria / target group	Legislative institutional arrangements /
SUB-SAHARAN AFRICA			
Mozambique , Gabinete de Apoio à População (Cabinet for the support of Vulnerable People)	Mean transfer of \$1, benefits adjusted to household size.	Pregnant women in destitute urban households. Benefit received from enrolment until after childbirth.	
Nigeria , Care of the Poor (COPE) Conditional Cash Transfer (CCT)	Conditional Cash Transfers. Basic income guarantee depending on number of children: 1=N1500, 2-3=3000, etc. Cash transfers paid by microfinance agencies and local community banks.	Female-headed households, pregnant women, with means tested.	Administered by the National Poverty Eradication Program (NAPEP) office at Federal and State Level.
Ethiopia , Meket Livelihoods Development Project (MLDP)	Conditional Cash Transfers (e.g. a 5-person household receives \$17,50) for those who can work and unconditional cash transfers for those who cannot or should not work.	Pregnant/ lactating mothers, (older people, children and those with disabilities).	UK based Save the Children project which ran from June 2004 to April 2008 funded by the Dutch government.
Country & programme	Description of maternity benefits	Eligibility criteria / target group	Legislative institutional arrangements /
LATIN AMERICA			
Brazil , Bolsa Família (BFP), technical and financial support received from the World Bank.	Conditional Cash Transfers. Amount depends on degree of poverty and family composition. \$6.25-\$18.7 per household per month.	Poor families (means tested and geographic targeting). The program reaches more than 46 million of low-income Brazilians.	Created in 2003 by Provisional Measure 132 and converted into Law 10.836 in 2004.
Bolivia , 'Juana Azurduy' stipend	Conditional Cash Transfers totalling US\$260 to pregnant	Only mothers and children without any form of insurance or	

¹⁶¹ The table is adapted from the Centre for Health Policy "Investigating the potential impact of maternity and early child support in South Africa: An options assessment" (Annexure 3 final draft).

	women, in instalments, provided conditions are met.	families with low income eligible with conditions, extremely poor families receive non-conditional payments. Mothers must attend 4 prenatal exams every two months.	
Bolivia, Zero malnutrition programme	Institutional (municipalities) Conditional Cash Transfers of \$50 000 for implementation of projects that contribute to food and nutrition security.	Pregnant women, young infants and children under 5 year of age	Multi-sectoral team comprising the Presidency and 9 Ministries. Implementation is decentralized to 166 of 337 municipalities nationwide.
Ecuador, Programa desnutrición zero	Conditional Cash Transfers, up to US\$110 entailing US\$10 for each ANC visit and US\$60 for giving birth and attending PNC.	Households with an infant and breastfeeding woman.	
Colombia, Familias en Acción (Families in action)	Mean \$50: \$20 per family, \$6 per primary school child, \$12 per secondary school child.	Poorest households in municipalities eligible using poverty criteria.	Families in Action Law
Country & programme	Description of maternity benefits	Eligibility criteria / target group	Legislative institutional arrangements /
MIDDLE AND SOUTH EAST ASIA			
India, Dr Muthulakshmi Maternity Assistance Scheme	Conditional Cash Transfers of Rs12000 paid in two tranches, Rs3000 is paid before delivery and the remainder after childbirth to assist with medical expenses.	Poor women in informal sector. Women in formal sector or with high income are excluded.	Department of Health and Family Welfare.
India, Janani Suraksha Yojana (Safe Motherhood Scheme)	Conditional Cash Transfers for delivery in government or accredited facility. \$13.3 in urban and \$15.6 rural areas.	Women issued with government below-poverty-line card or were from low caste or tribe.	
Philippines, Pantawid Pamilyang Pilipino Program	Conditional Cash Transfers. \$11 given per household per month, regardless of number of children. Also includes nutrition, breastfeeding seminars and family planning sessions.	Poor households with pregnant women or children <5.	
Nepal, Safe Delivery Incentive Program	Conditional Cash Transfers for women who deliver in health	Universal scheme not targeted at the poor. All women are eligible.	Maternal Health Financing Policy of 2005.

	facility. \$7.8 in plain districts; \$15.6 in hill districts and \$23.4 in mountainous districts.		
Armenia	Lump-sum benefit for every newborn of AMD50,000 and AMD430,000 for 3 rd or more children.	All pregnant women.	
Country & programme	Description of maternity benefits	Eligibility criteria / target group	Legislative institutional arrangements
Mongolia , Social Assistance Maternity Benefits	Short-term benefits at the minimum wage level given for 4 months.	All women after 196 days of pregnancy who are ineligible for social insurance.	
Bangladesh , Maternal Health Demand Side Financing pilot	Vouchers to receive skilled care at home or health facility and payments for transport and food.	Pregnant women in poorest sub-districts.	
EUROPEAN UNION			
Sweden , flexible Parental Leave system	Cash benefits: 180 SEK a day for 480 days (\pm 4 months). Parents have 480 days of parental leave for each child which they can divide between them. Father is entitled to 10 days during the first 3 months of birth of a child.	Mothers, fathers, adoptive parents.	Swedish Social Insurance Agency
Switzerland , compulsory Maternity Insurance	Cash benefits: daily allowance of 80% of average salary earned prior to childbirth until woman returns to work but not longer than 14 weeks	Female employees and self-employed women.	Social Security Administration office administers the maternity insurance scheme established by Federal Law on Income Compensation.
Germany , Maternity Leave	Self-employed and non-employed women have no maternity leave benefit rights.	Only for standard workers.	
United Kingdom , Maternity Allowance (MA) and Statutory Paternity Pay (SPP) paid directly by government.	Cash benefits: MA and SSP is the lesser of 90% usual income or £117.18.	Self-employed women must have been in self-employment for at least 26 of the 66 weeks prior to childbirth. Self-employed women must be paying Class 2 National Insurance contributions. Father is entitled to Statutory Paternity Pay (SPP) during paternity leave.	UK Department of Work and Pensions administers the national insurance scheme.

Australia, Paid Parental Leave Scheme	Cash benefits. Self-employed workers receive Dad and Partner Pay at the rate of national minimum wage (currently \$590 a week before tax) which is the same rate as the Parental Leave Pay.	Full-time, part-time, casual, seasonal, contract and self-employed workers.	Legislated Parental Leave administered by the Family Assistance Office, Department of Social Services.
Italy, maternity and parental leave.	Self-employed parents have access to less parental leave. Self-employed women may take only three months of parental leave with benefits. Self-employed men have no right to parental leave or benefits.		National Social Security Institute.
NORTH AND CENTRAL AMERICA			
Canada, Manitoba Healthy Baby Prenatal Benefit Program	Monthly cash benefit from second trimester of pregnancy.	Pregnant women and teenagers with net yearly income <\$32000. Eligibility criteria includes income tax records, social assistance number and note from a doctor verifying pregnancy.	Social Services Administration Act and Manitoba Prenatal Benefit Regulation 89/2001
El Salvador, <i>Comunidades Solidarias Rurales (Supporting Rural Communities)</i>	Conditional Cash Transfers in the form of health voucher of US\$15.	Geographical targeting of poorest 100 selected municipalities. Families with children <5 and pregnant women.	
New Zealand			
Paid parental leave scheme	A self-employed person who is the primary carer of the child is entitled to no more than 18 weeks of parental leave payments out of public money. His or her partner is entitled to 1 or 2 weeks depending on the employment test.	Self-employed women and their partners.	Parental Leave and Employment Protection Act 1987

ANNEXURE C: SUMMARY OF PROPOSED BENEFITS TO BE EXTENDED

	Source	Benefit Type	Extent of Benefit	Beneficiary	Implications for law reform	Responsibility
CASH BENEFITS						
1.	UI ACT, 2001 (Act 63 of 2001)	Maternity cash benefits	66% fixed rate of the contributor's earnings as at the date of application, subject to the prescribed maximum income threshold	Expectant female self-employed workers	Amend definition of employee in sec 1 of UIA; include definition of self-employed worker; amend sect 3 of UIA (scope of application)	DEL
2.	UIC ACT, 2002 (Act 4 of 2002)				Amend definition of employee in sec 1 of UICA; include definition of self-employed worker; amend sect 4 of UICA (scope of application)	DEL
3.	UI ACT, 2001 (Act 63 of 2001)	Maternity cash benefits	Residue of unclaimed maternity benefit	Surviving spouse or life partner	Amend section 30(3) of the UIA to make provision for the devolution of maternity benefits to surviving spouse or life partner of a deceased contributor	DEL
4.	UI ACT (Act 63 of 2001)	Parental cash benefits	66% fixed rate of the contributor's earnings as at the date of application, subject to the prescribed maximum income threshold	Self-employed workers	Amend definition of employee in sec 1 of UIA; include definition of self-employed worker; amend sect 3 of UIA (scope of application)	DEL
5.	UIC ACT (Act 4 of 2002)				Amend definition of employee in sec 1 of UICA; include definition of self-employed worker; amend sect 4 of UICA (scope of application)	DEL

6.	Social Assistance Act, 2004 (Act 13 of 2004)	Maternity support grant (R450 pm)	nine months of pregnancy	Expectant female self-employed workers	Amend sec 6 of Social Assistance Act	DSD
LEAVE BENEFITS						
7.	BCEA, 1997 (Act 75 of 1997)	Maternity leave	at least four consecutive months' maternity leave	Self-employed workers	Amend definition of employee in sec 1 of BCEA and link its application to section 25 of the Act; include definition of self-employed worker; amend sect 3(1) of BCEA (scope of application)	DEL
8.	BCEA, (Act 75 of 1997)	Parental leave	at least ten consecutive days parental leave	Self-employed workers	Amend definition of employee in sec 1 of BCEA and link its application to section 25(A) of the Act; include definition of self-employed worker; amend sect 3(1) of BCEA (scope of application)	DEL
9.	BCEA, (Act 75 of 1997)	Adoption leave	at least ten consecutive weeks adoption leave	Self-employed workers	Amend definition of employee in sec 1 of BCEA and link its application to section 25(B) of the Act	DEL
10.	BCEA, (Act 75 of 1997)	Commissioning parental leave	at least ten consecutive weeks commissioning parental leave	Self-employed workers	Amend definition of employee in sec 1 of BCEA and link its application to section 25(C) of the Act	DEL