

Republic of South Africa

Report to the Government

Assessment of the South African legislation in view of a possible ratification of the Social Security (Minimum Standards) Convention, 1952 (No. 102)

**International Labour Office, Geneva
International Labour Office Decent Work Team for Eastern
and Southern Africa and Country Office, Pretoria**

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Abstract

This report contains a detailed legal assessment of existing social security provisions against the requirements of Convention No. 102, and is intended to serve as a reference in view of a possible future ratification of Convention No. 102. It formulates a number of recommendations and, on the basis of the analysis of available data, concludes that South Africa is indeed in a good position to ratify the said Convention.

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Contents

	<i>Page</i>
Acknowledgements	vii
Executive summary	ix
Abbreviations	xiii
Introduction	1
CHAPTER I: THE LEGAL FRAMEWORK: INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, ILO SOCIAL SECURITY STANDARDS AND NATIONAL SOCIAL SECURITY SYSTEM.....	3
A. The international legal framework.....	3
B. The social protection system of South Africa.....	14
CHAPTER II: ASSESSING THE COMPATIBILITY OF THE SOCIAL SECURITY LEGISLATION OF SOUTH AFRICA WITH CONVENTION NO. 102	33
A. Medical care benefit (Part II of Convention No. 102)	33
B. Sickness benefit (Part III of Convention No. 102)	39
C. Unemployment benefit (Part IV of Convention No. 102)	44
D. Old-age benefit (Part V of Convention No. 102).....	49
E. Employment injury benefit (Part VI of Convention No. 102)	54
F. Family benefit (Part VII of Convention No. 102).....	65
G. Maternity benefit (Part VIII of Convention No. 102).....	70
H. Invalidity benefits (Part IX of Convention No. 102)	76
I. Survivors' benefits (Part X of Convention No. 102)	82
J. Equality of treatment of non-nationals (Part XII) and Common provisions (Part XIII).....	86
CHAPTER III: PROSPECTS OF RATIFICATION OF CONVENTION NO. 102 BY SOUTH AFRICA: CONCLUSIONS AND RECOMMENDATIONS	103
A. Overview.....	103
B. Conclusions and Recommendations	104
Bibliography.....	107

List of tables

Table 1. List of the main up-to-date ILO social security standards	6
Table 2. Legal Requirements of Convention No. 102 - Cash Benefits.....	8

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This report falls under the South Africa Decent Work Country Programme (DWCP) 2010-2014. It is the outcome of the well-established collaboration between the ILO Decent Work Team (DWT) for Eastern and Southern Africa, the ILO Country Office (CO) for South Africa in Pretoria, and the Social Protection Department¹ of the ILO in Geneva.

The ILO undertook this comprehensive study at the request of the Department of Labour of South Africa. An initial report was prepared by Prof. Ockert Dupper and presented to representatives of the Department of Labour and of the Unemployment Insurance Fund in May 2012. The study was further expanded and reviewed by Emmanuelle St-Pierre Guilbault, Legal Specialist, ILO Social Protection Department, assisted by Maya Stern Plaza, Legal Consultant to the ILO. Christina Holmgren, Standards Specialist at the DWT in Pretoria contributed to the validation of the study in South Africa. Mr. Luis Frota, Social Security Specialist, ILO DWT/CO Pretoria, facilitated the policy dialogue and stakeholders' consultations in South Africa, and assisted with reviewing the final document. Valuable comments were provided by Mr. Krzysztof Hagemejer, Chief, Policy and Research Development, Social Protection Department, ILO, and by Mr. Alexander Egorov and Mr. Kroum Markov, International Labour Standards Department, ILO.

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The final report is now presented to a wider group of South African stakeholders to generate fruitful debate, with the hope that it may contribute to the ongoing discussion aimed at setting up a truly integrated comprehensive social security system.

¹ Formerly named the Social Security Department.

Executive summary

Context and background

South Africa has succeeded over the years in progressively establishing significant building blocks of a comprehensive social security system through a mix of contributory (social insurance) and tax-financed (social assistance) schemes covering the classic contingencies of social security and offering protection against poverty, vulnerability and social exclusion. Its statutory and effective coverage rates are above the region's average and comparable to or even beyond those of other BRICS countries. There is also a general assumption that the system, at least in some of its components, meets international minimum standards in the field of social security, set out in Conventions and Recommendations of the International Labour Organization.

Despite progress made in recent years and the achievement of significant levels of coverage and protection and this general assumption of compliance, South Africa has not yet ratified any of the Conventions of the International Labour Organization that set standards in the field of social security.

Within the context of the long-lasting collaboration between the Government of South Africa and the ILO, this report has been prepared at the request of the Department of Labour, with a view to assessing whether South Africa would indeed be in a position to ratify the ILO Convention Concerning Minimum Standards of Social Security, 1952 (No. 102). Convention No. 102 is the flagship Convention of the ILO in the field of social security deemed to embody an internationally accepted definition of the very concept of social security. It is a key guiding tool for the establishment of comprehensive social security systems and reform processes at national level, as well as a reference at international and regional level. It defines the nine classic branches of social security – medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit – and sets minimum requirements for each branch. This key instrument also establishes common rules of collective organization, financing and management of social security, as well as principles of good governance of the system under the general responsibility of the State, the right to due process and the principle of equality of treatment of non-national residents.

Key findings

This report contains a detailed legal assessment of existing social security provisions against the requirements of Convention No. 102, and is intended to serve as a reference in view of a possible future ratification of Convention No. 102. It formulates a number of recommendations and, on the basis of the analysis of available data, concludes that South Africa is indeed in a good position to ratify the said Convention.

More specifically, this report concludes that South Africa could ratify the Convention on the basis of the branches that comply, for the most part, with its requirements, namely: **Old-age benefit (Part V), Employment injury benefit (Part VI), Family benefit (Part VII), and Invalidity benefit (Part IX).**

Ratification of three other parts of the Convention, namely **Sickness benefit (Part III), Unemployment benefit (Part IV) and Maternity benefit (Part VIII)**, would also be possible, subject to slight parametric adjustments of the scheme under which they are provided.

With respect to the other branches of social security which are not in compliance with Convention No. 102, in particular **Medical Care benefit (Part II)** and **Survivors' benefit (Part X)**, acceptance could be considered at a later date when national circumstances allow.

The legal analysis undertaken in this report also concludes, importantly, that the system is, for the most part, in conformity with the general rules and principles set out in the Convention.

Beyond the requirements of the Convention *stricto sensu*, it is also submitted that South Africa has the infrastructure, manpower and expertise needed for the improvement and maintenance of the existing system. The prerequisites for further extending social security in accordance with ILO social security standards are thus met in terms of administrative capacity, an important factor to consider at the time of ratification.

Why ratify Convention No. 102?

In ratifying Convention No. 102, South Africa would be following the guidance provided by the latest international labour standard, the Social Protection Floors Recommendation (No. 202), adopted by the International Labour Conference in June 2012. The system in place aims at providing income security to the greatest number, at a level that is perhaps not the highest but that is adequate for it to fulfil its two main functions: prevent vulnerability and destitution through social assistance and contribute to poverty reduction and mitigate the impact of vulnerability through social insurance. It is therefore very much in line with the spirit and objectives of Recommendation No. 202, and at the same time with that of Convention No. 102.

There would be many advantages for South Africa to ratify Convention No.102. In periods of reform, ratification can give a particularly strong signal to society and social partners of the State's commitment to comply with minimum social security standards. Convention No. 102 can thus facilitate the social and wider national dialogue process by becoming an integral component – in terms of standards, benchmarks, and principles – of social security reform.

In addition to the commitment that a country shows to its population by ratifying the Convention, it demonstrates to the international community its political acceptance of the minimum standards and basic social security principles set out in the Convention, and a concrete step towards meeting its obligations under other international instruments for the protection of human rights and under regional instruments, thereby setting an example for other countries. South Africa is the closest among countries in the region to having established a complete and comprehensive system. It thus has the opportunity to become a model and an example for other southern African and African countries to follow by ratifying, and applying, a key technical ILO Convention. By ratifying this flagship instrument, established as the main reference for social security systems by the Southern African Development Community (SADC) Code of Social Security, and being the first country to do so in the region, South Africa would establish itself as the forerunner. Also, like other BRICS countries, South Africa can demonstrate through the act of ratification that it has the political will to complete the effective implementation of coherent social security systems as part of its national development policies, in line with Recommendation No. 202.

Both international law and foreign law have served and continue to serve as important sources for the development of the South African social security framework. This flows from the provisions of the Constitution which require the consideration of international law in the interpretation of the right to have access to social security and appropriate social assistance as well as the fact that South Africa has already ratified a number of

international and regional instruments that set out the right to social security. Hence, ratifying Convention No. 102 would be in line with the rights-based approach to social security embraced by South Africa.

The way forward

The ILO is confident that the essential components of South Africa's social security system, in law and, to a reasonable extent, in practice, are consistent with Convention No. 102 and that ratification would provide a solid and sustainable basis for the development and progressive extension of social security in the medium and longer term. Convention No. 102, together with Recommendation No. 202, can serve as a road map for the reform process currently underway in South Africa with the aim of remedying the deficiencies of the current system using international minimum standards as references for the development and reform of social security schemes.

In the continuity of its long-lasting collaboration with the Government of South Africa, the ILO is available and well-disposed to provide the Government with the technical assistance required to complete the ratification process, as well as that needed to ensure greater conformity of national law and practice with the requirements of Convention No. 102 and to align the reform process with the principles and standards outlined in Convention No. 102 and Recommendation No. 202.

Abbreviations

BCEA	Basic Conditions of Employment Act
CCOD	Compensation Commissioner for Occupational Disease
CEACR	Committee of Experts on the Application of Convention and Recommendation
COIDA	Compensation for Occupational Injuries and Diseases Act
DOL	Department of Labour
DSD	Department of Social Development
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organization/Office
LRA	Labour Relations Act
NHA	National Health Act
NHI	National Health Insurance Act
ODMWA	Occupational Diseases in Mines and Works Act
OHSA	Occupational Health and Safety Act
PFMA	Public Finance Management Act
RAF	Road Accident Fund
SAA	Social Assistance Act
SADC	Southern African Development Community
SASSA	South African Social Security Agency
SDA	Skills Development Act
UIA	Unemployment Insurance Act
UICA	Unemployment Insurance Contributions Act
UIF	Unemployment Insurance Fund
UN	United Nations
WCA	Workmen's Compensation Act

Introduction

The Constitution of the Republic of South Africa enshrines social security as a right which is guaranteed by the establishment of a compelling legal and institutional framework that establishes a well advanced and developed social security system. South Africa has indeed succeeded, over the past years, in establishing a comprehensive social security system covering the nine classic contingencies set out in Convention No. 102 and offering protection against poverty, vulnerability and social exclusion. A leader in the region, South Africa has achieved relatively high coverage rates due to an inventive mix of contributory (social insurance) and non-contributory (social grants) schemes, well suited to the diversity in patterns of employment and relatively high unemployment rates, and unequal distribution of income and jobs among its population, caused by its unique history. The social security system is tailored to meet the social protection needs of persons experiencing a wide range of personal circumstances and with different contributory capacity.

At the international level, South Africa is playing an increasingly prominent role as witnessed by the high level of involvement of its delegates at the 101st Session of the International Labour Conference (2012) in the process leading to the adoption of the Social Protection Floors Recommendation (No. 202). The country is also imposing itself as an example of “good practices” and exports its expertise in the area of social security to other parts of the world.

In the last years, a profound reflection has been undertaken on the reform of existing contributory provisions, in view of the gaps and shortcomings identified and with the objective of enhancing the protection of persons covered, as well as the efficiency, effectiveness and sustainability of the system. As part of its poverty alleviation programme, the South African Government already operates a number of income support programmes including the old-age grant, the disability grant and the child support grant. These programmes reached 14 million beneficiaries in 2010 compared to 2.6 million beneficiaries in 1997 due to the reform undertaken by the Government. This wider coverage has helped South Africa reduce extreme poverty amongst its population.

However, there are still a number of deficiencies in the system which leave a number of important coverage gaps and which hamper the efficiency of existing modes of protection. With a view to improving the current system, proposals for reforms have been put forward and are currently envisioned by the South African Government. As part of its long-lasting collaboration with the Government and social partners, the ILO is providing advice in the context of the reform, with the standards and principles set out in ILO Conventions and Recommendations concerning social security as key references.

This report has been prepared on the basis of a request from the Department of Labour, with a view to assessing the possibility for South Africa to ratify the flagship ILO Convention in the field of social security, the Convention Concerning Minimum Standards of Social Security, 1952 (No. 102). It contains a detailed legal assessment of existing social security provisions against the requirements of Convention No. 102, and is intended to serve as a reference in view of a possible future ratification of Convention No. 102.

The analysis undertaken therein is meant to give an indication of where the South African social security system and its various branches stand in relation to the benchmarks set out in the Convention, defined with reference to the national context and applied to it. It is not meant to provide an authoritative statement of compliance or non-compliance of the system with the Convention, the competence of which lies with the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the supervisory body in charge of monitoring the application of ILO standards by States following ratification.

Chapter I provides an overview of the main provisions and minimum requirements of ILO social security standards and most particularly those of Convention No. 102, which are used as the benchmarks against which the social security statutory provisions currently in force in South Africa are assessed. This chapter also contains a description of South Africa's social security legal framework and an inventory of the legal provisions establishing and governing the functioning of the various social security schemes in place in the country.

Chapter II examines the compatibility of South Africa's social security legislation and the branches it covers with the minimum standards and principles set out in the respective Parts of Convention No. 102. The analysis was made on the basis of the data available and of the legislation in force at the time of writing.

With regard to the analysis it is important to note at this early stage that one of the key benchmarks specified in the Convention, the wage or earnings of a "standard beneficiary", has proven less straightforward than others to establish. This benchmark is of significance because it is used as the "reference wage" for assessing whether the levels of the benefits provided under the various schemes in place in the country meet the minimum requirements of the Convention. Despite the guidance provided by the Convention as to whom is considered as a "standard beneficiary" – broadly, a person deemed typical of skilled labour for the purpose of assessing earnings-related benefits, and a person deemed typical of unskilled labour for assessing flat-rate and non-contributory benefits². Identifying a beneficiary whose earnings or wages are representative of all persons covered is a difficult task in the current South African context where wide disparities of income exist between the main categories of economic activities and occupations, in some cases more or less equal in size. This report thus takes a pragmatic approach to this question by using as reference wage the weighted average of the earnings of the two groups of (skilled) occupations with the highest number of people to assess the level of the benefits paid by contributory schemes to a "standard beneficiary" against the requirements of the Convention. The assessment of the level of non-contributory benefits (grants) is done on the basis of the average wage of persons in the dominant category of occupation belonging to unskilled labour. Should South Africa wish to move ahead with the ratification of Convention No. 102, the ILO would encourage this issue to be further discussed and analysed at national level.

In Chapter III, the prospects of ratification of Convention No. 102 by South Africa are examined against the background of the compatibility analysis done in Chapter II. Conclusions are drawn as to the Parts of the Convention that are applied by the legislation, and areas which could be improved for greater compliance. Recommendations are then formulated as to the Parts that could be accepted by the Government in the ratification, and as to the way forward.

Convention No. 102 is a key reference in that it envisages social security as being provided through an integrated, comprehensive and coherent system that meets minimum requirements for the protection of beneficiaries and that applies basic principles of good governance. It provides a valuable framework that could be used as a road map and guide South Africa's reform and support efforts to create greater coherence while addressing current gaps in the provision of social security. The ILO is well-prepared to assist the Government in this process and to provide the assistance needed for ratification and implementation of Convention No. 102.

² See Articles 65 and 66 of Convention No. 102 which provide further guidance as to how to identify the typical skilled and unskilled labourers for the purpose of the analysis.

CHAPTER I: THE LEGAL FRAMEWORK: INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, ILO SOCIAL SECURITY STANDARDS AND NATIONAL SOCIAL SECURITY SYSTEM

International legal instruments, and notably ILO Conventions and Recommendations, lay down internationally agreed standards in the field of social security. International social security standards constitute the main references for states when establishing, developing or reforming their social security system through sound policy and legal frameworks. When ratified, ILO Conventions create binding obligations for member States; and if not ratified, they provide guidance and orientations, in the same way as Recommendations do. This chapter provides an overview of their main provisions and minimum requirements, and most particularly those of Convention No. 102, which will be used as the benchmarks against which the social security statutory provisions currently in force in South Africa will be assessed. At the same time, in order to better understand the South African context, this chapter also contains a description of the national social security legal framework and an inventory of the legal provisions establishing and governing the functioning of the various social security schemes in place in the country.

A. The international legal framework

Concern for social security at the international level first manifested itself with the creation of the ILO in 1919. Initially charged with the mandate to promote workers' social security rights, the ILO was later entrusted with a wider task in 1944, that of contributing to achieving the extension of social security to "all those in need". Some years later, social security was recognized by the world community, united in the General Assembly of the newly established United Nations, as an international human right, part of those "basic rights and freedoms to which all humans are entitled". Since then, social security has been explicitly recognized as a human right, and enshrined as such in international legal instruments and standards for its implementation have been formulated in ILO Conventions and Recommendations.

a) *The right to social security in international human rights instruments*

From an international legal perspective, the recognition of the right to social security has been developed through universally negotiated and accepted instruments that establish social security as a basic social right to which every human being is entitled. In this way, the right to social security has been enshrined in several human rights instruments adopted by the United Nations, and is expressly formulated as such in fundamental human rights instruments, namely the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Specifically, Article 22 of the Universal Declaration of Human Rights lays down that:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation 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.

And states in its Article 25 that:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary

social services, and the right to security in the event of unemployment, sickness, invalidity, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”) stipulates in its Article 9 that:

[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

While the Universal Declaration of Human Rights constitutes an unchallenged statement of fundamental human rights, the ICESCR has the quality of a treaty, open for signature and ratification and thus, a means for enforcing these human rights. States’ obligation in the implementation of these rights is one of progressive realization, as they undertake, upon ratification, to take steps towards the full realization of the rights, “to the maximum of their available resources” (Article 2, para. 1).

b) Social security for all: at the core of the ILO’s mandate

The promotion of social security and the furtherance of this right is an important part of the ILO’s mandate, since its foundation in 1919 (ILO, 1919, Preamble and Article 1). From then onwards, the ILO was established as the authority in this field. To this effect, the preamble of the ILO Constitution states that the Organization’s mandate is to improve conditions of labour through, *inter alia*,

the prevention of unemployment, ... the protection of the worker against sickness, disease, and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury.

The ILO’s mandate was widened by the Declaration of Philadelphia, the first international legal instrument to stipulate the right to social security as a right belonging to all, and the first expression of the world community’s commitment to the extension of social security to all. The Declaration of Philadelphia, made part of the ILO Constitution, lays down the:

solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve”, among others, “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”, as well as “provision for child welfare and maternity protection (ILO, 1944, Article III(f) and (h)).

More than 50 years later, in 2001, social security was reaffirmed by the International Labour Conference as a fundamental human right and its extension to all in need was restated as a fundamental part of the ILO’s mandate, and a challenge that needed to be addressed seriously and urgently by all member States (ILO, 2001). Consequently, the ILO launched in 2003 the Global Campaign on Social Security and Coverage for All. The ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference in 2008, again reaffirmed the tripartite commitment to extend social security to all in need of such protection in the framework of the Decent Work Agenda.

The International Labour Conference in 2009 recognized the crucial role of social protection policies in crisis response, and the Global Jobs Pact called for countries to “give consideration, as appropriate, to building adequate social protection for all, drawing on a basic social protection floor”. The High-level Plenary Meeting of the UN General Assembly on the Millennium Development Goals (MDG Summit) in September 2010

recognized that “promoting universal access to social services and providing social protection floors can make an important contribution to consolidating and achieving further development gains” and hence endorsed the social protection floor initiative which the UN Chief Executives Board had launched in 2009.

Regional tripartite ILO meetings in Latin America, Arab States and Asia and the Pacific during 2007 and 2008 discussed social security extension strategies. A generic **two-dimensional extension strategy** emerged, combining the extension of coverage to all through nationally defined social protection floors and the progressive implementation of higher levels of social security through comprehensive systems. This strategy was endorsed by the Yaoundé Tripartite Declaration on the implementation of the social protection floor adopted at the 2nd African Decent Work Symposium in Yaoundé in 2010, and the Chair’s Summary of the Tripartite Meeting of Experts on Strategies for the Extension of Social Security Coverage in 2009.

More recently, the International Labour Conference, in June 2011, adopted a Resolution and Conclusions which set out the strategy of the International Labour Organization with regard to addressing the challenge of extending coverage and further developing social security systems (ILO, 2011a). Based on the premise that social security is a human right, and a social and economic necessity, the ILC noted that closing coverage gaps is of highest priority for equitable economic growth, social cohesion and Decent Work for all women and men, and called for the extension of social security coverage through a two-dimensional approach, with a view to building comprehensive social security systems.

Effective national strategies to extend social security, in line with national circumstances, should aim at achieving universal protection of the population through minimum levels of income security and health care (horizontal dimension) and progressively ensuring higher levels of protection guided by up-to-date ILO social security standards, and notably ILO Convention No. 102 (vertical dimension). In line with national priorities, resources and circumstances, such two-dimensional strategies should aim at building comprehensive social security systems.

The two dimensions of the extension of coverage are consistent with moving towards compliance with the requirements of the **Social Security (Minimum Standards) Convention, 1952 (No. 102)**, and are of equal importance and should be pursued simultaneously where possible (ILO, 2011b, paras 8 and 9).

In order to strengthen the normative basis of the extension of social security, the ILC concluded that there was a need for a new international labour standard in the form of an autonomous Recommendation on this subject to provide flexible but meaningful guidance to member States in building national social protection floors within comprehensive social security systems. Accordingly, the **Social Protection Floors Recommendation, 2012 (No. 202)** was discussed and adopted by the ILC in June 2012.

c) Main ILO social security standards

The ILO, in the pursuit of its mandate in the field of social security, and in its capacity as the responsible UN agency, has over the years adopted a range of standards, namely Conventions and Recommendations, laying down concrete obligations and guidelines for States to implement this right.

Historically and conceptually, social security standards can be classified into three different groups or generations of standards, according to the approach of social security that they embodied at the time of their adoption.

The first generation of standards corresponds to the instruments adopted since the creation of the ILO until the end of the Second World War. These standards are aimed at establishing compulsory social insurance systems for specific branches and at covering the principal sectors of activity and the main categories of workers.

The second generation of standards corresponds to the era of social security. The new approach consisted in unifying and coordinating the various social protection schemes within a single social security system covering all contingencies and extending social security coverage to all workers. This new conception is reflected in the flagship social security Convention, namely the Social Security (Minimum Standards) Convention, 1952 (No. 102).

The third generation of standards corresponds to the instruments adopted after Convention No. 102. Modeled on the latter, they offer a higher level of protection in terms of the population covered and the level of benefits and revise first-generation standards.

The adoption of the new Social Protection Floors Recommendation, 2012 (No. 202) marks the beginning of a new phase in ILO social security standard-setting, which could be referred to as “universal social security coverage and comprehensive systems” (2012-). Recommendation No. 202 envisages the development of comprehensive social security systems and the extension of coverage. It is the first ILO standard that sets forth as its priority objective the provision of basic levels of social security, i.e. essential health care and basic income security, to all members of society, with a view to realizing the human right to social security and to progressively ensure higher levels of protection. Recommendation No. 202 also complements existing standards by providing guidance on how to cover the unprotected, the poor and most vulnerable, including workers in the informal economy and their families. In this way, it addresses poverty, vulnerability and social exclusion as “contingencies”. It further envisages a systemic approach to social security that should be reflected in national social security extension strategies seeking to close gaps in basic protection and raise levels of protection, with explicit linkages to more advanced ILO social security standards and notably Convention No. 102 which should serve as a reference for such purposes.

Since the establishment of the ILO, the International Labour Conference has adopted 31 Conventions and 23 Recommendations on social security. In 2002, the ILO Governing Body confirmed six out of these 31 Conventions as up-to-date social security Conventions. These are listed in the Table 1 below:

Table 1. List of the main up-to-date ILO social security standards

<ul style="list-style-type: none"> - Income Security Recommendation, 1944 (No. 67) - Medical Care Recommendation, 1944 (No. 69) - Social Security (Minimum Standards) Convention, 1952 (No. 102) - Equality of Treatment (Social Security) Convention, 1962 (No. 118) - Employment Injury Benefits Convention, 1964 (No. 121) - Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128) - Medical Care and Sickness Benefit Convention, 1969 (No. 130) - Maintenance of Social Security Rights Convention, 1982 (No. 157) - Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) - Maternity Protection Convention, 2000 (No. 183) - Social Protection Floors Recommendation, 2012 (No. 202)

Source: www.ilo.org

d) Short overview of the minimum standards and basic principles laid down in Convention No. 102

Convention No. 102 is the flagship of the six up-to-date ILO social security Conventions. It is the only international Convention which defines the nine classic branches of social security and sets minimum standards for each branch. Therefore, it is now widely considered as the key reference for the establishment of comprehensive social security systems. The nine branches for which Convention No. 102 makes provision are: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

The **minimum standards** are set for each contingency with regard to:

- ***minimum percentage*** of the population protected in case of occurrence of one of the contingencies;
- ***minimum level of benefits*** to be paid in case of occurrence of one of the contingencies, and
- ***conditions for and periods of entitlement*** to the prescribed benefits.

Table 2 displays the minimum legal requirements of Convention No. 102 in relation to cash benefits to be provided under the different social security branches.

Table 2. Legal Requirements of Convention No. 102 - Cash Benefits

Convention No. 102	Minimum Standards			
Social Security Branches	Coverage	Minimum Benefit	Duration of Payment of Benefits	Entitlement Conditions
Sickness benefit	<ul style="list-style-type: none"> - At least 50 per cent of all employees; or - Economically active population constituting at least 20 per cent of all residents; or - All residents with limited means 	45% of reference wage	Benefit has to be granted for at least 26 weeks in each case of sickness	<p>Possibility to prescribe qualifying period; but no longer than necessary to preclude abuse;</p> <p>Possibility to establish waiting period of 3 days</p>
Unemployment benefit	<ul style="list-style-type: none"> - At least 50 per cent of all employees; or - All residents with limited means 	45% of reference wage	Benefit has to be granted for at least 13/26 weeks, within period of 12 months	<p>Possibility to prescribe qualifying period; but no longer than necessary to preclude abuse.</p> <p>Possibility to establish waiting period of 7 days</p>
Old-age benefit	<ul style="list-style-type: none"> - At least 50 per cent of all employees or - Economically active population constituting at least 20 per cent of all residents, or - All residents with limited means 	40% of reference wage	Pension has to be paid until death	Prescribed age: not more than 65 years; possibility of fixing higher age with due regard to working ability of elderly persons in country; pension of 40% has to be paid after qualifying period of 30 years of contributions/ employment or 20 years of residence; reduced pension to be paid after 15 years of contributions/employment
Employment injury benefit	<ul style="list-style-type: none"> - At least 50 per cent of all employees and their wives and children 	50% 50% 40% of reference wage	<p>Possibility of converting pension into a lump sum where</p> <p>(1) the degree of incapacity is slight or</p> <p>(2) the competent authority is satisfied that the lump sum will be properly utilized</p>	<p>Benefit has to be granted from first day of the occurrence of the employment injury;</p> <p>Benefit must be granted at least to a person having been employed in the territory at the time of the accident</p>
Temporary invalidity				
Permanent invalidity				
Family benefit	<ul style="list-style-type: none"> - At least 50 per cent of all employees; or - Economically active population constituting at least 20 per cent of all residents; or - All residents with limited means 	3% or 1.5% of reference wage	In case of periodical payment it shall be granted at least until child reaches school-leaving age or age 15	Possibility of prescribing a qualifying period, either not more than 3 months of contribution or employment, or one year of residence

Maternity benefit	<ul style="list-style-type: none"> - At least all women in prescribed classes, constituting not less than 50 per cent of all employees; or - All women in prescribed classes of the economically active population, constituting not less than 20 per cent of all residents 	45% of reference wage	Cash benefit has to be granted for at least 12 weeks, unless a longer period of absence from work is required/ authorized by national legislation	Possibility to prescribe qualifying period; but no longer than necessary to preclude abuse
Invalidity benefit	<ul style="list-style-type: none"> - At least 50 per cent of all employees; or - Economically active population constituting at least 20 per cent of all residents; or - All residents with limited means 	40% of reference wage	Benefit is to be granted throughout the contingency or until old-age benefits become payable	Pension of 40% of reference wage has to be paid at least after completion of a qualifying period of 15 years of contribution/ employment or 10 years of residence; reduced benefit to be paid after 5 years of contributions/ employment
Survivors' benefit	<ul style="list-style-type: none"> - At least wives and children of employees constituting not less than 50 per cent of all employees; or - Wives and children of breadwinners in prescribed classes of the economically active population, constituting not less than 20 per cent of all residents; or - All resident widows and resident children with means below certain limit 	40% of reference wage	Benefit has to be granted throughout contingency	Pension of at least 40% of reference wage has to be paid at least after a qualifying period of 15 years of contribution/ employment or 10 years of residence; reduced benefit to be paid after 5 years of contributions/ employment; In case of a widow, the right to benefit may be made conditional on her being presumed to be incapable of self-support (due to e.g. advanced age, invalidity or caring for child of deceased)

These minimum standards should be reached by the application of the following basic social security principles anchored in Convention No. 102, which have to be complied with irrespective of the type of scheme established. These are the:

- ***general responsibility of the State for the due provision of the benefits and the proper administration of the scheme***, which requires that the social security system be based on a proper legal framework, and that the sustainability of the systems be ensured through regular actuarial valuations;
- ***collective financing of social security schemes***, in a manner which avoids hardship for people of small means, where the total of contributions paid by workers must not exceed 50% of the total resources of the scheme;
- ***guarantee of defined benefits by the State***,
- ***adjustment of pensions in payment***,
- ***right of appeal in case of refusal of the benefit or complaint as to its quality or quantity***.

Convention No. 102 contains a number of clauses which allow member states a certain degree of flexibility in reaching its objectives. This is done first by allowing ratifying States to accept as a minimum three out of the nine branches of social security, with at least one of those three branches covering a long-term contingency or unemployment and with a view to extending coverage to other contingencies at a further stage (Article 2). In addition, the scope of personal coverage under Convention No. 102 provides alternatives that take into account differences in the employment structure and in the socioeconomic situation of member States, as well as between the different categories of residents within a State. Hence, for each branch accepted the Convention gives member States the possibility to cover only a certain proportion of their population. Furthermore, in the implementation of social security branches it allows member States whose economy and medical facilities are insufficiently developed to make use of temporary exceptions relating, for example, to the proportion of people covered (Article 3). The Convention also provides for flexibility as to the type of schemes member States may establish for implementation of the Convention and to reach its objectives. Such objectives can be reached through: non-contributory (universal or means-tested), or contributory social insurance schemes (with earnings-related or flat-rate components or both), or a combination of both.

e) *Relevance of Convention No. 102*

As already mentioned, amongst the up-to-date social security Conventions, the most prominent is Convention No. 102. It is the only international Convention which defines the nine classic branches of social security that are internationally accepted, sets minimum standards for each and lays down standards and principles for the sustainability and good governance of those schemes. Convention No.102 is deemed to embody an internationally accepted definition of the very principle of social security. It also provides guidance and a framework for establishing comprehensive social security systems.

Over the years, Convention No. 102 has had, and continues to have, substantial influence on the development of social security in various regions of the world. In fact, “many developing countries, inspired by the Convention, have embarked upon the road to social security” (ILO, 2011c, para 81). Moreover, as noted by the ILC, “several member States currently implementing successful and innovative social security extension policies have recently ratified Convention No. 102 and others have indicated their intention to do so” (2011a, para. 28). Convention No.102 has also provided the blueprint for the European Code of Social Security and a main reference for the elaboration of the Code on Social

Security in the Southern African Development Community which in its article 4.3 requires that every member State maintain its social security system at a satisfactory level at least equal to that required for ratification of Convention No.102.

The uniqueness and relevance of Convention No. 102, as underlined by the ILO constituents, is therefore undeniable.

f) *Importance of ratification of Convention No. 102*

There are many advantages for a state to ratify Convention No.102. Firstly, in periods of reform, such as the case of South Africa, the ratification of Convention No. 102 can give a particular strong signal to society and social partners of the state's commitment to comply with minimum social security standards, whatever design the social security system retains. Convention No. 102 can thus facilitate the social dialogue process by becoming an integral component (in terms of the standards, benchmarks and principles) of social security reform.

Moreover, Convention No. 102 can serve as a road map for social security reform. This Convention is a key reference in that it envisages social security as being provided through an integrated, comprehensive and coherent system. This is of particular importance for South Africa since it has many components of a comprehensive social security system and is seeking to streamline these and create greater coherence while addressing current gaps in the provision of social security.

South Africa's Constitution enshrines social security as a right which has been guaranteed by the establishment of a compelling legal and institutional framework. However, the requirements of Convention No. 102 can serve to complete the existing framework by reinforcing the technical parameters of existing schemes, thereby ensuring that minimum standards are met, in terms of scope, level of benefits, the financial sustainability of social security schemes and good governance.

The ratification of Convention No. 102 would also be an important step for South Africa in giving effect to Recommendation No. 202 which states that Member States should consider giving effect and ratifying Convention No. 102 as early as national circumstances allow. member States are strongly encouraged to ratify the Convention since it sets the minimum standards to progressively achieve the vertical extension of social security and effectively implement a coherent social security system. Just as other BRICS, South Africa can demonstrate through the act of ratification that it has the political will to complete the effective implementation of coherent social security systems as part of their national development policies, in line with Recommendation No. 202.

In general terms, ratification of Convention No. 102 is also recognized for bringing about the following advantages:

A path to decent work, strategy for reducing poverty and contribution to the Millennium Development Goals

Primarily, once ratified and implemented through law and applied in practice, Convention No. 102 can **contribute greatly to decent work and poverty alleviation by providing for adequate minimum levels of benefits for the nine classic social security contingencies** which are designed to guarantee the replacement of former earnings as well as access to medical care. As highlighted by the ILC in the ILO's strategy for the extension of social security (2011), Convention No. 102 "sets out principles that guide the design, financing, governance and monitoring of national social security systems (... and which) continues to serve as a benchmark and reference in the gradual development of comprehensive social security coverage at the national level" (ILO, 2011a, para. 28).

An international legal framework for fair and stable globalization and for ensuring a level playing field

One of the most important features of the Convention is that it lays down the basic minimum social standards agreed upon by all players in the global economy. Therefore, an international legal framework based on these standards ensures a level playing field. It acts as a safeguard of workers' and their families' rights; and overall, it enhances countries' competitive advantage in international trade by ensuring decent conditions for its workforce and therefore more productive work. Studies have shown that in their criteria for choosing countries in which to invest, foreign investors rank workforce quality and political and social stability highest among decisive factors.³ International experience proves that ILO social security Conventions, and Convention No. 102 more particularly, serve as a means for preventing the levelling down of social security systems worldwide as they constitute benchmarks for assessing whether their requirements have been reached and contribute to the creation of a worldwide level playing field for social conditions.

By ratifying Convention No. 102, a country thus contributes to the establishment of a global level playing field that prevents the downgrading of the application of standards and unfair competition by a "race to the bottom" leading to lower protection, below the minimum levels set out in Convention No.102.

Tools for policy and legal action

International labour standards also serve as *targets for harmonizing national law and practice* in a particular field. The standards therefore represent worldwide agreed guidelines for national social policies. Since its adoption Convention No. 102 has had and continues to have a strong influence on the design and development of formal social security systems worldwide; more than 50 years after its adoption, it still constitutes the reference for the establishment and reform of social security systems globally and is thus considered as a symbol. It has adapted well to changing perceptions and practices in social security policies and programmes because it focuses on outcomes, whilst leaving room for the determination of the mechanisms to attain them, to be defined at national level.

Social security frameworks act as social and economic stabilizers in times of crisis

The social impact of financial and economic crises on workers and their families can be mitigated by social security, by way of its automatic income replacement functions and measures, i.e. unemployment benefit scheme and cash transfers which act as safeguards against poverty and health care protection. By ratifying Convention No. 102, a country undertakes to implement minimum social security standards through a legal framework; this ensures that the minimum standards of social security provided in compliance with Convention No. 102 are maintained at all times. Convention No. 102 therefore acts as a powerful tool for the maintenance of worldwide agreed minimum standards of social security at the national level (and therefore preserving decent standards of living and the health of its people) and for preventing countries from backsliding and suffering from long-term social consequences of the crisis.

³ See McKinsey Global Institute. 2012. *Africa at work: Job creation and inclusive growth*, particularly Exhibit 18 p. 40 and Exhibit 19 p.41, for the case of South Africa. Main obstacles to growth and job creation cited by Employers in South Africa are, in order: macroeconomic conditions and instability, limited access to finance, high costs to operate (excluding wages and including electricity, transport, and water), political instability, and insufficient skills.

In this regard, the ratification of Convention No. 102 and its application in practice will also enhance the confidence of insured persons in the scheme, in the national social security administration, and in the political system of the country in general.

It must also be noted that the ILO disposes of a unique supervisory system that aims, primarily, at ensuring the application of Conventions by member States following ratification. Based on communication and dialogue, the supervisory process allows the identification of compliance gaps and the provision of targeted technical assistance to help States overcoming obstacles in implementation. It also allows workers' and employers' organizations to comment on the reports that Governments of ratifying States have to submit at regular intervals to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the supervisory body in charge of assessing compliance.

A basis for technical assistance

When a member State has ratified Convention No. 102, it may benefit from the vast experience of the ILO in the field of social protection and from the provision of technical assistance. This is of utmost importance where a country is facing an ageing population or in the context of a crisis when existing social security systems reforms aim at the reduction of expenditures.

The technical assistance which the ILO offers ranges from setting up new social security systems, adapting existing schemes, and reforming entire social security systems. It includes policy advice, actuarial valuations and studies, advice on the collection of data and assistance for the drafting of legislation.

A tool for the improvement of social security governance, administration and services and increased confidence in the system

Convention No. 102 lays down basic principles for the sound governance and proper administration of social security (e.g. government's responsibility in securing the necessary financing for the benefits at least at the levels stipulated by the Convention and periodical actuarial review of contributions and benefit Schedule, and tripartite representation in administration, among others). These principles, when taking a legal form, together with the technical assistance which is provided by the ILO following ratification provide a solid basis for the establishment or reform of social security institutions and increase these institutions' accountability and therefore, acceptance by the public. This, in turn, increases the public perception of the legitimacy of the social security institutions and boosts "contribution compliance" "morale".

A commitment to Convention No. 102 and to these principles, expressed by the act of ratification, enables the provision of regular and sustainable benefits and the sound governance of institutions, thus enhancing insured persons' confidence in the social security system, in the national social security administration and in the political system of a country in general. Convention No. 102 can thus serve as a guiding instrument to improve aspects of South Africa's existing social security system where gaps remain.

Convention No. 102 as a tool for the progressive implementation of social security and the extension of coverage

Convention No. 102 is considered as a tool for the extension of social security coverage, and provides ratifying countries with an incentive for doing so by offering flexibility in its application, depending on the socio-economic level of the countries. As mentioned above, this is done through *flexibility clauses* allowing ratifying member States to gradually attain universal coverage. Based on the notion that each country should have the discretion to determine how best to ensure its income security, thereby reflecting in its choices its social and cultural values, history, institutions and level of economic development, the

Convention fixes a set of objectives or standards based on commonly agreed principles that constitute a socially acceptable minimum for all member States. It thus prescribes certain minimum requirements to be observed by ratifying States while aiming at the progressive realization of a more comprehensive protection, both in terms of the number of contingencies covered and of persons protected.

A tool that provides the flexibility required to address new trends in the labour market and a new social security policy paradigm

With respect to the adoption of policies aimed at establishing a *new balance between expenditure and income in pension schemes*, Convention No. 102 offers a range of options to ratifying States. With respect to *changes in retirement age*, Convention No. 102 sets out that “the prescribed age shall be not more than 65 years or such higher age as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned” (Article 26, paragraph 1). It is obvious that the working ability of the insured persons depends on their individual health situation. In light of this provision, Convention No. 102 does not oppose reforms giving insured persons the right to retire earlier with a reduced level of pension if the reduction factor is suitable. Convention No. 102 further stipulates that the minimum pensions levels have to be maintained throughout the contingency and that they shall be reviewed “following substantial changes in the general level of earnings where these result from substantial changes in the cost of living” (Articles 65, paragraph 10, and 66, paragraph 8, of Convention No. 102).

Towards the ratification of Convention No. 102 by South Africa?

When ratifying Convention No. 102, a country demonstrates to the international community and to its population that it accepts and is willing to apply the minimum standards and basic principles laid down in the Convention. This is particularly true when a country becomes the forerunner in its region, as the first one to ratify an international Convention. There is currently no southern African country that has ratified Convention No. 102. Thus, South Africa has the opportunity to become a model and an example for other southern African and African countries to follow by ratifying, and applying, a key technical ILO Convention.

To date, 48 countries have ratified Convention No. 102 and several other countries have demonstrated a strong interest in doing so.⁴ In recent years, the ratification of Convention No. 102 was of particular importance for countries undergoing political change or comprehensive labour market reforms including Brazil (2009), Bulgaria (2008), Romania (2009) and Uruguay (2010). For South Africa, as the analysis undertaken in this report demonstrates, Convention No. 102 has a huge potential to serve as a catalyst for improvement of the current system through the reform of existing schemes and extension of coverage.

B. The social protection system of South Africa

a) General overview

South Africa’s current social security system is reasonably comprehensive by middle-income country standards. The system is comprised of an extensive social assistance

⁴ For detailed information on the ratification of Convention No. 102, see: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247:NO

programme and a number of social insurance programmes, and is underpinned by an entrenched Constitutional right to social security.

Although the new democratic government inherited a social security system aimed at the white minority population “that was fragmented, inequitable and administratively inefficient” (Liebenberg, 2006, p. 70), the current South African Constitution is characterised by a broad-ranging Bill of Rights, which includes socio-economic and environmental rights. The right to social security is entrenched as one of the socio-economic rights provisions contained in Sections 26 and 27 of the Constitution. Section 26(1) provides the right of everyone “to have access to adequate housing”, and Section 27(1) the right of everyone “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 dependents, appropriate social assistance.” These first subsections of Sections 26 and 27 respectively are qualified by a second subsection, which reads: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.”

All these rights are enforceable by the Courts, and the Courts have a wide discretion to grant “just and equitable” remedies. The Constitution places an overarching obligation on the state to “respect, protect, promote and fulfill the rights in the Bill of Rights”,⁵ which means that all the rights in the Bill of Rights impose a combination of negative and positive duties on the state. The Constitutional Court has developed a substantial body of jurisprudence on the obligations imposed by the socio-economic rights provisions in the Constitution although it has yet to delve into the scope and content of the right to social security pursuant to Section 27(1)(c).⁶

As pointed out earlier, the current social security system is comprised of a comprehensive social assistance programme and a number of social insurance programmes. Each will now be discussed in turn (social assistance in part b; and social insurance in part c). This will be followed by a brief overview of current proposals for reform of the South African social protection system (part d). Finally, the distinct South African legislative scheme applicable to each of the branches of social security contained in Convention No. 102 will be succinctly summarised (in part e), then each social security contingency will be analysed in Chapter II of this report.

b) Social assistance

Social assistance takes the form of social grants, which are paid according to the terms of the Social Assistance Act 13 of 2004. The four main social grants are the grant for the aged, the grant for the disabled, the foster child grant, and the child support grant.⁷

Numerous studies indicate that the system of social grants have contributed significantly to reducing overall poverty and (income) inequality. As a recent report noted, “Not only do

⁵ Section 7(2) of the Constitution.

⁶ For an overview, see Dupper, O. 2012. “The Role of Law and Legal Institutions in Reform of Social Protection Systems: Experiences from South Africa” in K. Bender and M. Kalternborn (eds): *Reforming Social Protection in Developing Countries: Determinants and Strategies of Institutional Change* (Kluwer 2012, forthcoming).

⁷ The other grants are the war veterans grant, the care dependency grant, grant-in-aid, and social relief of distress. See <http://www.sassa.gov.za/> [last accessed on 4 March 2012].

the grants have a significant impact on poverty (at the lower poverty line) but they also make a significant impact on inequality... (T)he Gini coefficient on “pre-grant” income is 0.03 higher than when calculated on either reported income or simulated income” (Leibbrandt, 2010, p. 66).⁸

The positive attributes of social transfers have been confirmed and evidence suggests that they constitute an effective tool to prevent and fight poverty (Caracciolo, 2010). It suggests, in particular, that social assistance transfers increase domestic demand and encourage growth by expanding domestic markets (Govindjee, 2011, p. 779). In addition, there is also evidence that indicates that households receiving grants are more likely to send their children to school and provide better nutrition and health care for their children (Leibbrandt, 2009).⁹

While the assimilation of more people into the labour market is at the heart of South Africa’s poverty reduction strategy, there remains a need for programmes that provide income support to the unemployed and people that are unable to work. Social assistance cash grants provide income support to people whose livelihoods are most at risk.¹⁰ The number of grant recipients has increased significantly during the past 15 years, partly because social welfare was previously targeted mainly at white recipients (Pauw, 2007, p. 2). Grants are generally well targeted and mostly reach the poorest of the poor (Bhorat, 2009, p. 44). For example, 62 per cent of social grants go to the poorest 40 per cent of households and 82 per cent to the poorest 60 per cent (South African Presidency, 2008, p. 19). Almost 15 million South Africans (nearly a quarter of the population) benefit from one grant or another (National Treasury, 2012, p. 85).

In general, there are two major factors that may limit the development of social assistance schemes. On the one hand, in many developing countries tax collection is a serious development problem. On the other hand, if the benefit is to be based on the application of an income or means test, it may be difficult to administer with equality and efficiency. On both these fronts, South Africa provides a counterweight to conventional wisdom. First, it has a well-functioning and sustainable tax base allowing for fiscal planning and redistribution of resources towards social spending (Leibbrandt, 2009). Tax collection has undergone a remarkable transformation since 1994. As Budlender writes:

An important factor in understanding revenue issues in the post-apartheid period is the remarkable performance of the South African Revenue Services (SARS). Not only was SARS able to restructure itself from a moribund apartheid institution lacking any legitimacy among the population, but the agency has also significantly improved tax administration and tax

⁸ For confirmation of these findings, see Bhorat, H; Van Der Westhuizen, C.; Jacobs, T. 2009. “Income and Non-Income Inequality in Post-Apartheid South Africa: What Are the Drivers and Possible Policy Interventions?”, *Development Policy Research Unit (DPRU) Working Paper 09/138*, pp. 44 ff.

⁹ Also see Woolard, I.; Harttgen, K.; Klasen, S. 2010. “The Evolution and Impact of Social Security in South Africa”, paper prepared as a background paper for the conference on “Promoting Resilience through Social Protection in Sub-Saharan Africa”, Dakar, Senegal, 28-30 June, 2010, p.24. Available at <<http://erd.eui.eu/media/BackgroundPapers/Woolard-Harttgen-Klasen.pdf>> [last accessed on 3 March 2012].

¹⁰ On the positive impact of social grants on work-seeking behaviour and employment, see Department of Social Development (South Africa). 2008. *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security*, Discussion Paper, p. 11; Samson, M. 2009. “Social Cash Transfers and Employment: A Note on Empirical Linkages in Developing Countries” in *Promoting Pro-Poor Growth: Employment*, p. 179.

morality in South Africa. SARS tax collections have repeatedly exceeded government targets, opening up the possibilities for increased social expenditures (Budlender, 2009, p. 6).

Thus, while tax rates remained virtually unchanged since 1994, more efficient tax collection together with a broadening of the tax base has enabled the government to increase spending on the poor.

As far as administration of social assistance is concerned, the implementation of the means test per se does not seem to function as a major barrier to poor households who are eligible for social grants, but it does constitute a poverty or informality trap, beyond the threshold level, as beneficiaries may tend to forego or under-report earnings above the means test for fear of losing benefits.

However, most important blockage comes from the fact that enrollment in social grants is contingent on the presentation of civil registration which can mean significant exclusions from benefits. For example, in a recent study UNICEF estimated an exclusion error of around 20 per cent, which means that 20 per cent of all households eligible for the grant are not benefiting.¹¹

The share of administrative costs – although it still remains at a relatively high level – has also decreased over time.¹²

The post-apartheid government has been very active in reforming and expanding the system of social grants. A key aspect of the post-apartheid fiscal expenditure patterns has therefore been a *widening* and *deepening* of South Africa's social security system (Bhorat, 2009). While spending on budget items such as education and health has remained fairly constant in real terms, consolidated expenditure on social assistance has increased from 30.1 billion South African Rand (ZAR) (3.2 per cent of GDP) in 2000-01 to ZAR101.4 billion (4.4 per cent of GDP) in 2008-09 (Leibbrandt, 2009). However, since then, consolidated expenditure has continued to increase although it has remained relatively stable as a percentage of GDP (around 3.4 per cent) (National Treasury, 2012, p. 87). Currently, just over 2.7 million people receive the old-age grant, close to 11 million children benefit from the child support grant, and 1.2 million people are in receipt of the disability grant (National Treasury, 2012, p. 85). It is estimated that the number of grant recipients will increase from 15.6 million in 2011-12 to 16.8 million in 2014-15 (National Treasury, 2012, p. 84). As Seekings notes, "(i)n no other country in the South does social assistance cover such a wide range of circumstances, reach so many of its citizens or cost so much in relation to GDP" (2006, p.6).

Acknowledgement of the reality of resource constraints to the expansion of social assistance has resulted in increasing policy-focus being placed upon contributory social security arrangements, since these arrangements seek to draw from a reasonable proportion

¹¹ As cited in Woolard, I.; Harttgen, K.; Klasen, S. 2010. "The Evolution and Impact of Social Security in South Africa", paper prepared as a background paper for the conference on "Promoting Resilience through Social Protection in Sub-Saharan Africa", Dakar, Senegal, 28-30 June, 2010, p. 17. Available at <<http://erd.eui.eu/media/BackgroundPapers/Woolard-Harttgen-Klasen.pdf>> [last accessed on 3 March 2012].

¹² From about 7 per cent in 2006-7 to about 6 per cent in 2009-10. See Woolard, I.; Harttgen, K.; Klasen, S. 2010. "The Evolution and Impact of Social Security in South Africa", paper prepared as a background paper for the conference on "Promoting Resilience through Social Protection in Sub-Saharan Africa", Dakar, Senegal, 28-30 June, 2010, p. 29. Available at <<http://erd.eui.eu/media/BackgroundPapers/Woolard-Harttgen-Klasen.pdf>> [last accessed on 3 March 2012].

of individual or family income and do not place a direct strain on the availability of state resources (Department of Social Development, 2008, p. 4).¹³

There is however an important gap in South Africa's social security system: the exclusion of the structurally or the long-term unemployed from social security coverage. There is no social assistance grant that particularly targets persons who have either exhausted their (limited) unemployment insurance benefits, or those who have never been formally employed and thus never contributed to the social insurance system.¹⁴ Structurally employed youths and adults receive limited or no support from the existing social assistance framework (Department of Social Development, 2008, p. 8).¹⁵ In addition, as will be illustrated, the existing unemployment insurance framework is inadequate and insufficient for purposes of addressing the plight of this group.

c) Social insurance

Since the mid-1970s, a substantial part of the urban workforce in the formal sector has been covered through the Unemployment Insurance Fund (UIF) and by extension the Unemployment Insurance Act (UIA).¹⁶ Those excluded from its coverage were categories of workers outside of the formal sector, such as agricultural labourers, seasonal workers, domestic workers and other workers in the informal economy. Government employees, and those earning an income at a threshold determined by the earnings of a skilled manual worker (in South Africa, a "white" skilled worker) were also excluded. In addition, exclusion was based either on grounds of security of tenure (government employees) or of a low propensity to become unemployed (workers "above" the grade of skilled worker). Mineworkers in South Africa were admitted to the UIF in 1988 and agricultural workers formally employed in 1994.¹⁷

¹³The proposed National Retirement and National Health Insurance Systems are examples of this mindset, and will be discussed in more detail in Part B, section d) of this chapter.

¹⁴ Although social grants cover those under the age of 18 and those over the age of 60 who are unable to support themselves, as well as all disabled persons, adults between the age of 19 and 59 who are not disabled are effectively not entitled to any social assistance – even when they are unable to support themselves.

¹⁵ Also see Government of the Republic of South Africa. 2011. *Decent Work Country Programme*, p. 9. The main source of income for this group of people is indirect, meaning that they rely on the labour incomes of other household members or, through a process known as "benefit dilution", rely on social grants received by other household members (in particular the old-age pension and the child support grant). It has been pointed out that reliance on such private safety nets can generate disincentive effects that can prolong unemployment, including low labour-market mobility and the reduction of job-search activities: See Klasen, S.; Woolard, I. 2008. "Surviving Unemployment Without State Support: Unemployment And Household Formation In South Africa" 18(1) *Journal Of African Economies*, p. 17.

¹⁶ Prior to that the UIF excluded most African workers – see Committee of Inquiry into a Comprehensive System of Social Security for South Africa. 2002. *Transforming the Present – Protecting the Future. Draft Consolidated Report. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March 2002).

¹⁷This paragraph is taken from Committee of Inquiry into a Comprehensive System of Social Security for South Africa. 2002. *Transforming the Present – Protecting the Future. Draft Consolidated Report. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March 2002).

While the UIA has extended its scope of coverage over time, exclusion and marginalization in the unemployment insurance system persist. The reality is that the UIF currently only covers about 10 per cent of South Africa's unemployed (Leibbrandt, 2009, p. 36). This is due to three main reasons. In the first place, the current maximum benefit period under the UIA is 238 days.¹⁸ Studies indicate that almost half (44 per cent) of the unemployed with previous work experience have been unemployed for more than a year, which means that they would have exhausted their benefits if they were ever eligible for them (Leibbrandt, 2009, p. 36). Secondly, slightly more than half (55 per cent) of those unemployed report that they have never worked and have thus not contributed to the UIF (Leibbrandt, 2009, p. 36). Finally, the UIF continues to exclude certain categories of workers from coverage, most notably the atypically employed, particularly independent contractors, so-called dependent contractors and those who are self-employed or informally employed; public servants in the national and provincial spheres of government; learners; and certain categories of migrant workers (Dupper, 2010, pp. 448-459). Thus, while the UIF clearly has an important role to play in providing replacement income to the short-term unemployed with work experience, the vast majority of the unemployed fall outside of this system. This lacuna has resulted in attention being thrust upon the need for some form of non-contributory unemployment assistance in South Africa.

South Africa's occupational injuries scheme operates as a public compensation fund, funded by employers based on a risk-assessment. The Compensation for Occupational Injuries and Disease Act (COIDA) covers "employees" as defined, which definition expressly includes those who work under an apprenticeship or learnership, as well as casual employees. However, it nevertheless excludes a large number of people from coverage, most notably domestic workers as well as those involved in non-standard forms of work such as the informally employed, the self-employed and so-called dependant contractors. As pointed out above, domestic workers have now been included under the unemployment insurance system, and are also covered by the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA). This makes their exclusion from COIDA questionable (and possibly unconstitutional).

South Africa does not (yet) have a national or public retirement fund scheme. Current arrangements for income security in old age have been described as follows:

There is a large private pensions sector, built on a well-established legal framework, sophisticated institutions and deep financial markets. The regulatory framework within which private pensions operate is broadly consistent with international standards.¹⁹ Even in the absence of compulsory contributions, coverage levels amongst the formally employed are comparatively high. For those who reach retirement age without a funded pension benefit, the social old age grant provides an assured minimum monthly income (National Treasury, 2007, p. 2).

In the absence of a national retirement fund scheme, occupational private retirement funds have therefore become the preferred method through which workers ensure financial support in their old age. However, because it is mostly limited to workers in the formal economy, coverage is inevitably incomplete. Even within the formal economy, it is estimated that about 80 per cent of workers are covered by retirement funds. Those excluded from coverage tend to work for smaller employers as well as employers in the domestic and agricultural sectors. Workers in the informal economy generally earn too

¹⁸ Section 13(3) of the UIA provides that unemployment insurance benefits accrue at a rate of one day's benefit for every completed six days of employment as a contributor subject to a maximum accrual of 238 days' benefit.

¹⁹ Note that the international standards referred to here are not ILO standards.

little to make contributions to retirement funds, and most rely on the government disability and old-age grants for insurance and retirement cover.

There is also currently no legal compulsion to belong to a retirement fund (even though many employers make membership a condition of employment) and there is also no legal obligation on members of retirement funds to preserve and transfer contributions and entitlements should they, for example, change their employers or resign or be dismissed. In other words, they may spend these benefits that they withdraw from their retirement funds as they see fit and are not forced to transfer the benefit to their new employer's retirement fund or to transfer it into a retirement annuity of their choice. This may increase the risk of their reliance on the state's old-age grant when they reach retirement age.

South Africa's current health care system essentially consists of two distinct and separate systems, namely a highly resourced private sector serving a minority of the population (approximately 16 per cent), and an under-resourced (both in terms of financial and human resources) public sector serving the majority of the population (approximately 84 per cent). The public sector has disproportionately less human resources than the private sector, yet it has to manage much larger patient numbers. Those who have access to the private system do so mainly through membership of medical schemes, hospital care plans and out of pocket expenses. In essence, it only benefits those who are employed and subsidized by their employers (whether the employer is the State or in the private sector). On the other hand, the majority of the population relies on the public health system, which is funded through the budget (general taxes) and – as already pointed out – is under-resourced relative to the size of the population that it serves. The public health system provides free primary health care and exempts the poor from hospital fees (Kautzky, 2008, p. 27).

While South Africa spends far more than other middle-income countries on health care (8.5 per cent of its GDP), the health-outcomes have been comparatively poor primarily because of the inequities between the public and the private sector. The private sector absorbs an estimated 62 per cent of national health expenditure providing medical care to approximately seven million people, while the public sector absorbs only 38 per cent and provides for an estimated 41 million (Wasserman, 2010, p. 52).

d) Current reform proposals:

Social assistance

As indicated earlier, the social assistance system has an extensive reach in South Africa, with almost 15 million beneficiaries (25 per cent of the population). Nonetheless, the major gap in South Africa's system is the fact that there is no basic social protection guarantees for the structurally or the long-term unemployed. In other words, there is no social assistance grant that particularly targets persons who have either exhausted their limited unemployment insurance benefits, or those who have never been formally employed and thus never contributed to the social insurance system.

In this regard, the Department of Social Development (DSD) has proposed the following to address this lacuna in the system. For unemployed "adults" who have never been in formal employment, and consequently have never qualified for unemployment insurance, a conditional social assistance grant is proposed at a value equivalent to one fifth of the proposed continuation benefit (Department of Social Development, 2008, p. 18).²⁰ These

²⁰ This analysis was taken from Govindjee, A.; Dupper, O. 2011. "Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa" in *Stellenbosch Law Review*, Vol. 22, No. 3, p. 775.

proposals appear to be based, in part, on the proven positive correlation between receipt of a social grant and a person's attempts to find employment (Samson, 2009, p. 45; Department of Social Development, 2008, p. 12). As such, the DSD suggests that reforming the social assistance system in this matter would prevent households with unemployed breadwinners from falling into extreme poverty, while simultaneously assisting their re-entry into formal employment (both because of the conditionalities attached to the proposed benefits, and because of the apparent relationship between receipt of social assistance and the search for employment).

The *Creating our Future* policy document also promotes the idea of a conditional social assistance grant to unemployed youth, at a value of 30 per cent of a determined unemployment insurance continuation benefit (a flat rate benefit proposed to be introduced by the Unemployment Insurance Fund). Conditions for such a grant would include assessments by a labour and skills adviser, successful participation in skills-acquisition programmes, participation in employment structured to enhance skills development and participation in surveys to evaluate the continuation of unemployment (Department of Social Development, 2008, p. 20). Failure to participate meaningfully in the programme, or to achieve set skills acquisition goals, would be penalized in the form of a reduced grant payment for set periods.

It has been argued that the low value of such continuation benefits or grants will act as a deterrent against the problem of grant dependency and that implementing such proposals between now and 2015 would eradicate poverty experienced by over one third of the population of the country (Department of Social Development, 2008, pp. 17-18). It must be noted, however, that the feasibility of introducing such a costly form of social assistance at this stage of South Africa's development is questionable and does not appear to have found significant support at National Treasury level.

Unemployment insurance

As far as unemployment insurance is concerned, some modest reforms have been enacted to extend coverage. The 2001 UIA widened its scope of coverage to include domestic workers, seasonal workers and so-called high-income earners.

Despite these inclusions, the UI system still excludes certain categories of workers, most notably atypical workers (for example, independent contractors, dependent contractors, and the self-employed), informal economy workers and the long-term unemployed, migrant workers and civil servants (Dupper, 2010, p. 449). In a recent development, the UIF announced that it had recommended certain legislative changes to the Minister of Labour. Three of those changes relate to the inclusion of some excluded categories, while the other two relate to the benefit replacement rate (raising the minimum replacement rate from 38 per cent to 45 per cent of previous earnings in line with ILO Convention No. 102 of 1952) and the benefit period (increasing it from 238 days to 12 months), respectively.

As far as the inclusion of currently excluded categories are concerned, the Fund recently recommended that public servants, legal migrants and those in learnerships be included under its umbrella.²¹ The exclusion of public servants has always been based on the assumption that the risk of unemployment for public servants is either low or non-existent.²² This assumption may be challenged, both legally and factually. The job security afforded to South African public servants is not as adequate as it is assumed to be. The risk

²¹ *Legalbriefs*, 14 September 2010.

²² See, for example, Olivier, M.; Van Kerken, E. 2003. "Unemployment Insurance" in *Social Security: A Legal Analysis*, p. 438.

of unemployment for private sector workers is often not greater than that of public servants in South Africa.²³ In addition, it is doubtful if the exclusion of public servants from the UIF is constitutionally tenable.²⁴ Their proposed inclusion is therefore to be welcomed.

Finally, a recent government discussion paper proposes either a “continuation benefit” (at a value of 50 per cent of a minimum wage still to be determined; to be funded from the existing UIF surplus) for a maximum three-year period for people who exhaust their unemployment insurance entitlements without having been able to find suitable employment or, alternatively, an unlimited, reduced-value conditional continuation benefit to be funded out of general revenue (Department of Social Development, 2008, pp. 19-20).²⁵ Importantly, it is proposed that recipients of the continuation benefit would need to participate in labour activation programmes where these have been implemented, possibly including skills development programmes. Even though the document indicates specifically that the proposals contained therein do not represent the government’s final position on any matter, it does indicate that some support exists for addressing the plight of the structurally unemployed by means other than public work programmes.

Worker’s compensation

While worker’s compensation legislation in South Africa has typically provided for a pay ceiling, effectively excluding high-income workers from coverage, the current legislation (operative since 1993) is more extensive: it covers all employees for compensation, not just those classified as “workmen”. This has resulted in an indirect form of solidarity: because employees (professionals, office workers, etc.) who do not do manual labour are less likely to claim for compensation, including these under the definition of “employee” increases the pool of funds available to pay compensation to those workers in higher risk categories (Garzarelli, 2008, p. 3).

Despite all these changes, COIDA still excludes significant groups of people from coverage. Most notably, COIDA does not cover domestic workers, the unemployed and those involved in non-standard forms of work such as the informally employed, the self-employed and so-called dependant contractors. The exclusion of domestic workers, the self-employed and dependent contractors²⁶ may be found to constitute a violation of section 9(1) of the Constitution (equal protection and benefits of the law) and section 9(3) (indirect discrimination against, for example black women (as domestic workers) as a particularly vulnerable group).

²³ There is no significant difference between the employment protection afforded to public servants and other employees as both are largely subject to the same dismissal law contained in Chapter VIII of the Labour Relations Act (Olivier, M.; Van Kerken, E. 2003. “Unemployment Insurance” in *Social Security: A Legal Analysis*, p. 438).

²⁴ See Olivier, M.; Van Kerken, E. 2003. “Unemployment Insurance” in *Social Security: A Legal Analysis*, pp. 439-440.

²⁵ The proposals make two suggestions in this regard: either a conditional continuation benefit of up to three years to be funded from the existing UIF surplus, or an unlimited, reduced-value conditional continuation benefit to be funded out of general revenue.

²⁶ In South Africa it is a reality that many people operate in the informal sector (for example, street vendors) on behalf of someone else. Even though such people could through a formal approach be classified as self-employed this is not in line with reality. In most instances these people are distributing goods/services of (and assisting in furthering the business of) someone else rather than their own private enterprise.

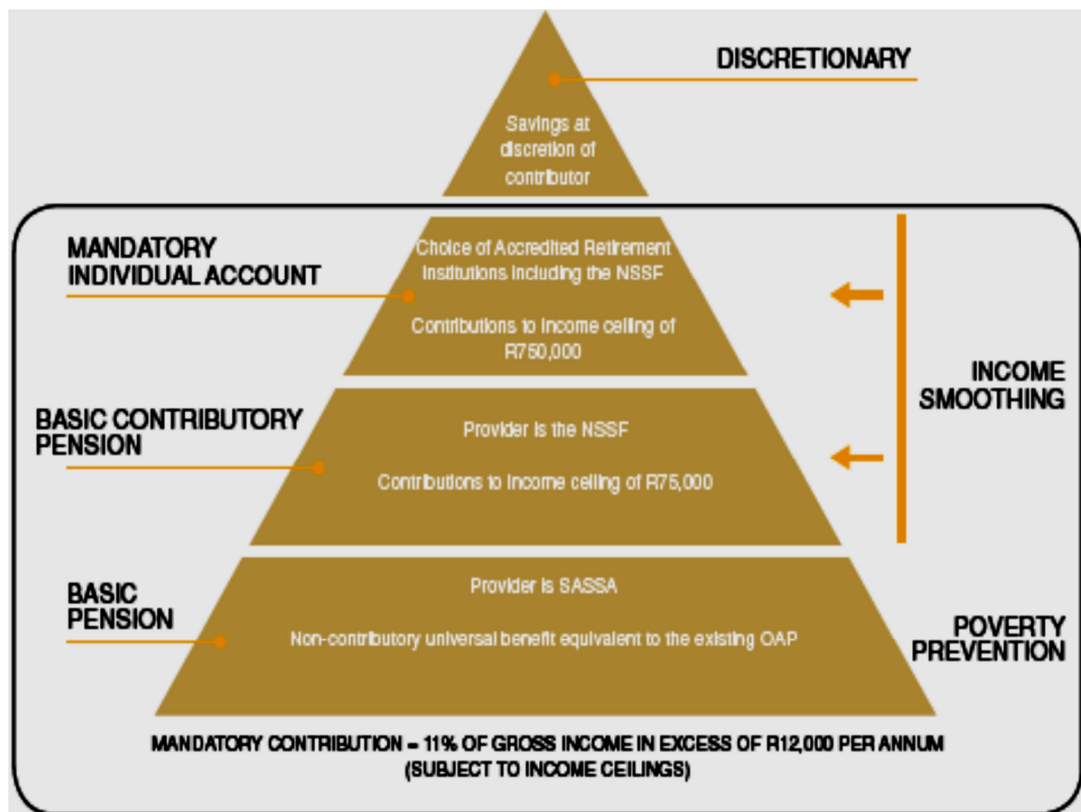
Pension reform

As indicated above, South Africa does not currently have a national or public retirement fund scheme. In its absence, occupational private retirement funds have become the preferred method through which workers ensure financial support in their old age. More than two-thirds of South Africans reach retirement age without a funded pension benefit and rely mainly on the social old-age grant for support. From an international perspective, the absence of a mandatory tier of contributions makes the South African retirement system unique. Another unusual characteristic is the absence of state provision (or delivery) of an earnings-related retirement. Moreover, the system is fragmented with close to 14,000 retirement funds.

The proposals currently under discussion would create a comprehensive solution for retirement reform, involving both non-contributory and contributory retirement provisions.

What is being considered is a universal basic pension to replace the current old age grant together with a mandatory contributory arrangement for formal sector income earners. The framework considered involves four tiers. The first tier (*the basic pension*) provides for a universal minimum benefit available to all citizens and qualifying residents. Tier two (*the basic contributory pension*) provides for a mandatory contribution towards either a Defined Benefit (DB) pension arrangement, or a Defined Contribution (DC) pension arrangement with legally guaranteed minimum benefits at least equivalent to the DB system. The provider would be a new statutory institution, the National Social Security Fund (NSSF), established to administer the mandatory contributory system. The income ceiling for mandatory participation would be ZAR75,000 (approximately €7,500.00). The third tier (*mandatory individual accounts*) provides for a mandatory contribution toward a DC individual account arrangement with any accredited pension provider chosen at the discretion of the contributor. Accredited funds would include the NSSF and the income ceiling for mandatory participation would be ZAR750,000 (€75,000.00). Finally, the fourth tier (*discretionary savings*) would enable contributors earning more than ZAR750,000 to make all decisions related to the surplus at their own discretion.

If implemented, these reforms would significantly strengthen the important principles of equity, pooling of risks, mandatory participation, and solidarity.



Source: National Treasury 'Social Security And Retirement Reform: Second Discussion Paper' (2007).

Health care reform

As mentioned above, South Africa's current health care system essentially consists of two distinct and separate systems, namely a highly-resourced private sector serving a minority of the population (approximately 16 per cent), and an under-resourced (both in terms of financial and human resources) public sector serving the majority of the population (approximately 84 per cent).

In order to address this inequitable situation, the government has proposed the introduction of National Health Insurance (NHI) in South Africa (Department of Health, 2011). The proposals, which will completely overhaul the current health care system, will be phased-in over a period of 14 years. In essence, the new proposed system will provide health care coverage to South Africans, irrespective of whether they are employed or not. Membership to the NHI will be *mandatory* for all citizens and permanent residents, but only those earning above a certain level will be required to make financial contributions. Membership in the current private medical schemes will still be possible but no South African and legal permanent resident can opt out of contributing to NHI even if they retain their medical scheme membership.

The main objectives of the NHI are identified as follows (Department of Health, 2011, p. 18):

- to provide improved access to quality health care services for all South Africans irrespective of their employment status (i.e. whether they are employed or not);
- to create a single fund (National Health Insurance Fund) in order to pool risks and thereby promote equity and social solidarity;
- to procure services on behalf of the entire population and efficiently mobilise and control key financial resources, which will reign in spiralling costs; and

-
- to strengthen the under-resourced and strained public health sector.

It is clear that urgent intervention is necessary in order to address the two-tiered system of health care that exists in South Africa. The current proposals regarding the introduction of a National Health Insurance will make contributions to NHI compulsory for all South Africans above a certain minimum income level, irrespective of employment. While there will still be room in the new health system for private medical schemes, it is clear that their role will be a very different one from the one it plays today. While in terms of the new health care system everyone will be obliged to join the NHI, only those who can afford to will choose to continue their membership of private medical schemes, perhaps eventually reducing private medical schemes to a form of top-up insurance.

e) *The relation between the South African legal framework and the branches of social security contained in Convention No. 102*

It is clear that South Africa's social security system is fragmented, not only in terms of the numerous institutions that administer and adjudicate the constituent parts, but also in respect of the multiplicity of legislative instruments in place to regulate the system. In South Africa, there is no single overarching piece of legislation governing social security. The only legislative instrument related to social security that could be considered overarching is the Constitution, which, in Section 27(1)(c), guarantees the right to access to social security.²⁷

The Constitution is the supreme law of the country, and the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of State.²⁸ Although the Constitution places an obligation on the State to ensure universal access to social security, it simultaneously allows a certain degree of latitude in relation to these aspects: the right must be realized "progressively"; the measures taken must be "reasonable"; and it must be done "within available resources".²⁹

In the area of social assistance, the Social Assistance Act 13 of 2004 (supplemented by regulations) is the most important legislative instrument. In addition, common law, particularly administrative law, plays an important role in respect of the exercise of social security discretion and social delivery. The South African Social Security Agency Act 9 of 2004 provides for the establishment of the South African Social Security Agency (SASSA). The mandate of SASSA is to ensure effective and efficient administration, management and payment of social assistance.

Social insurance schemes covering different contingencies are regulated by individual pieces of legislation. Retirement coverage *outside of social assistance* is regulated mainly in terms of the Pension Funds Act 24 of 1956. However, some occupational-based retirement schemes are provided for by other statutes and cover particular categories of workers. These include the Military Pensions Act 84 of 1976; Special Pensions Act 69 of 1996; and General Pensions Act 29 of 1979.

Health care for the overwhelming majority of the population (84 per cent) is provided by the limited public measures, such as free primary health care, as well as free hospital care

²⁷ See Part B. a) of this chapter for more detail.

²⁸ Section 8(1).

²⁹ Section 27(2).

for women with young children and the aged. For the rest (16 per cent of the population), medical services are covered by private schemes, which are regulated by the Medical Schemes Act 131 of 1998.

Different pieces of legislation deal with employment-related injuries and diseases including within the mining sector, and are administered by different government departments. In terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), compensation for employment injuries and diseases is paid to employees and their dependants out of the Compensation Fund, to which employers contribute on the basis of industry-based risk assessments. In the mining context protection against employment-related injuries and diseases is provided for in separate legislation, namely the Occupational Diseases in Mines and Works Act 78 of 1977 (ODMWA). In respect of preventative safety measures, the two most significant pieces of legislation are the Occupational Health and Safety Act 85 of 1993 (OHSA) and the Health and Safety in Mines Act 29 of 1996.

In the area of unemployment protection, the Unemployment Insurance Act 63 of 2001 (UIA) covers workers and their dependants against a suspension of earnings arising from unemployment, illness, maternity, and adoption. In other words, the legislation regulates three of the branches of ILO Convention No. 102, namely Part III (Sickness benefit), Part IV (Unemployment benefit) and Part VIII (Maternity benefits).

A non-employment based social insurance scheme is the Road Accident Fund established under the Road Accident Fund Act 56 of 1996 (RAFA). The Fund, which is primarily funded from a compulsory fuel levy, pays out compensation to a third party for any loss or damage suffered as a result of any bodily injuries or death caused by the negligent driving of motor vehicles.

Finally, it is important to point out that both international law and foreign law serve as important sources for the development of a legal framework of social security in South Africa. This flows, firstly, from the provisions of the Constitution, which require the consideration of international law in the interpretation of the right to have access to social security and appropriate social assistance,³⁰ and further requires the adoption by courts of an approach towards the interpretation of legislation that is consistent with international law.³¹ Secondly, South Africa has ratified a number of international treaties that are relevant to social security (in particular the social security position of different categories of people including non-citizens such as treaties relating to the position of children and refugees). Thirdly, the Constitution supports the consideration of the legal systems of other countries when grappling with the interpretation of a right such as the right to have access to social security and appropriate social assistance.³² Finally, enabling legislation often contains direct references to international law. For example, the Unemployment Insurance Act 63 of 2001 provides that the scale of benefits must be determined with reference to the relevant provisions of Convention No. 102.³³

³⁰ Section 39(1)(b).

³¹ Section 233 of the Constitution provides that "... 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."

³² Section 39(1)(c).

³³ Section 12(3) and Schedule 2 of the UIA.

If one relates this legislative framework to Convention No. 102, it becomes clear that there is not necessarily a clear link between one legislative scheme and a particular branch of social security contained in Convention No. 102. Instead, the situation is more complex, with most of the branches covered by a multiplicity of (legislative) schemes providing different types of benefits and administered by different entities. While the detailed analysis of this complex state of affairs will be performed in Chapter II of this report (when each branch of social security will be discussed in detail), it may be useful at this stage to provide a brief summary of the different social security schemes found in South Africa and how they relate to the different social security branches listed in Convention No. 102.

A. Medical care:

There is no public scheme providing for basic medical care to all residents/employees in South Africa. Benefits that are available are provided for across the social security system. Examples of these are medical care benefits in the context of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 as well as the Road Accident Fund Act 56 of 1996.

There are prescribed minimum benefits that have to be provided by private medical funds, which cover approximately 16 per cent of the population. The general enabling legislation in this regard is the Medical Schemes Act 131 of 1998, which regulates supervision of private health financing through medical schemes. The overwhelming majority of the population is not covered by private health insurance, and therefore has to rely on the public health system. In 1994, the government introduced the Primary Health Care Programme, which provides free health care to pregnant mothers, the disabled, pensioners and the indigent. This is regulated by the National Health Act 61 of 2003.

B. Sickness benefit:

The Unemployment Insurance Act 63 of 2001 provides for a number of benefits, one of which is sickness benefits. The other four benefits for which the Act makes provision are unemployment benefits, maternity benefits, adoption benefits and survivors' benefits. The Act thus regulates five of the nine branches of social security, which makes it one of the pivotal pieces of social security legislation in South Africa.

In addition, section 22 of the Basic Conditions of Employment Act 75 of 1997 provides that an employee is entitled to paid sick-leave of a minimum of six weeks in a 36-month cycle.

C. Unemployment benefit:

The Unemployment Insurance Act 63 of 2001 and Unemployment Insurance Contributions Act 4 of 2002 are applicable to all employers and employees except for those specifically excluded. The first-mentioned piece of legislation regulates unemployment benefits and the latter the issue of contributions to the unemployment protection scheme. As an insurance scheme, the system invariably provides benefits only for a limited period of time to those who were or are working and who contributed to the scheme.

D. Old-age benefit:

South Africa does not have a national or public retirement fund scheme. In the absence of a national retirement fund scheme, the elderly in South Africa have two main sources of income: state old-age pensions and private pensions. Many people are not able to save adequately for retirement and are forced to rely on the state old-age pension. The latter is granted to income-eligible persons over the age of 60, and is regulated by the Social

Assistance Act 13 of 2004. Private retirement funds are primarily regulated by the Pension Funds Act 24 of 1956.

E. Employment injury benefit:

Since 1973, compensation for occupational diseases has been governed by two pieces of legislation. The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) provides a system of no-fault compensation to employees who suffer injuries or contract occupational diseases during the course of their employment. Compensation can take the form of payment for loss of earnings, travelling expenses, medical expenses or pensions.

However, the recognition of occupational diseases specific to the mining industry and related works have led to the enactment of the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA).

Due to a number of inconsistencies between COIDA and ODMWA,³⁴ there have been persistent calls for a number of years for the merging of the two systems of compensating occupational diseases into one. To date, these calls have not been heeded.

F. Family benefit:

According to Convention No. 102, family benefits relate to the “responsibility for the maintenance of children”. In South Africa, the contingency is addressed by means of social grants provided for by the Social Assistance Act 13 of 2004. The following social grants have relevance:

- The Child Support Grant is directed at poor children under age 18, and is provided to the primary care giver of a child, up to a maximum of six children.
- The Care Dependency Grant provides financial support for a severely disabled child under the age of 18 who is in need of special care.
- The Foster Care Grant is paid to foster parents of children up to the age of 18. This grant is the only grant that is not means-tested in order to encourage families to foster children who would otherwise be placed in institutional care.

G. Maternity benefit:

In South Africa, two pieces of legislation regulate maternity benefits (in the narrow sense of maternity leave and cash benefits). Maternity leave is regulated by the Basic Conditions of Employment Act 75 of 1997 (BCEA), which provides that an employee is entitled to at least four consecutive months’ maternity leave.³⁵ In South Africa, employees are not entitled to paid maternity leave. However, the Unemployment Insurance Act 63 of 2001 (UIA) provides that female contributors to the Unemployment Insurance Fund are entitled to maternity benefits for a maximum period of 17.32 weeks or four months. This brings the period for which cash benefits can be claimed in line with the period of maternity leave provided for in the BCEA. A contributor who claims maternity benefits in terms of the

³⁴ One example being the payment to workers with permanent disability: under ODMWA payment is in the form of a lump sum while payment under the 1941 WCA and the 1993 COIDA is by way of a monthly pension.

³⁵ Section 25.

UIA will not lose her entitlement to claim any other category of UIF benefits, namely unemployment benefits, sickness benefits and adoption benefits.

However, maternity benefits in the broader sense (as, for example, referred to in ILO Convention No. 102) also include the provision of medical care for pregnancy and confinement. In this respect, the National Health Act 61 of 2003 provides that pregnant and lactating women who are not members or beneficiaries of private medical aid schemes must receive free health services in public health establishments.³⁶

H. Invalidity benefit:

In South Africa, there is no public scheme in existence that provides for invalidity benefits. As is the case with survivors' benefits, for example (see below), benefits arise under different legislative schemes. The following pieces of legislation have relevance in this area:

- Unemployment Insurance Act 63 of 2001: In terms of the UIA, disability causing or amounting to illness resulting in unemployment may vest an entitlement to unemployment benefits in the affected employee.³⁷ However, if the employee receives a benefit in terms of COIDA (see ii below) in relation to an occupational injury or disease, he or she will be disqualified from receiving benefits in terms of the UIA.³⁸
- Compensation for Occupational Injuries and Diseases Act 130 of 1993 and Occupational Diseases in Mines and Works Act 78 of 1973: COIDA provides compensation for temporary and permanent disablement resulting from occupational injuries; while both COIDA and ODMWA provide compensation for occupational diseases contracted during the course and scope of employment.
- Road Accident Fund Act 56 of 1996: The Fund is only liable if a "serious injury" has been sustained as a result of the negligent driving of a vehicle. An injury will be assessed as "serious" if the injury results in 30 per cent or more impairment. However, certain injuries will be regarded as "serious" even if the injury does not result in 30 per cent or more impairment of the whole person. These are injuries that: (i) Result in a serious long-term impairment, or the loss of a body function; (ii) Constitute permanent serious disfigurement; (iii) Result in severe long-term mental, or severe long-term behavioural disturbance or disorder; or (iv) Result in the loss of a foetus.
- Social Assistance Act 13 of 2004: The Disability Grant provides assistance to disabled individuals between the ages of 18 and 59 years, while the Grant-In-Aid is an additional grant awarded to persons who are in receipt of the Older Persons Grant, Disability or War Veteran's Grants and who are unable to care for themselves.

I. Survivors' benefit:

South Africa's social security system does not provide for the payment of death and survivors' benefits as a separate contingency or category. As a rule, these benefits are linked to the existence of principal beneficiaries. In the event of social insurance schemes,

³⁶ Section 4(3)(a).

³⁷ Section 20.

³⁸ Section 14(a)(ii)

the principal beneficiaries are usually contributors to the different social insurance funds.³⁹ The protection of survivors and dependants therefore acquires a patchwork character. The following statutory instruments all provide for survivors' benefits:

- (i) *Compensation for Occupational Injuries and Diseases Act 130 of 1993*: The Act provides that dependants of a deceased contributor may claim from the Compensation Commissioner.
- (ii) *Occupational Diseases in Mines and Works Act 78 of 1973*: ODMWA provides for a lump-sum payment to the widow/er or dependent children if the worker dies and is found to have a compensatable disease on autopsy, which was not previously compensated, or only partially compensated.
- (iii) *Unemployment Insurance Act 63 of 2001*: The UIA extends protection to a "surviving spouse or life partner" and to children. However, children can only claim if (a) there is no surviving spouse or life partner or (b) the spouse or life partner has not made an application for the benefits within six months of the contributor's death.⁴⁰
- (iv) *Pension Funds Act 24 of 1956*: In the absence of a national pension scheme, the only real survivors' benefits in South Africa are provided via retirement funds. The PFA contains fairly detailed provisions regarding survivors' benefits. In essence, it distinguishes between legal and factual dependants, and leaves it in the hands of the fiduciary managers of a fund to identify the class of dependants, and to distribute the benefits equitably among them.⁴¹
- (v) *Road Accident Fund Act 56 of 1996*: The Act regulates the payment of compensation for loss or damage wrongfully caused by the driver of a motor vehicle. When a person is killed as result of the negligence or wrongful act of the driver of a vehicle, his or her dependants have a claim for past and future loss of support, as well as for reasonable funeral expenses.

To summarise: the legislative scheme applicable in respect of each branch of social security is as follows:

³⁹ The exceptions are (i) COIDA (only employers contribute to the Compensation Fund) and (ii) the Road Accident Fund Act 56 of 1996 (the Road Accident Fund is financed through a compulsory levy on motor vehicle fuel).

⁴⁰ Section 30(2).

⁴¹ See section 37C of the Pension Funds Act.

Medical care

- Compensation for Occupational Injuries and Diseases Act 130 of 1993
- Road Accident Fund Act 56 of 1996
- Medical Schemes Act 131 of 1998
- National Health Act 61 of 2003

Sickness benefit

- Unemployment Insurance Act 63 of 2001
- Basic Conditions of Employment Act 75 of 1997

Unemployment benefit

- Unemployment Insurance Act 63 of 2001
- Unemployment Insurance Contributions Act 4 of 2002

Old-age benefit

- Social Assistance Act 13 of 2004
- Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance of 2008
- Pension Funds Act 24 of 1956

Employment injury benefit

- Compensation for Occupational Injuries and Diseases Act 130 of 1993
- Occupational Diseases in Mines and Works Act 78 of 1973

Family benefit

- Social Assistance Act 13 of 2004
- Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance of 2008
- Unemployment Insurance Act 63 of 2001

Maternity benefit

- Basic Conditions of Employment Act 75 of 1997
- Unemployment Insurance Act 63 of 2001
- National Health Act 61 of 2003

Invalidity benefit

- Unemployment Insurance Act 63 of 2001
- Compensation for Occupational Injuries and Diseases Act 130 of 1993
- Occupational Diseases in Mines and Works Act 78 of 1973
- Road Accident Fund Act 56 of 1996
- Social Assistance Act 13 of 2006
- Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance of 2008
- Pension Funds Act 24 of 1956

Survivors' benefit

- Compensation for Occupational Injuries and Diseases Act 130 of 1993
- Occupational Diseases in Mines and Works Act 78 of 1973
- Unemployment Insurance Act 63 of 2001
- Pension Funds Act 24 of 1956
- Road Accident Fund Act 56 of 1996

CHAPTER II: ASSESSING THE COMPATIBILITY OF THE SOCIAL SECURITY LEGISLATION OF SOUTH AFRICA WITH CONVENTION NO. 102

As mentioned in Chapter I, a State that wishes to ratify Convention No. 102 must accept obligations under the Convention in respect of at least three of its nine branches and one of those three branches covering a long-term contingency or unemployment. The possibility for South Africa of ratifying Convention No. 102 must be assessed in light of this requirement. This chapter thus examines the compatibility of the existing South African social security legislation and the branches it covers, with the minimum standards and principles set out in Convention No. 102 under its respective Parts. In this chapter, the structure of the *Report Form for the Social Security (Minimum Standards) Convention, 1952 (No. 102)*⁴² will be used to compare the South African legislation with the provisions of Convention No. 102. The prospects of ratification of Convention No. 102 by South Africa will be discussed in Chapter III, against the background of the compatibility analysis done in this chapter.

A. Medical care benefit (Part II of Convention No. 102)

As mentioned in Chapter I, South Africa's current health care system essentially consists of two distinct and separate systems, namely a highly-resourced private sector serving a minority of the population, and an under-resourced public sector serving the majority of the population. In order to address this inequitable situation, the government of South Africa has proposed the introduction of National Health Insurance (NHI). The proposals, which will completely overhaul the current health care system, will be phased-in over a period of 14 years. Pilot projects will be introduced in 2012-13, consisting of the establishment of a number of pilot sites in selected districts "to begin laying the foundations of national health insurance" (National Treasury, 2012, p. 83).

Membership of private medical aid schemes in South Africa is not statutorily mandated although it is frequently a condition of employment. It is doubtful however that such schemes can be taken into consideration since they fail to comply with the requirements of the Convention. For example, even though no specific statistical data is available, various general household surveys over the years indicate that membership of private medical aid schemes is limited to families and individuals in the top income deciles.⁴³ As a result, it will be difficult to illustrate that private medical aid schemes "cover a substantial part of the persons whose earnings do not exceed those of the skilled manual male employee". In addition, it is not clear that such schemes comply with the specific medical care provisions of the Convention such as Article 10, which requires that in the case of pregnancy and

⁴² Available on the ILO's NORMLEX database at:
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:51:0::NO:51:P51_CONTENT_REPOSITORY_ID:2543094:NO

⁴³ For example, the most recent survey indicates that 17.6 per cent of individuals in South Africa belong to private medical aid schemes, with the white population much more likely to belong to a medical aid compared to the other population groups (see Statistics South Africa. 2010. *General Household Survey 2010*, pp. 18-19). Since there is no discrimination based on race, "this difference more closely reflects income inequality between races" (see OECD. 2010. *Tackling Inequalities in Brazil, China, India and South Africa: The Role of Labour Market and Social Policies*, p. 252). Also see Van den Heever, A. 2011. *Evaluation of the Green Paper on National Health Insurance*, 20 December 2011, p. 24.

confinement and their consequences, the beneficiary is not required to participate in the costs of such care.⁴⁴

These, and many other reasons,⁴⁵ lead to the conclusion that private medical aid schemes in South Africa cannot be taken into account in order to determine compliance with the provisions of Part II of Convention No. 102. As a result, the analysis under Part II will focus exclusively on the public health care system.

Contingency:

Article 8 of Convention No. 102 provides that the contingencies covered shall include any morbid condition (ill-health condition), whatever its cause, and pregnancy and confinement and their consequences.

As detailed under the following parts, this contingency seems to be addressed and covered by the public health system which provides basic, primary and emergency medical care, as well as maternal care.

Morbid condition (or ill-health), whatever its cause, is covered by the public health care system in South Africa which makes all health services available by law, at least implicitly. It may be concluded that Article 8 of the Convention is applied.

Coverage:

Article 9 of the Convention provides as follows:

The persons protected shall comprise

- (a) prescribed classes of employees, constituting not less than 50 per cent of all employees, and also their wives and children; or
- (b) prescribed classes of economically active population, constituting not less than 20 per cent of all residents, and also their wives and children; or
- (c) prescribed classes of residents, constituting not less than 50 per cent of all residents.

According to the National Health Act, all persons, except members of private medical aid schemes and their dependants are entitled to free health services subject to any condition prescribed by the Minister.⁴⁶ Recourse will thus be had to (c), meaning that the public health care system in South Africa must cover at least 50 per cent of all residents. As such, information in the form set out in Title III under Article 76 will be furnished.

⁴⁴ While cost sharing is allowed in terms of Convention No. 102, in the case of a morbid condition, Article 10(2) of the Convention makes it clear that cost sharing cannot be required in the case of pregnancy, confinement and their consequences. Also see International Labour Office. *Report Form for the Social Security (Minimum Standards) Convention, 1952* (No.102), Part II, p. 3.

⁴⁵ For example, the diversity and large number of schemes (over 100), the different rules that apply in the case of each scheme, and the different type of benefits and fee arrangements, among others, all make it very difficult (if not impossible) to group the schemes together under one umbrella for purposes of analysis.

⁴⁶ Section 4, National Health Act

The statutory personal coverage of the National Health Act is meant to have been extended to permanent residents, refugees and asylum seekers by way of jurisprudence emanating from the Constitutional Court.⁴⁷ Although the National Health Act does not appear to have been updated accordingly, all residents, whether nationals or non nationals, have a Constitutional right to health care.

Under the presumption that all persons not covered by private medical schemes resort to the public health scheme, it is estimated that in 2011, approximately 84 per cent of the total population (just over 42 million individuals) were covered by the public health care system since only 16,1 per cent of individuals had private medical aid scheme coverage (Statistics South Africa, 2011, p. 17). However, these crude figures above have been described as “naïve” (van den Heever, 2011, p. 56). A recent study has determined that the number of South Africans covered by the public health care system (the “catchment population”) was closer to 70-76 per cent. In truth, the de facto situation is certainly more complex.

In the first place, many people without coverage under private medical schemes make use of private services on an out-of-pocket basis despite having free access to public sector facilities for reasons such as the absence of public facilities or the lack of adequate facilities (van den Heever, 2011, p. 24). This means that not all those without private medical aid make use of the public health care system.

Secondly, as stated above, the public health care system distinguishes patients according to the fees they are required to pay for medical services. In essence, all South Africans who earn more than ZAR6,000.00 per month, or any household earning more than ZAR8,333.00 per month, must pay in full when using public health care facilities (Department of Health, 2012, p. 3). Those earning less than these threshold amounts are either (fully or partially) subsidized patients or receive free medical care services.

Convention No. 102 provides that while the beneficiary of medical care may be required to share in the cost of the medical care provided (in respect of a morbid condition only), the rules concerning such cost-sharing shall be so designed as to avoid hardship.⁴⁸ In so far as the income threshold for cost-sharing is set at a level that is sufficiently high not to impose a financial burden on those who have to participate in the costs of accessing medical care, especially persons with small means, the requirements of the Convention would be fulfilled. If this is not the case, however, and if a substantial amount of those covered by the public health care scheme find themselves unable to financially access the care and services required by their health condition, to the extent that effective coverage falls below the minimum percentage required by the Convention, i.e. 50% of all residents, the scheme would fall short of meeting the Convention’s standards.

Where the statutory personal coverage under the National Health Act was in effect extended to provide health services to all residents in South Africa, regardless of nationality, it is concluded that the national legislation covers over 50 per cent of all residents, as required by the Convention.

In practice, the assumption is that over 70 per cent of the total population in South Africa receives medical care under the public health scheme. However, this is only an estimate. Data on the actual percentage of residents protected under the public health scheme in case of a morbid condition, and pregnancy, confinement and their consequences, would allow a better assessment of compliance with article 9 of Convention No. 102.

⁴⁷ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11.

⁴⁸ See Article 10(2) of Convention No. 102.

Extent of the benefit

Article 10(1) provides that the benefit shall – in the case of a morbid condition - include at least (i) general practitioner care, including domiciliary visiting; (ii) specialist care at hospitals for in-patients and out-patients, and such specialist care as may be available outside hospitals; (iii) the essential pharmaceutical supplies as prescribed by medical or other qualified practitioners; and (iv) hospitalization where necessary.

Of further relevance to the treatment of morbid conditions is Article 10(2) of the Convention, which provides that where the beneficiary is required to share in the costs of medical care, the applicable rules should be designed so as to avoid hardship.

While the Medical Schemes Act 131 of 1998 contains a minimum package of benefits (entitled the “prescribed minimum benefits”) that has to be provided by all private medical aid schemes, no such defined package of benefits exists for the public health sector.⁴⁹ The National Health Act is a framework legislation, meaning that it sets out broad legal and operational principles that are fleshed out in regulations. It establishes the national health system and the provision of health services, defined as “health care services, including reproductive health care and emergency medical treatment, basic nutrition and basic health care services for children”.⁵⁰ All South Africans are entitled to free primary health care services in State health care facilities. Primary health care is not defined in the Act, but this term was defined in a recent authoritative study to include the following:

- (i) Emergency medical services
- (ii) Reproductive health services
- (iii) Basic package of primary health care services which include immunization; ante-natal care; family planning; nutrition; sexually transmitted infection; child curative; adult chronic; minor ailments; and tuberculosis treatment.

In addition, as mentioned elsewhere in this report, all health care for pregnant women and children under the age of 6 years is provided free to users of public health facilities.

In order to determine with more detail the benefits that must be provided by the public health system, it is also necessary to consult a range of policy documents and notices issued by the Department of Health. The two most important documents in this regard are the *Approved UPFS 2011 Fee Schedule for Full Paying Patients* and the *Explanation of the Current Policy regarding the Classification of Patients for the Determination of Fees*.⁵¹

In practice, a number of constraints militate against effective access to such services. As the recent *Public Inquiry into the Right to Access to Health Care Services* observed:

Access to health care services, especially for the poor, is severely constrained by expensive, inadequate or non-existent transport, by serious shortages with regard to emergency transport, and by long waiting times at clinics and other health care service providers. These constraints

⁴⁹ As far back as 2002 the Taylor Committee recommended that a minimum core set of services be established for the public sector. These were to be framed as minimum norms and standards.

⁵⁰ Section 1 *National Health Act* 61 of 2003, together with section 27 and 28(1)(c) of the Constitution of South Africa.

⁵¹ Both available at www.doh.gov.za.

amount to a denial of the right to access health care for some of the poorest and exacerbate existing vulnerabilities of marginalised groups and individuals within the country (SAHRC, 2008, p. 56).

In respect of the cost of treatment, some patients qualify for free medical services. For example, all non-medical aid members are entitled to free “primary health services” at State health care facilities.⁵² In addition, pregnant women and children under the age of 6 years, persons with mental disorders and those with infectious, formidable or notifiable diseases and those whose income falls below a certain amount – among others – are also entitled to free health services (Department of Health, 2012, pp. 4-6). Patients earning less than ZAR72,000.00 per year (or households earning less than ZAR100,000.00 per year) qualify for subsidised care (Department of Health, 2012, p. 3). While those qualifying for subsidised care have to pay for some services (such as assistive devices and inpatient care), the bulk of services are still provided free of charge (see chart below). The fee structure for those who qualify for subsidised medical care in public health care facilities is set out below:

Table 3: Categories for Partial Subsidisation

Category	Means Test	Subsidisation (% of UPFS)
H1	Individual : Income less than R36 000 per annum Household : Income less than R50 000 per annum	Consultations : 20% with no differentiation for emergency consultations Inpatient : 1% of the UPFS general ward day tariff summed for 7 days for each 30 days or part thereof (Note 1). No differentiation on the basis of bed type. Patient and Emergency Transport: 5% Assistive devices : 25% All other services : Free Calculated amounts should be rounded to the nearest R5 to facilitate cash accounting.
H2	Individual : Income less than R72 000 per annum Household : Income less than R100 000 per annum	Consultations: 70% with differentiation for emergency consultations Inpatient days: 7% per day with differentiation on the basis of bed type Procedures, imaging and oral health: 50% Patient and Emergency Transport: 15% Assistive devices : 75% All other services : Free Calculated amounts should be rounded to the nearest R5 to facilitate cash accounting.
H3	Individual : Income greater or equal to R72 000 per annum Household : Income greater or equal to R100 000 per annum	All services listed in the UPFS at full price

From this table, it is understood that certain categories of persons are required to pay 70 per cent of the Uniform Patient Fee Schedule (UPFS) for consultations, 7 per cent for inpatient fees and 50 per cent for procedures, imaging and oral health. Persons earning ZAR6,000 or more per month are required to pay the full UPFS fees for all medical services. It is estimated that nearly 5 million persons fall within this group. The Convention requires that cost sharing be such as to avoid hardship. Said differently, the participation in the costs of medical care should not be such as to lead beneficiaries and

⁵² Section 4(3)(b) National Health Act 61 of 2003.

their families into poverty, or deprive them of other essential goods and services, or place persons or households in financial difficulty.

Convention No. 102 further requires that in the case of pregnancy, confinement and their consequences, the treatment must meet two requirements. In the first place, it must include pre-natal, confinement and post-natal care either by medical practitioners or by qualified midwives as well as hospitalization where necessary.⁵³ Secondly, the allowance in respect of cost sharing that applies in the case of morbid conditions is not applicable to pregnancy, meaning that the beneficiary should not be required to share in the cost of medical care.⁵⁴

Medical care in respect of pregnancy is examined in detail under Part VIII (Maternity benefit) and seems to be in compliance with both conditions set out above. The medical care provided to pregnant women is extensive, and the care is free to all those not covered by private medical aid.

South Africa's public health system is therefore only in partial compliance with Article 10 of Convention No. 102.

Medical care in case of a morbid condition seems limited to the provision of primary health care services comprising emergency medical services, reproductive health services and a basic package of services and treatments. As such, Article 10(1)(a) of Convention No. 102 is not fully respected in that it is not clear if such medical care includes domiciliary visits, specialist care, essential pharmaceutical supplies or hospitalization where necessary.

The extent of the medical care in respect of pregnancy, confinement and its consequences however appears to cover all the aspects referred to in Article 10(1)(b).

With regard to cost sharing, it appears that pregnant and confined women receive medical services free of charge independently of their classification as full paying or subsidised patients. However, the current fee structure for patients required to participate in the cost of medical care in case of a morbid condition appears to be significant for certain categories of persons and as such may cause hardship to such beneficiaries according to the terms of Convention No. 102.

Qualifying period:

Article 11 specifies that the benefit shall, in a contingency covered, be secured at least to a person protected who has completed, or whose breadwinner has completed, such qualifying period as may be considered necessary to preclude abuse.

There is no qualifying period required by law for entitlement to medical care benefits in South Africa.

South Africa is in compliance with Article 11 of Convention No. 102 as the national legislation does not provide for a qualifying period for access to medical care.

Duration of the benefit:

Article 12 of Convention No. 102 deals with the issue of the duration of the medical care benefit. It lists three requirements: Firstly, the benefit must be provided throughout the contingency. However, in the case of morbid conditions, it may be limited to 26 weeks. Secondly, the benefit may not be suspended while a sickness benefit continues to be paid.

⁵³ Article 10(1)(b).

⁵⁴ See Article 10(2).

Thirdly, provision must be made to enable the limit (of 26 weeks) to be extended for prescribed diseases recognised as entailing prolonged care.

Legally, there are no limits placed on the duration of medical care, and it is therefore assumed that benefits are generally provided throughout the contingency. This means that conditions one and three above are complied with. In addition, those who receive a sickness benefit in terms of the Unemployment Insurance Act (discussed in more detail in Part III: Sickness benefit), are entitled to free medical care in terms of the public health system.⁵⁵

The duration of medical care benefits in South Africa is in compliance with the requirements of Article 12 of Convention No. 102. Benefits are provided throughout the contingency, and the benefit is not suspended while sickness (illness) benefits are being paid.

B. Sickness benefit (Part III of Convention No. 102)

In most countries with relatively developed and comprehensive social security systems, the term “unemployment benefit” is normally used only in relation to benefits that may be claimed when a person becomes unemployed in the ordinary sense, namely when employment is lost as a result of termination of services. Separate systems would regulate illness, maternity and adoption benefits.

However, in South Africa, all these contingencies are subsumed under one scheme, namely the unemployment benefit scheme as regulated by the UIA (and the Unemployment Insurance Contributions Act, UICA). As a result, many of the arrangements (institutional, procedural and administrative) for the payment of unemployment benefits are the same in the case of sickness and maternity benefits.

Contingency

Article 14 of Convention No. 102 specifies that the contingency covered shall include incapacity for work resulting from a morbid condition and involving suspension of earnings.

In terms of the UIA, a contributor is entitled to sickness benefits (or “illness benefits”) from the date that he or she is unable to perform work on account of illness and meets with the prescribed requirements.⁵⁶

The contingency of sickness is covered by the UIA, as defined in Article 14 of Convention No. 102.

⁵⁵ The guidelines issued by the Department of Health provide that persons supported by the Unemployment Insurance Fund (in terms of which sickness (or “illness”) benefits in South Africa are paid), qualify for full subsidisation of medical care. See Department of Health. 2012. *Explanation of the Current Policy regarding the Classification of Patients for the Determination of Fees*, p. 2.

⁵⁶ Section 20.

Coverage

All contributors to the Unemployment Insurance Fund are entitled to the benefits provided by the UIA, including sickness (or “illness”) benefits. The UIA applies to all employees defined as “any 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.”⁵⁷ While the current UIA widened its scope of coverage to include domestic workers, seasonal workers and the so-called high-income earners, it excludes the self-employed and those employed in the informal economy. Given the focus of South Africa’s illness benefits on workers in the formal economy, recourse in this analysis will therefore be had to Article 15(a) of Convention No. 102, which prescribes that coverage of the unemployment system should comprise “prescribed classes of employees, constituting not less than 50 per cent of all employees”. The total number of employees considered for the purposes of measuring the application of this Article must include, in the logic of the Convention, any insured persons who are normally engaged in an economic activity or normally work as employees, including those temporarily unemployed.

Calculation of the coverage of South Africa’s illness benefit scheme:

- | | |
|----|--|
| A. | Number of employees protected (in law): 11 364 000 |
| B. | Total number of employees: 17 742 000 |
| C. | Number of employees protected as percentage of total number of employees (in law): 64% |

From the above, the statutory personal coverage under the sickness benefits scheme set out in the UIA is in conformity with the requirements of Article 15(a) of Convention No. 102 in that the persons protected constitute 72.8 per cent of the total number of employees, above the minimum requirement of “50 per cent of all employees” set out in the Convention.

Amount of the sickness benefit

Article 16 of the Convention states that the amount of the sickness benefit must be calculated in conformity with the rules established in Articles 65, 66 or 67 of Convention No. 102. Article 65 is applicable in the case of earnings-related benefits and Article 66 in the case of flat-rate benefits, while Article 67 applies to means-tested benefits.

In terms of Schedule 2 of the South African UIA, unemployment benefits are calculated in one of two ways, depending on a contributor’s income prior to becoming unemployed.

In the first place, contributors who earned less than a particular amount (known as the “benefit transition income level”) are entitled to a percentage of their previous income. Instead of using a fixed percentage of the remuneration earned prior to the period of unemployment in order to calculate benefits, the South African UIA introduces a graduated scale of benefits that differentiates between higher-income contributors and lower-income contributors. Schedule 2 of the South African UIA, read with section 12(3)(b), sets the maximum income replacement rate at 60%, and the maximum amount of the benefit at ZAR3,077.62.

Contributors who earned more than the benefit transition income level are entitled to the maximum benefit amount, i.e. ZAR3,077.62, “equal to the entitlement of a contributor

⁵⁷ Section 1 and 3(1) of the UIA.

who was previously paid at the benefit transition income level”.⁵⁸ According to Schedule 2 of the UIA, the ‘benefit transition level’ is linked to the wage of a skilled manual worker. In other words, the wage of a “skilled manual worker” corresponding to a fictitious amount fixed in the UIA, determines the income level at which to set a ceiling for benefit calculation purposes. The current income ceiling is set at R8099.00 per month. Contributors who earn more than this amount and who become unemployed will receive the capped benefit of R3 077.62.⁵⁹

In this regard, it must be noted that Article 16 of Convention No. 102 (read with Article 65, para. 3, as well as the Schedule to Part XI entitled Periodical Payments to Standard Beneficiaries) allows that a ceiling be fixed on the rate of the benefit or on the earnings taken into account for the calculation of the benefit, in so far as this ceiling should not be set below the earnings of a skilled manual male employee or at least not in such a way that the benefit of a skilled manual male employee does not reach the prescribed replacement rate. Hence, the sickness benefit of a beneficiary with earnings less or equal to those of a skilled manual employee, as defined in Convention No. 102, and determined accordingly, must not correspond to less than 45 per cent of his previous earnings.

The benchmark used in this analysis is that of the earnings of a skilled manual employee, established according to Article 65(6)(b) of Convention No. 102, namely “a person deemed typical of skilled labour selected among the major group of economic activities with the largest number of persons protected.” This benefit calculation method and the benchmark used, in general terms, is fully in line with the spirit and logic of the Convention, which aims, first and foremost, at protecting average and low earners.

According to data from the Quarterly Labour Force Survey 2011, the skilled male labourer among the occupation with the largest number of persons protected appears to be either an employee in craft and related trade (comprising roughly 18 per cent of all male employees) or an employee who is a plant and machine operator (comprising roughly 15 per cent of all male employees). The weighted average monthly earnings of someone falling in these categories are approximately ZAR4,662.

According to Schedule 3 of the UIA, which defines the income replacement rate and benefit (see below), a person whose earnings are equal to ZAR4,662 would receive a benefit at an approximate income replacement rate of 42 per cent, which falls just below the replacement rate of 45 per cent required by the Convention for a sickness benefit.

⁵⁸ Schedule II, Part 1(2) UIA.

⁵⁹ See Schedule III UIA.

Schedule 3 of the UIA sets out the calculation of benefit as follows:

Income	Income Replacement Rate (IRR)	=	UI benefit
150.00	58.64		87.96
300.00	57.39		172.17
500.00	55.88		279.41
700.00	54.53		381.69
1 000.00	52.74		527.35
1 500.00	50.25		753.79
2 000.00	48.24		964.87
3 000.00	45.19		1 355.74
3 075.57	45.00		1 384.01
 4 000.00	42.98		1 719.30
5 000.00	41.31		2 065.49
6 000.00	40.00		2 399.95
7 410.00	38.57		2 857.99
8 099.00	38.00		3 077.62
10 000.00	30.78		3 077.62

With reference to Schedule 3 of the UIA, only a person receiving an income of ZAR3,075.75 or below is entitled to a benefit at the replacement rate required by the Convention (at least 45 per cent). Although this benchmark is meant to represent the wage of a skilled manual labourer, ZAR3,075.75 does not appear to correspond anymore to the income of a person deemed typical of skilled labour, as defined in Convention No. 102. The analysis here above shows that in applying the guidance of the Convention for its determination, the wage of such a person falls closer to ZAR4,662.

It is therefore recommended that a parametric adjustment be undertaken to bring the listed incomes and related income replacement rates and benefits in line with the wage of a skilled manual labourer. The parametric adjustment required would entail increasing the replacement rate granted to persons earning the equivalent of the wage of a skilled manual male employee (i.e. ZAR4,662) by approximately 3 per cent to meet the replacement rate required by the Convention (i.e. 45 per cent).

The current level of sickness benefit set out in the UIA nearly meets the requirement of Article 16 of Convention No. 102, in that the sickness benefit of a beneficiary whose earnings are less or equal to those of a skilled manual male employee, as defined in the Convention, would correspond to a replacement rate of approximately 42 per cent, whereas the Convention requires a replacement rate of 45 per cent. A parametric adjustment increasing the replacement rate of a person deemed typical of skilled labour by approximately 3 per cent is recommended.

Qualifying period

Section 13(3) of the UIA provides that unemployment benefits under the UIA accrue to a contributor at the rate of one day's benefit for every completed six days of employment as a contributor, subject to a maximum accrual of 238 days' benefit in the four-year period immediately preceding the date of application for benefits. This means that the qualifying period required for entitlement to sickness benefit for the minimum duration prescribed in Article 18 of the Convention would be approximately 36 months. In this regard, Article 17 of Convention No. 102 provides that the goal of any qualifying period for entitlement to

benefits must be to “preclude abuse”, with a view to keeping such period at the minimum required for such purposes. The CEACR has indicated in previous cases before it that a qualifying period of no more than 18 months could be justified for such purposes.

The length of the qualifying period that a person must complete for entitlement to a sickness benefit under the UIA as well as the rules concerning the computation of the qualifying period seem excessive and therefore not complying with the requirements of Article 17 of Convention No. 102.

Duration of benefits

Article 18 of Convention No. 102 provides that the sickness benefit shall be granted throughout the contingency, except that the benefit may be limited to 26 weeks in each case of sickness, in which event it need not be paid for the first three days of suspension of earnings.

Schedule 2 of the UIA specifies the following method of calculating the days of benefits that a contributor is entitled to:

- “Determine the total number of days that the contributor was employed (and contributing) in the four-year period immediately preceding the date of application for benefits.
- Divide the total number of days by 6, disregarding any remainder or fractional portion of the result.
- Subtract the number of days (if any) for which the contributor claimed benefits (other than maternity benefits) in terms of this Act during the preceding four years.”

Benefits under the South African UIA accrue to a contributor at the rate of one day’s benefit for every completed six days of employment, subject to a maximum accrual of 238 days (or 34 weeks) for all benefits provided under this Act, other than maternity benefits, in the four-year period immediately preceding the date of application for benefits.⁶⁰

It appears that the duration of illness benefits under the UIA is not in conformity with the requirements of Article 18 of Convention No. 10, which allows the duration of the sickness benefit to be limited to 26 weeks, but requires that such minimum period be guaranteed in *each case of sickness*. The UIA does not meet this minimum standard because, in the first place, the 34 weeks benefit period set out in the UIA is not guaranteed strictly speaking since credits can be exhausted as they are contingent on contributions over a four-year cycle. In addition, the 34 weeks maximum benefit is not applicable to different instances of sickness but rather appears to be a limit applicable to all benefits provided under the UIA (excluding maternity benefits). As such, there may be instances where beneficiaries may not be entitled to an initial or subsequent sickness benefit for a duration of 26 weeks because they have exhausted the 34 weeks maximum through the receipt of unemployment, illness, adoption and dependants’ (survivors’) benefits.

Since the UIA does not guarantee the payment of illness benefit for at least 26 weeks in each case of sickness, the benefit duration set out in the UIA does not seem to comply with the requirements of Article 18 of Convention No. 102.

⁶⁰ Section 13(3) UIA.

Waiting period

In cases where the sickness benefit is limited in any way (and not provided throughout the contingency), Article 18 of Convention No. 102 provides that the benefit need not be paid for the first three days of suspension of earnings. The principal reason for imposing a waiting period is primarily to save costs. Brief illnesses account for the largest percentage of the total, and the cost of processing these cases is disproportionately high (ILO, 1984, p. 38).

Section 20(2)(a) of the UIA imposes a much longer waiting period. It provides that a contributor is not entitled to illness benefits if the period of illness is less than 14 days. However, employers in South Africa are obliged to provide paid sick leave for a period of six weeks in a three-year cycle.⁶¹ Paid sick leave prevents the suspension of earnings, which is the contingency that sickness benefits have the purpose of mitigating. In South Africa, however, once a worker's entitlement to paid sick leave is exhausted, if he/she becomes sick again, there is no longer an obligation for the employer to provide paid sick leave before entitlement to illness benefits under the UIA. As a consequence, a worker who has exhausted his or her right to paid sick leave in a given period (three-year cycle) will be left without any income replacement, whether in the form of paid sick leave or sickness benefit, during 14 days, until the sickness benefit under the UIA becomes payable.

While, in most cases of sickness, there is effectively no waiting period in that there is no suspension of earnings until the payment of sickness benefit, there may be some cases where a sick person is left to wait 14 days, in excess of the maximum 3 days allowed by Article 18 of the Convention No. 102. The UIA is therefore not in compliance with the requirements of Convention No. 102 in respect of the waiting period.

The 14-day waiting period imposed by the UIA for payment of sickness benefits is longer than the maximum waiting period specified in Article 18 of Convention No. 102, and therefore not in conformity with it.

C. Unemployment benefit (Part IV of Convention No. 102)

Contingency

An unemployed contributor to the Unemployment Insurance Fund is entitled to unemployment benefits if the reason for the unemployment is listed as a reason in section 16(1)(a), namely i) the termination of the contributor's contract of employment by the employer of that contributor or the ending of a fixed term contract; ii) the dismissal of the contributor; iii) insolvency or iv) in the case of a domestic worker, the termination of the contributor's contract of employment by the death of the employer of that contributor. Unemployment benefits in this context exclude the benefits to which an employee is entitled in the event of illness, maternity or in the case of adoption benefits. The application must be made in accordance with the prescribed requirements; the contributor should be registered as a work-seeker with a labour centre established under the Skills

⁶¹ Section 22 (1) and (2) Basic Conditions of Employment Act 75 of 1997.

Development Act (SDA) 97 of 1998⁶² and the contributor should be a person capable of and available for work.⁶³

The UIA is in conformity with Article 20 of Convention No. 102, which provides that the contingency covered shall include suspension of earnings due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work.

Coverage

The UIA applies to all employees defined as “any 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.”⁶⁴ The current UIA widened its scope of coverage to include domestic workers, seasonal workers and the so-called high-income earners. However, the definition nevertheless still excludes a variety of vulnerable groups from the UIA’s scope of coverage. These excluded groups are largely comprised of certain categories of atypical workers (e.g. independent contractors, dependent contractors, and the self-employed), informal economy workers and the long-term unemployed.

Given the focus of South Africa’s unemployment benefits on workers in the formal economy, recourse in this analysis will be had to Article 21(a) of Convention No. 102, which prescribes that coverage of the unemployment system should comprise “prescribed classes of employees, constituting not less than 50 per cent of all employees”.

Calculation of the coverage of South Africa's unemployment benefit scheme:⁶⁵

- A. Number of employees protected (in law): 11 364 000
- B. Total number of employees: 13 498 000⁶⁶
- C. Number of employees protected as percentage of total number of employees (in law): 84%

From the above it is concluded that the statutory personal coverage under the unemployment scheme set out in the UIA is in conformity with the requirements of Article 21(a) of Convention No. 102 in that the persons protected constitute 100% of the total number of employees, above the minimum requirement of “50 per cent of all employees” set out in the Convention.

⁶² Section 23(2) SDA. In terms of the SDA, labour centres have a range of employment services-related functions, including the registration of work-seekers, the registration of work placement opportunities and assisting work-seekers to access such opportunities.

⁶³ Section 16(1) UIA.

⁶⁴ Section 1 and 3(1) UIA.

⁶⁵ See Title I, Article 76 of Convention No. 102.

⁶⁶ Statistics South Africa, 2011a, p. vi. This figure is made up as follows: 9,616,000 employed in the formal sector (non-agricultural); 630,000 employed in agriculture; 2,134,000 employed in the informal sector (non-agriculture) and 1,118,000 employed in private households.

Amount of the unemployment benefit

Article 22 of the Convention states that the amount of the unemployment benefit must be calculated in conformity with the rules established in Articles 65, 66 or 67 of Convention No. 102. Article 65 is applicable in the case of earnings-related benefits and Article 66 in the case of flat-rate benefits, while Article 67 applies to means-tested benefits.

In terms of Schedule 2 of the South African UIA, unemployment benefits are calculated in one of two ways, depending on a contributor's income prior to becoming unemployed:

In the first place, contributors who earned less than a particular amount (known as the "benefit transition income level") are entitled to a percentage of their previous income. Instead of using a fixed percentage of the remuneration earned prior to the period of unemployment in order to calculate benefits, the South African UIA introduces a graduated scale of benefits that differentiates between higher-income contributors and lower-income contributors. Schedule 2 of the South African UIA (reproduced here below), read with section 12(3)(b), sets the maximum income replacement rate at 60 per cent and the maximum amount of the benefit at ZAR3,077.62.

Contributors who earned more than the benefit transition income level are entitled to the maximum amount i.e. ZAR 3,077.62, "equal to the entitlement of a contributor who was previously paid at the benefit transition income level".⁶⁷ According to Schedule 2 of the UIA, the "benefit transition level" is linked to the wage of a skilled manual worker. In other words, the wage of a "skilled manual worker", corresponding to a fictitious amount fixed in the UIA, determines the appropriate income level at which to set a ceiling for membership of the unemployment benefit scheme. The current income ceiling is set at ZAR8,099.00 per month. Contributors who earn more than that amount and who become unemployed will receive the capped benefit of ZAR3,077.62.⁶⁸

In this regard, it must be noted that Article 22 of Convention No. 102 (read with Article 65, para. 3 as well as the Schedule to Part XI entitled Periodical Payments to Standard Beneficiaries) allows that a ceiling be fixed on the rate of the benefit or on the earnings taken into account for the calculation of the benefit, in so far as this ceiling should not be set below the earnings of a skilled manual male employee or at least not in such a way that the benefit of a skilled manual male employee does not reach the prescribed replacement rate. Hence, the unemployment benefit of a beneficiary with earnings less or equal to those of a skilled manual employee, as defined in Convention No. 102, and determined accordingly, must not correspond to less than 45 per cent of his previous earnings.


The benchmark used in this analysis is that of the earnings of a skilled manual employee, established according to Article 65(6)(b) of Convention No. 102, namely "a person deemed typical of skilled labour selected among the major group of economic activities with the largest number of persons protected". According to data from the Quarterly Labour Force Survey 2011, the skilled male labourer among the occupation with the largest number of persons protected appears to be either an employee in craft and related trade (comprising roughly 18 per cent of all male employees) or an employee who is a plant and machine operator (comprising roughly 15 per cent of all male employees). The weighted average monthly earnings of someone falling in these categories are approximately ZAR4,662.

⁶⁷ Schedule II, Part 1(2) UIA.

⁶⁸ See Schedule III UIA.

According to Schedule 3 of the UIA, which defines the income replacement rate and benefit (see below), a person whose earnings are equal to ZAR4,662 would receive a benefit at an approximate income replacement rate of 42 per cent, which falls just below the replacement rate of 45 per cent required by the Convention for an unemployment benefit.

Schedule 3 of the UIA sets out the calculation of benefit as follows:

Income	IRR	= UI benefit
150.00	58.64	87.96
300.00	57.39	172.17
500.00	55.88	279.41
700.00	54.53	381.69
1 000.00	52.74	527.35
1 500.00	50.25	753.79
2 000.00	48.24	964.87
3 000.00	45.19	1 355.74
3 075.57	45.00	1 384.01
 4 000.00	42.98	1 719.30
5 000.00	41.31	2 065.49
6 000.00	40.00	2 399.95
7 410.00	38.57	2 857.99
8 099.00	38.00	3 077.62
10 000.00	30.78	3 077.62

With reference to Schedule 3 of the UIA, only a person receiving an income of ZAR3,075.75 or below is entitled to benefit at the replacement rate required by the Convention (at least 45 per cent). Although this schedule is meant to represent the wage of a skilled manual labourer, ZAR3,075.75 does not appear to be an income representative of a person deemed typical of skilled labour according to Convention No. 102 since the analysis here above has determined that the wage of such a person falls closer to ZAR4,662. It is therefore recommended that a parametric adjustment be undertaken to bring the listed incomes and related income replacement rates and benefits in line with the wage of a skilled manual labourer. The parametric adjustment required would entail increasing the replacement rate granted to persons earning the equivalent of the wage of a skilled manual male employee (i.e. ZAR4,662) by approximately 3 per cent to meet the replacement rate required by the Convention (i.e. 45 per cent).

The current level of unemployment benefit set out in the UIA nearly meets the requirement of Article 22 of Convention No. 102, in that the benefit of a beneficiary whose earnings are less or equal to those of a skilled manual male employee, as defined in the Convention, would correspond to a replacement rate of approximately 42 per cent, whereas the Convention requires a replacement rate of 45 per cent. A parametric adjustment increasing the replacement rate of a person deemed typical of skilled labour by approximately 3 per cent is recommended.

Qualifying period

Section 13(3) of the UIA provides that unemployment benefits under the UIA accrue to a contributor at the rate of one day's benefit for every completed six days of employment as a contributor, subject to a maximum accrual of 238 days benefit in the four-year period immediately preceding the date of application for benefits. This means that the qualifying

period required for entitlement to unemployment benefit for the minimum duration prescribed in Article 24 of the Convention would be approximately 18 months. In this regard, Article 23 of Convention No. 102 provides that the goal of any qualifying period for benefits must be to “preclude abuse”.

The length of the qualifying period for unemployment benefits under the UIA, at the level and for the duration required by Convention No. 102, as well as the rules concerning the computation of the qualifying period are in conformity with the requirements of Article 23 of Convention No. 102.

Duration of the benefit

As stated above, benefits under the South African UIA accrue to a contributor at the rate of one day’s benefit for every completed six days of employment, subject to a maximum accrual of 238 days (or 34 weeks) for all benefits provided under this act (except maternity benefits) in the four-year period immediately preceding the date of application for benefits. The UIA does not specify a minimum number of days that need to be reached before a person is entitled to the benefit. A contributor will therefore be eligible to claim benefits (whether unemployment, illness, adoption or dependants’) for the maximum duration (34 weeks) subject to accrual of the necessary days of employment. As such, it appears that there may be cases where beneficiaries will not be entitled to an initial or subsequent unemployment benefit for a duration of 13 weeks because they may have already exhausted the 34 weeks maximum through the receipt of unemployment, illness, adoption and dependants’ (survivors’) benefits.

Schedule 2 of the UIA specifies the following method of calculating the days of benefits that a contributor is entitled to:

- “Determine the total number of days that the contributor was employed (and contributing) in the four-year period immediately preceding the date of application for benefits.
- Divide the total number of days by 6, disregarding any remainder or fractional portion of the result.
- Subtract the number of days (if any) for which the contributor claimed benefits (other than maternity benefits) in terms of this Act during the preceding four years.”

Article 24 of Convention No. 102 provides that the duration of the benefit may be limited to 13 weeks within a period of 12 months in cases where classes of employees (rather than all residents) are protected (as is the case in South Africa). In addition, Article 24(2) stipulates that in cases where the duration of the benefit shall vary with the length of the contribution period, the average duration of benefits must be at least 13 weeks within a period of 12 months.

While the UIA does not impose a limitation on the number of weeks of payment of unemployment benefits within the specified period (12 months), other than the condition that the contributor must fulfil the qualifying period necessary for entitlement to a 13 week duration is explained here above, this act does however subject the maximum period of entitlement to all benefits which are provided under this act (except maternity benefits), thereby imposing a limitation which may result in a reduction or exclusion of an otherwise due unemployment benefit.

From the above, it is concluded that the duration of benefits under the UIA is not in conformity with the requirements of Article 24 of Convention No. 102 in that there may be cases where an unemployment benefit is paid for less than 13 weeks within a 12-month period.

Waiting period

In South Africa, section 16(1) of the UIA provides that an unemployed contributor is entitled to unemployment benefits if the period of unemployment is longer than fourteen days. During those fourteen days, the employer is not obliged to provide the unemployed contributor with any form of pay or salary.

Article 24(3) of Convention No. 102 allows for a maximum waiting period of seven days before benefits are payable.

The waiting period provided by the UIA in South Africa is therefore longer (i.e. 14 days) than the period provided under Article 24 of Convention No. 102 (i.e. 7 days).

D. Old-age benefit (Part V of Convention No. 102)

South Africa does not (yet) have a national or public retirement fund scheme. However, at the time this study was carried out, the government was in the process of establishing a mandatory statutory pension fund to provide old-age, disability and survivors' benefits. What is being considered is a universal basic pension to replace the current old-age grant together with a mandatory contributory arrangement for formal sector income earners (for more detail on the proposals, see Part A above). However, these proposals have not yet been implemented. In the absence of the proposed national pension scheme, elderly in South Africa have two main sources of income: state old-age pensions and occupational / private pensions.

About two-thirds of all South Africans do not contribute to a retirement fund, meaning that they will be reliant on either private savings or the state older persons grant when they reach retirement age. Although occupational pension funds cover about 70 per cent of all employees in the formal sector, membership to such funds by the informally employed and domestic workers is negligible (van den Heever, 2007, p. 9).

Membership in occupational pensions or provident funds is not statutorily mandated; however it is frequently a condition of employment. Such schemes, privately managed cannot however be taken into consideration since they fail to comply with some of the key requirements of Convention No. 102, including the provision of defined benefits, for which the State assumes the responsibility, as well as participatory management and oversight. They include provident funds, which mostly pay lump-sum benefits at retirement. Often the rules of these funds also make provision for withdrawals prior to retirement, which is not in accordance with the principles of social insurance and jeopardizes the guarantees to be provided in compliance with Convention No. 102. In addition, the regulatory framework is fragmented with many occupational and voluntary arrangements neither regulated nor overseen by government departments or the Registrar of Pension Funds in the Financial Services Board (Oxford Policy Management, 2010, p. 92).

As a result, this part of the report will focus exclusively on the older persons grant under the Social Assistance Act 13 of 2004 in order to determine compliance with Part V of Convention No. 102.

Contingency:

Article 26 of Convention No. 102 provides that:

1. The contingency covered shall be survival beyond a prescribed age.

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2. The prescribed age shall be not more than 65 years or such higher age as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned.
 3. National laws or regulations may provide that the benefit of a person otherwise entitled to it may be suspended if such person is engaged in any prescribed gainful activity or that the benefit, if noncontributory, may be reduced where the earnings of the beneficiary or his other means or the two taken together exceed a prescribed amount.

According to the national legislation, a person is eligible for the older persons grant when attaining the age of 60 years.⁶⁹

The provisions regarding the contingency covered are in compliance with the requirements of Article 26 of Convention No. 102.

Coverage

Article 27 prescribes that the persons protected shall comprise:

- (a) prescribed classes of employees, constituting not less than 50 per cent of all employees; or
- (b) prescribed classes of the economically active population, constituting not less than 20 per cent of all residents; or
- (c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

Because the older persons grant is a means-tested benefit, regard will be had to subparagraph (c), meaning that information in the form set out in Title IV under Article 76 will be furnished.

The Social Assistance Act provides at section 5 that a person is entitled to social assistance if they are a resident and a South African citizen or member of a group or category of persons prescribed by the Minister by notice in the Gazette. Section 2(1) of the same Act states that the Social Assistance Act also applies to a person who is not a South African citizen, if an agreement, between the Republic and the country of which that person is a citizen, makes provision for this Act to apply to a citizen of that country who resides in the Republic. Furthermore, the Regulations relating to the application for the payment of social assistance and the requirement or conditions in respect of eligibility for social assistance of 2008, clearly mention “permanent residence,” at Section 2(e), as an eligibility criteria for entitlement to the older persons grant. While the Social Assistance Act 13 of 2004 appears to limit its application to South African residents and non-national residents who belong to member States with bilateral agreements with the Republic of South Africa, the Regulations seem to extend the personal coverage to all permanent residents irrespective of existing bilateral agreements and nationality. Such an interpretation would appear to be in conformity with jurisprudence emanating from the Constitutional Court which concluded that a similar provision of the Social Assistance Act 59 of 1992 (the

⁶⁹ Section 10, SAA. The eligibility age for men and women was equalized on 1 April 2010. See Social Assistance Amendment Act 6 of 2008.

predecessor to the Social Assistance Act 13 of 2004) limiting the personal scope to South African citizens was unconstitutional and should include residents⁷⁰ and refugees.⁷¹

The older persons benefits are paid wholly out of public funds. Despite the leeway that Convention No. 102 provides for member States to exclude non-nationals from tax-funded social assistance benefits, and the restrictions laid down in the law, it would appear that the aforementioned judicial pronouncements have ensured that social assistance benefits have been extended to different categories of non-nationals, the most significant of which are permanent residents and refugees.

The discrepancies in the national legislation are regretful. However, where permanent residents are included in the personal scope of the Social Assistance Act 13 of 2004, older persons grants appear to be awarded equally to all residents who meet the following means test, irrespective of nationality.

The means test is calculated according to the income and assets of the individual or of the couple. The threshold in 2011 beyond which a person would not qualify for an older persons grant is as follows:⁷²

Assets threshold

- A single person should not have assets totalling more than ZAR752,400;
- A couple's joint assets should not total more than ZAR1,504,800.

The value of a house that a person lives in is not taken into account for the calculation of total assets, regardless of whom it belongs to.

Income threshold

- A single person should not earn more than ZAR44,880 per year; or ZAR3,740 per month;
- A couple's joint income should not be more than ZAR89,760 per year, or ZAR7,480 per month.

The income of a spouse is taken into account whether or not the applicant is married in or out of community of property. However, if the applicant has been deserted by his or her spouse for more than 3 months, then the marital status of the applicant is not taken into account.⁷³

Applicants whose income and assets are below the threshold qualify for the older persons grant, but the maximum value of the grant (consisting of ZAR1,140, or ZAR1,160 in case

⁷⁰ *Khosa and Others v Minister of Social Development and Others*, [2004] ZACC 11.

⁷¹ *Bishogo, C. and Two Others v Minister of Social Development and Four Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005;

⁷² The asset and income thresholds are those at 1 April 2011 so that they are on the same time basis as the wage of a standard beneficiary, determined according to the Quarterly Labour Force Survey for 2011.

⁷³ Annexure A(3) of the Regulations.

of persons over 75, at 1 April 2011) may be adjusted in terms of the formula for determining older persons grants. However, it may not fall below ZAR100 per month.

Where an old age benefit is provided to all residents whose means during the contingency do not exceed a prescribed limit, in such a manner as to comply with the requirements of Article 67 (assessed here below), the older persons grant would be in conformity with the Convention. Although there are current discrepancies between the national legislation and jurisprudence, it appears that judicial precedence has had the effect of extending the scope of personal coverage of social assistance grants and that the relevant Regulations have accordingly made permanent residence a condition for entitlement to older persons grant. It would thus seem that the national legislation is in compliance with Article 27 of Convention No. 102.

Value of the benefit

Article 28 of Convention No. 102 prescribes that the benefit must be calculated as follows in the case of means-tested benefits: “(W)here all residents whose means during the contingency do not exceed prescribed limits are protected, in such a manner as to comply with the requirements of Article 67.”

Article 67 prescribes that in respect of means-tested benefits:

- (a) the rate of the benefit shall be determined according to a prescribed scale or a scale fixed by the competent public authority in conformity with prescribed rules;
- (b) such rate may be reduced only to the extent by which the other means of the family of the beneficiary exceed prescribed substantial amounts or substantial amounts fixed by the competent public authority in conformity with prescribed rules;
- (c) the total of the benefit and any other means, after deduction of the substantial amounts referred to in subparagraph (b), shall be sufficient to maintain the family of the beneficiary in health and decency, and shall be not less than the corresponding benefit calculated in accordance with the requirements of Article 66;
- (d) the provisions of subparagraph (c) shall be deemed to be satisfied if the total amount of benefits paid under the Part concerned exceeds by at least 30 per cent the total amount of benefits which would be obtained by applying the provisions of Article 66.⁷⁴

In South Africa, the formula for the determination of the value of the older persons grant is as follows:

$$D = 1,3A - 0,5B$$

Where:

A = maximum social grant payable per annum as approved;

⁷⁴ Measuring the application of Article 28 of the Convention against this benchmark requires actuarial studies to be carried out, as indicated in the report form of Convention No. 102 under Title V and will not be undertaken at this stage, when other benchmarks can be used.

B = the annual income of the applicant determined in accordance with the specific regulations issued in this regard;⁷⁵

D = annual social grant amount payable.⁷⁶

Various sources of income are taken into consideration in determining the applicant annual income, including any compensation payable to an applicant, any profits, withdrawals or other benefits derived from a business concern, any payment from an inheritance or trust, and any payment that the applicant receives as an employee.⁷⁷ All these factors will reduce the value of the grant, but it cannot be reduced below ZAR100 per month.⁷⁸

It appears that the determination of the rate of the older persons benefit complies with sub-articles (a) and (b) of Article 67 of the Convention.

Sub-article 67(c) refers to Article 66, and establishes the provisions of Article 66, in conjunction with the Schedule to Part XI, as the benchmark against which the value of the means-tested benefit should be measured to assess conformity with Convention No. 102. More precisely, the benefit should correspond to at least 40% of the wage of the unskilled male labourer, as defined in the Convention. In this report, regard will be had to Article 66(5) in order to determine the reference wage in terms of Article 66, i.e. that of “a person employed in the major group of economic activities with the largest number of economically active male persons protected in the contingency in question.”

The Quarterly Labour Force Survey indicates that the largest number of ordinary adult male labourers in South Africa fall into what Statistics South Africa classifies as “elementary” occupations (Statistics South Africa, 2011a, Average Monthly earnings by occupation and sex (15-64)). In 2011, 1,441,000 out of the 6,230,000 employees fell into this category, representing approximately 23 per cent of all employees. The average monthly salary for men in this group was **ZAR2,679**. This amount will therefore serve as the benchmark for the analysis to follow.

The value of the older persons grant in 2011 was **ZAR1,140 (or 1,160 in respect of those over 75 years of age)**, which corresponds to a replacement rate of nearly **85 per cent** of the reference wage for a standard beneficiary (i.e. a man of pensionable age with a wife also of pensionable age). It would thus appear that the amount of older persons grant is well above the 40 per cent replacement rate required in terms of Article 67, in conjunction with Article 66(5).

Based on the data used for the analysis, the value of the older persons grant is well above compliance with the requirements of Article 28 (read in conjunction with Articles 66 and 67) of Convention No. 102.

Qualifying period

Article 29 of Convention No. 102 establishes certain requirements in respect of the qualifying period for the old-age benefit. With regard to older persons grant provided to

⁷⁵ Section 19 and 20 Regulations.

⁷⁶ Annexure A Regulations.

⁷⁷ Section 19 Regulations.

⁷⁸ Annexure A(5) Regulations.

residents on a means-tested basis, the benefit granted should at minimum be equal to a replacement rate of 40 per cent after a period of residence not exceeding 20 years, or to 30 per cent, where there is no qualifying period.

The personal scope of the law seems to have been extended to include persons residing in the country for entitlement to the grant,⁷⁹ but there is no further requirement specified as to the duration of the period of residence required. As such it appears that a resident would be entitled to an old-age benefit without being subjected to a qualifying period.

In view of this, and subject to non-national permanent residents being entitled to an old age benefit in the same manner as national permanent residents, the national legislation is in compliance with Article 29 of Convention No. 102.

Duration of the old-age benefit

Article 30 of Convention No. 102 specifies that the old age benefit “shall be granted throughout the contingency”. Accordingly, the old person’s grant is paid until the beneficiary dies.⁸⁰

The national legislation, in respect of the duration of the old person’s grant, is in compliance with the requirements of Article 30 of Convention No. 102.

E. Employment injury benefit (Part VI of Convention No. 102)

The Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) creates a statutory system for the payment of compensation for work-related deaths, injuries and diseases arising out of and in the course of an employee’s employment. The recognition of occupational diseases specific to the mining industry and related works has led to the enactment of the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA). ODMWA covers Occupational Lung Disease in miners only. COIDA provides for compensation of occupational injury in all industries (including mining) and for occupational disease in all industries (except mining) as well as for certain occupational diseases not covered by ODMWA, such as noise-induced hearing loss.

Contingency

Article 32 of Convention No. 102 provides that the contingencies covered shall include the following (where it is due to accident or a prescribed disease resulting from employment):

- (a) a morbid condition;
- (b) incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national laws or regulations;
- (c) total loss of earning capacity or partial loss thereof in excess of a prescribed degree, likely to be permanent, or corresponding loss of faculty; and

⁷⁹ Khosa and Others v Minister of Social Development and Others, [2004] ZACC 11.

⁸⁰ Section 28(1)(a) Regulations.

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- (d) the loss of support suffered by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be made conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.

COIDA provides for benefits to be paid to (i) employees who suffer a total and partial temporary disablement as a result of an accident or occupational disease; (ii) employees who are permanently disabled (total or partial) as a result of an accident or occupational disease; and (iii) the dependants of employees who die as a result of injuries sustained in accidents at work or as a result of an occupational disease. The first two contingencies (total or partial temporary or permanent disablement) correspond to Articles 32 (a), (b), and (c) of Convention No. 102, and seem to be in conformity therewith. The third contingency corresponds to Article 32(d) of Convention No. 102, which refers to dependants. In this regard, it is important to note that in terms of COIDA, the surviving spouse's entitlement to the benefit is not conditional on him or her being incapable of self-support. Recourse in this report is therefore not had to the last sentence of Article 32(d) of Convention No. 102.

ODMWA provides compensation to both current and former mineworkers who suffer from an "occupational disease", which include pneumoconiosis, tuberculosis, permanent obstruction of airways and progressive systemic sclerosis.⁸¹ ODMWA provides for a lump-sum payment to the widow/er or dependent children if the worker dies and is found to have a compensatable disease on autopsy, which was not previously compensated, or only partially compensated.⁸²

COIDA does not prescribe a minimum degree of loss of earning capacity as a precondition for an employee to receive benefits under the Act.⁸³ The only role that the degree of disablement of the employee plays is in respect of a permanent disability. COIDA pays lump sums for permanent disability below 30 per cent (in other words, disablement between 1 per cent and 30 per cent) and a periodical payment if the permanent disability is ascertained to be greater than 30 per cent.

ODMWA defines two degrees of disease severity. First Degree disability is defined as not less than ten per cent (10%) and no more than forty per cent (40%) disability caused by one of the scheduled diseases. Second Degree is defined as single disease disability between forty per cent (40%) and one hundred per cent (100%).⁸⁴

Medical care is also covered in case of a morbid condition resulting from employment injury, albeit to a certain extent, the detail of which is examined in the analysis below.

The contingencies covered by COIDA and ODMWA are in conformity with Article 32 of Convention No. 102.

⁸¹ Section 1 ODMWA.

⁸² Section 81(1) ODMWA.

⁸³ See International Labour Office, *Report Form For the Social Security (Minimum Standards) Convention, 1952 (No. 102)*, which requires this information (see in particular, Part VII, p. 1).

⁸⁴ Section 44 ODMWA.

Coverage

Article 33(a) of Convention No. 102 prescribes that the persons protected shall comprise “prescribed classes of employees, constituting not less than 50 per cent of all employees, and, for benefit in respect of death of the breadwinner, also their wives and children;

COIDA covers employees and their dependants. An “employee” is defined very broadly as “a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind...”.⁸⁵ In theory, COIDA also covers the informally employed. However, employers who operate informally tend to not register with the Compensation Fund, and their employees are unaware that they are covered. This entails that there are seldom claims from the informal sector.⁸⁶

While the 1941 employment injury legislation provided for a pay ceiling, effectively excluding high-income workers from coverage, the COIDA is more extensive: it covers all employees for compensation, not just those classified as “workmen”. In addition, under the COIDA, all types of work relationships are covered, including workers on temporary contracts. Furthermore, while the 1941 Workmen’s Compensation Act (WCA) only extended compensation to widows, COIDA covers the surviving spouse irrespective of gender. Also included under the definition of “dependant” is “a person with whom the employee was ... living as husband and wife”.⁸⁷

Only domestic workers, self-employed persons, volunteers and military personnel are expressly excluded from coverage under COIDA.⁸⁸ ODMWA covers all persons working on a mine or related works engaged in what is defined as “risk work”.

⁸⁵ Section 1 COIDA.

⁸⁶ See Garzarelli, G.; Keeton-Stolk, L.; Schoer, V. 2008. *Workers Compensation in The Republic of South Africa*, report produced for the United States Agency for International Development, p. 4.

⁸⁷ Section 1 COIDA.

⁸⁸ Section 1 COIDA.

Calculation of the coverage of South Africa's employment injury scheme under COIDA:⁸⁹

Number of employees protected:

Statutory coverage (in law): 10 246 000⁹⁰

Total number of employees: 13 498 000⁹¹

Number of employees protected as percentage of total number of employees: 76%

The scope of personal coverage under COIDA is in conformity with the requirements of Articles 48(a) in that the persons protected constitute more than "50 per cent of all employees". As illustrated above, it appears that 76 per cent of all employees in South Africa are protected in case of employment injury (in law).

Medical care

Article 34(2) of Convention No. 102 provides that the medical care shall comprise:

- “(a) general practitioner and specialist in-patient care and out-patient care, including domiciliary visiting;
- (b) dental care;
- (c) nursing care at home or in hospital or other medical institutions;
- (d) maintenance in hospitals, convalescent homes, sanatoria or other medical institutions;
- (e) dental, pharmaceutical and other medical or surgical supplies, including prosthetic appliances, kept in repair, and eyeglasses; and
- (f) the care furnished by members of such other professions as may at any time be legally recognised as allied to the medical profession, under the supervision of a medical or dental practitioner.”

Compensation under COIDA can take the form of payment for loss of earnings (not subject to taxation), travelling expenses, medical expenses, lump-sum payments or pensions. As far as medical expenses are concerned, the Compensation Commissioner is liable for the payment of the reasonable medical costs incurred by the employee as a result of an occupational injury/disease for a maximum period of 24 months from the date of injury or diagnosis of disease. However, this time period can be extended if it can be shown that medical treatment reduces the disability.

⁸⁹ See Title I, Article 76 of Convention No. 102.

⁹⁰ Statistics South Africa, 2011a, p. vi. This figure is made up as follows: 9,616,000 employed in the formal sector (non-agricultural) and 630,000 employed in agriculture. Excluded are 2,134,000 employed in the informal sector (non-agricultural) and 1,118,000 employed in private households. The latter two groups are excluded for different reasons. While domestic workers are expressly excluded from coverage by COIDA, informal sector employees are not. However, studies indicate that informal workers are effectively excluded because informal sector employers tend to not register with the Compensation Fund, and their employees are unaware that they are covered, resulting in very few claims. See Garzarelli, G.; Keeton-Stolk, L.; Schoer, V. 2008. *Workers Compensation in The Republic of South Africa*, report produced for the United States Agency for International Development, p. 4.

⁹¹ Statistics South Africa, 2011a, p. vi. This figure is made up as follows: 9,616,000 employed in the formal sector (non-agricultural); 2,134,000 employed in the informal sector (non-agricultural); 630,000 employed in agriculture; and 1,118,000 employed in private households.

In section 1 of COIDA, “medical aid” is defined as “medical, surgical or hospital treatment, skilled nursing services, any remedial treatment approved by the Director-General, the supply and repair of any prosthesis or any device necessitated by disablement, and ambulance services where, in the opinion of the Director-General, they were essential.”⁹²

The cost of the medical aid covered may not be recovered from an employee or an employer. It is an offence for an employer to demand or receive from an employee a contribution towards medical aid supplied in terms of COIDA.⁹³

The medical care extended to victims of employment injury under Convention No. 102 is quite extensive, and even more comprehensive than that required under its Part II – medical care – examined here above, in case of a morbid condition (ILO, 1984, p. 48). Convention No. 102 envisages every type of care, at no cost to the worker, and sets no time-limit, but rather requires that medical care be provided throughout the contingency.

“Reasonable medical costs” is not defined in COIDA, and it is doubtful whether it amounts to the comprehensive packages of care envisaged by Convention No. 102. Moreover, the fact that medical care under COIDA is limited to 24 months (albeit with the possibility of a further extension) also appears to fall short of the standard established by Convention No. 102.

Clarification should thus be sought as to the definition of “reasonable medical costs”, so as to determine whether it is comprised of the care, services, treatments, etc. required under Convention No. 102. In addition, and as noted above, clarification as to whether the 24-month limitation on the provision of health care under COIDA is applied even in cases where the health condition of the injured person would require such provision, but would not necessarily lead to a reduction of the disability.

It therefore appears that the medical care provided under COIDA is not fully in compliance with Article 34(2) of Convention No. 102. Persons protected should be entitled to all types of medical care listed under Article 34 including specialist in-patient and out-patient care, domiciliary visits, dental care, nursing care at home or in other medical institutions, maintenance in hospitals and other medical institutions, and dental and pharmaceutical supplies. Such medical care should be granted throughout the contingency and as such should not be limited to 24 months. Clarification should be sought to determine what types of medical care fall under the definition of “reasonable medical costs” and whether provisions extending the coverage of medical care past the 24-month limitation are in place.

On the other hand, ODMWA pays only a lump-sum benefit, and there is no provision for the costs of ongoing medical care. The only provision for covering the costs of ongoing medical care appears to be restricted to those miners diagnosed with a compensable disease while in mine service. Section 36A provides that “the owner of a controlled mine or a controlled works shall from the date of commencement of a compensatable disease pay the legitimate and proven cost incurred by or on behalf of a person in his or her service, or who was in his or her service at the commencement of a compensatable disease, in respect of medical aid necessitated by such disease.”

The only general medical care that workers are entitled to under the Act is a bi-annual free examination that includes a chest x-ray and lung function tests. Application can also be made for such an examination before the 24-month period has lapsed if a medical

⁹² Section 1(xxv) COIDA.

⁹³ Section 77(1) COIDA.

practitioner supports the application.⁹⁴ Because an ill former mineworker is not entitled to any *ongoing* medical care (other than the bi-annual examinations), he (or she) then becomes reliant on the public health system for medical care.

It therefore appears that the medical care provided under ODMWA is not in compliance with Article 34(2) of Convention No. 102 since persons suffering from employment injuries are not entitled to all the types of medical care required by the Convention.

Reintegration

Article 35(1) of Convention No. 102 provides that “(t)he institutions or Government departments administering the medical care shall co-operate, wherever appropriate, with the general vocational rehabilitation services, with a view to the re-establishment of handicapped persons in suitable work.”

Neither COIDA nor ODMWA provide on reintegration measures (Committee of Inquiry into a Comprehensive System of Social Security for South Africa, 2002, ch. 12, para. 12.6).⁹⁵ There is no provision in COIDA and very little provision in ODMWA, which specifically attempts to enforce reintegration measures – such as compulsory rehabilitation or vocational training programmes.⁹⁶ Also, when regard is had to the benefits payable to an injured or diseased employee, it is clear that the main aim is to compensate an employee for loss of occupational faculties, and for medical expenses.⁹⁷ This also flows from the fact that benefits are calculated on the basis of the previous income of the injured/diseased employee. A special allowance may be paid towards defraying the costs of a disabled employee who requires constant help to perform essential actions of life.⁹⁸ This should be seen as a measure to support the disabled employee in functioning physically, rather than as an attempt to ensure his/her integration in society or for suitable work.

Given the insufficient treatment of the issue of rehabilitation by the legislature, the vocational rehabilitation system in South Africa appears to be rather limited.

There may however be measures prescribed in administrative circulars or directives and put in place accordingly, which would, in practice, give effect to Article 35 of the Convention. Additional information may be sought so as to assess whether this Article is currently applied, at least partially, in practice.

⁹⁴ Section 32 ODMWA.

⁹⁵ ODMWA also makes no provisions for rehabilitation and return to work services. See Olivier, M.; Govindjee, A.; Nyenti, M. 2011. “The role of international and regional standards in the development of an appropriate rehabilitation, re-integration and return-to-work policy framework in South Africa”, paper delivered at the conference entitled Interaction Between International, Regional and National Labour Law and Social Security: Standards and Methods, Stellenbosch, October 2011, p. 16.

⁹⁶ COIDA requires that the employer pay the compensation due to the injured employee for the first three months of temporary total disablement (section 47(3)). This could perhaps be seen as a measure that will – to some extent – ensure the continuation of the employee's link with his/her employment. However, this remains essentially a temporary measure, which is not backed by other (re)integration measures.

⁹⁷ The formula for calculating the compensation is contained in Schedule 4 of the Act (Schedule 3 in the event of occupational diseases). A distinction is made between temporary and permanent disability.

⁹⁸ Section 28 COIDA.

In view of the above, it seems that COIDA and ODMWA are not in compliance with Article 35 of Convention No. 102. Further information as to the application of this Article in practice would however be required to complete the assessment.

Amount of the employment injury benefit

Article 36(1) of Convention No. 102 provides that, in respect of incapacity for work, total loss of earning capacity likely to be permanent or corresponding loss of faculty, or the death of the breadwinner, the benefit shall be a periodical payment calculated in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66. Article 65 is applicable in the case of earnings-related benefits and Article 66 in the case of a flat-rate benefit.

The calculation of employment injury benefits in terms of COIDA is earnings-related, and compliance will therefore be determined on the basis of the requirements of Article 65. The benchmark used in this analysis is that of the earnings of a skilled manual employee, established according to Article 65(6)(b) of Convention No. 102, namely “a person deemed typical of skilled labour selected among the major group of economic activities with the largest number of persons protected”.

Temporary incapacity

In terms of COIDA, in the case of temporary total disablement (TDD), compensation is calculated based on the employee’s salary at the time of the accident and includes all normal allowances. Compensation is paid at the rate of 75 per cent of the employee’s earnings up to a maximum prescribed by the Minister of Labour. The current maximum compensation for temporary total (100 per cent) disablement (or temporary incapacity in the language of Convention No. 102) is ZAR17,366.25 per month, and the minimum ZAR2,430.75.⁹⁹

Permanent disablement (invalidity)

If the permanent disablement (referred to as “invalidity” in Convention No. 102) is assessed at more than 30 per cent of loss of earning capacity, the employee will receive a monthly pension for life. Permanent disability benefit of a degree of loss of earning capacity of 100 per cent is calculated at 75 per cent of the employee’s monthly earnings subject to a prescribed maximum and minimum benefit. In case of total (100 per cent) invalidity, this is set at ZAR17,366.25 (maximum benefit) and ZAR2,430.75 (minimum benefit). Lesser degrees of disablement (in excess of 30 per cent) will attract pensions proportionate to the degree of disability (with 75 per cent as the maximum baseline).¹⁰⁰

As mentioned earlier, the benchmark used in this analysis, given that COIDA makes provision for earnings-related benefits, is that established by Article 65(6)(b). According to data from the Quarterly Labour Force Survey 2011, the skilled labour appears to be either an employee in craft and related trade (comprising roughly 18 per cent of all male employees) or the male who is a plant and machine operator (comprising roughly 15 per

⁹⁹ Schedule 4 COIDA. Article 55 of COIDA provides that these minimum and maximum amounts can be amended by the Minister of Labour on the recommendation of the Director-General and after consultation with the Compensation Board.

¹⁰⁰ Schedule 4 COIDA.

cent of all male employees). The weighted average monthly earnings of someone falling in either category are approximately ZAR4,662.

In terms of Convention No. 102 (Schedule to Part XI), the benefits payable both in the case of temporary and permanent invalidity for work must correspond to at least 50 per cent of previous earnings. COIDA, which sets the level of the invalidity benefit at 75 per cent of previous earnings, is in compliance with Convention No. 102. It is not specified in the law in which case and to whom the minimum employment injury benefit is paid. In any case, the current minimum benefit payable to workers who are temporarily or permanently disabled, ZAR2,430.75 represents 52 percent of the former earnings of a standard beneficiary selected among the persons deemed typical of skilled labour (i.e. ZAR4,662) and thus meets the requirements of the Convention.

ODMWA only provides for a lump-sum payment based on the percentage permanent disability and the remuneration of the employee. Convention No. 102 states that compensation in the case of employment injury must be in the form of periodical payment, unless the degree of incapacity is slight, or where the competent authority is satisfied that the lump sum will be properly utilised.¹⁰¹ Neither of these conditions is satisfied in terms of ODMWA. Firstly, compensation in terms of ODMWA is only provided in the case of permanent, irreversible, and incurable conditions. The degree of incapacity can thus never be characterised as “slight”. Secondly, it is well documented that many people are either reluctant or ill equipped to invest lump-sum payments, which are often used for immediate financial obligations resulting in deprivation and need at a later stage. In the absence of (legal) compulsion to reinvest the whole or part of the lump sum, there is no guarantee that it will be “properly utilised”.

The level of the benefit payable under COIDA to persons who are temporarily incapacitated for work or who have permanently lost their earning capacity as a result of an employment injury fully meets the replacement rate required under Convention No. 102 (Article 36, paragraph 1, in conjunction Article 65 of Convention No. 102).

Benefits under ODMWA are limited to lump-sum payments for permanent disability and as such it is not in compliance with Article 36.

Partial loss of earning capacity

Article 36(2) provides that in case of partial loss of earning capacity likely to be permanent, or corresponding loss of faculty, the benefit, where payable, shall be a periodical payment representing a suitable proportion of that specified for total loss of earning capacity or corresponding loss of faculty.

As mentioned above, a permanent disablement due to an employment injury, assessed at a degree of 100 per cent gives entitlement to a periodical payment corresponding to 75 per cent of the injured person’s monthly earnings subject to a prescribed maximum and minimum benefit – respectively ZAR17,366.25 and ZAR2,430.75, where the disablement is total (100 per cent). Lesser degrees of disablement (in excess of 30 per cent) will attract pensions proportionate to the degree of disability (with 75 per cent as the maximum baseline).¹⁰² According to the analysis here above, it appears that the requirements of Article 36, para. 2 of Convention No. 102 are met by these provisions.

¹⁰¹ Article 36(3) of Convention No. 102.

¹⁰² Schedule 4 COIDA.

Furthermore, Article 36(3) provides that the periodical payment may be commuted for a lump sum where (i) the degree of incapacity is slight; or (ii) where the competent authority is satisfied that the lump sum will be properly utilized.

In terms of COIDA, permanent disability assessed at between 1 and 30 per cent is paid in the form of a lump sum and is calculated at 15 times an employee's monthly earnings at the time of the accident, subject to a maximum and a minimum of such earnings as prescribed. The current recommended maximum compensation is ZAR194,535 and the minimum ZAR48,615.¹⁰³ The lump-sum payment in the event of a permanent disability of a degree less than 30 per cent is calculated pro rata to the lump sum for 30 per cent.

The degree of incapacity is left to the member State to determine. With regard to what constitutes a slight degree of incapacity that could give rise to a lump sum meeting the requirement of the Convention, the ILO Employment Injury Recommendation, 1964 (No. 121)¹⁰⁴ provides, on an indicative basis, that it should be less than 25 per cent. Convention No. 102, however, allows for other considerations to be taken into account in this appreciation. Should there be measures in place for the competent authority to assess whether the lump sum will be properly utilised by the beneficiary, and that it will fulfil its purpose of ensuring adequate income security to that person, that palliates his/her reduced earning capacity and ensure that his/her needs are met, throughout the contingency, the criteria laid down in the subparagraph 3(b) of Article 36 could be deemed to be satisfied. In this regard, an important question to consider is whether a person with a degree of disablement of 30 per cent or less suffers a real loss of earnings capacity or whether the purpose of the lump sum is rather to compensate a loss of physical ability which does not, effectively, translate into a loss of earnings capacity.

Considering the above, the amount of the employment injury benefit under COIDA for permanent but partial disablement, varying between 31 per cent and 99 per cent seems to be in compliance with the provisions of Convention No. 102, Article 36(2), since it is calculated on the basis of the benefit provided in case of total loss of earning capacity, in proportion of the degree of disability affecting the injured person

As to the prescribed degree of incapacity for commuting the periodical payment into a lump sum, i.e. 30 per cent, it does not appear unreasonably high in view of the requirements of paragraph 3 of Article 36 of the Convention. This should however be appreciated in the broader context of the employment injury benefits scheme and its objectives, together with the objectives of the Convention, and as to whether they are met by the provision of a lump sum for lesser degrees of disability down from 30 per cent.

Dependants

Convention No. 102 prescribes that the benefit payable to a "widow with two children", if proportionate to earnings, would have to be at least 40 per cent of the previous earnings of the deceased person.

In terms of COIDA, the surviving spouse will receive a lump-sum payment of twice the monthly pension the deceased employee would have received for 100 per cent permanent disability (the current minimum amount is set at ZAR4,861.50 and the maximum amount at ZAR34,732.50) Thereafter, the dependant will further receive a monthly pension of 40 per cent of what an employee would have received for permanent and total disability (i.e.,

¹⁰³ GN 1182 in GG 33858, 10 December 2010.

¹⁰⁴ This Recommendation supplements the ILO Employment Injury Benefits Convention, 1964 (No. 121), which sets higher standards than Convention No. 102 in the employment injury branch.

40 per cent of 75 per cent of final earning). The current maximum amount is set at ZAR6,946.50, with the minimum set at ZAR972.30.

The remaining 60 per cent is spread among surviving children, with each child allowed to receive no more than 20 per cent of the pension. If the deceased employee had more than three dependent children, they all share equally in the pension in respect of the 60 per cent (the maximum amount established under this heading is ZAR3,473.25, and the minimum set at ZAR486.15).

A standard beneficiary who becomes, as a result, totally and permanently disabled, would be entitled to a benefit corresponding to 75 per cent of his/her previous earnings. In case he/she dies, the spouse will be entitled to 40 per cent of that 75 per cent, and each child, to 20 per cent of that 75 per cent.

Referring to the above analysis, the earnings of a standard beneficiary, i.e. a person deemed typical of skilled labour selected among the major group of economic activities with the largest number of persons protected, is approximately ZAR4,662. This means that the standard beneficiary under Convention No. 102 (a widow with two children) will be entitled to a total benefit corresponding to 60 per cent of the deceased person's former earnings (40 per cent of the total invalidity benefit, which is equal to 30 per cent of the deceased person's former earnings, to which is added another 40 per cent of the total invalidity benefit, for two surviving children (i.e. 20 per cent per child) for a total of 30 per cent of the deceased person's former earnings). This replacement rate is above the requirements of Article 36 of Convention No. 102 read together with Article 65 (i.e. 40 per cent of a standard beneficiaries' former earnings).

The monthly pension of 60 per cent of the deceased employee's earnings payable to the surviving spouse and in respect of two children is in compliance with Convention No. 102, which prescribes a minimum rate of 40 per cent of previous earnings.

Coverage of persons employed in the territory of the Member:

Article 37 of Convention No. 102 prescribes that the benefits (medical care and compensation) shall, in a contingency covered, be secured at least to a person protected who was employed in the territory of the Member at the time of the accident if the injury is due to accident or at the time of contracting the disease if the injury is due to a disease and, for periodical payments in respect of death of the breadwinner, to the widow and children of such person.

In terms of COIDA, all those considered to be "employees" as defined by article 1 (xix) are entitled to benefits under the Act. ODMWA covers persons performing "risk work" at mines and related works. Coverage under both pieces of legislation includes various categories of non-citizens, including permanent residents, temporary residents who are migrant workers on a work permit, refugees, asylum seekers and, arguably, in the light of *Discovery Health Ltd*,¹⁰⁵ also irregular or undocumented migrants.

People employed *outside* South Africa are generally excluded from COIDA, but while they are temporarily performing work within the country they may be entitled to compensation

¹⁰⁵ *Discovery Health Ltd v CCMA & Others*, (2008) 29 ILJ 1480 (LC).

in the event of injuries, provided that arrangements have been made with the Commissioner.¹⁰⁶

Non-resident employees are entitled to benefits while outside South Africa. However, in terms of COIDA, a lump sum *in lieu* of a pension may be awarded to an employee (or his or her dependant) who receives a pension and who is resident outside South Africa or is absent for a period or periods totaling more than six months.¹⁰⁷ It has already been mentioned that ODMWA only pays lump-sum benefits.

However, it must be noted that while workers and their dependants are entitled to benefits while outside South Africa, the lack of assistance from social security institutions in the migrant-sending countries often restricts access to such benefits.¹⁰⁸ In addition, corruption in the receiving country prevents many compensation payments from ever reaching the beneficiaries (Fultz, 1998, p. 18).

In sum, it appears, from a legal perspective, that both COIDA and ODMWA are in compliance with Article 37 of Convention No. 102 regarding the coverage of persons employed within South Africa as well as the payment to dependants outside its territory.

Duration of benefit

Article 38 of Convention No. 102 specifies that the benefit must be granted throughout the contingency, except that, in respect of incapacity for work, the benefit need not be paid for the first three days in each case of suspension of earnings.

Cash benefits in terms of both COIDA and ODMWA are generally provided throughout the contingency, except in cases where a lump sum is paid. Further exceptions occur in respect of temporary total disablement under COIDA, where a 24-month limit is placed on compensation,¹⁰⁹ and temporary disablement as a result of tuberculosis (TB) under ODMWA, where the benefit is limited to six months.¹¹⁰ However, in the case of temporary total disablement under COIDA, the disablement may be treated as permanent if it continues after 24 months. Permanent disability is payable monthly during the lifetime of the employee and expires at the end of the month in which the employee dies.¹¹¹

In the case of TB under ODMWA, the person may receive a lump-sum payment after the period of six months when he or she is found to be suffering from a compensable disease.¹¹²

¹⁰⁶ Section 23(3)(a) COIDA.

¹⁰⁷ Section 60(1) COIDA.

¹⁰⁸ See Fultz, E.; Pieris, B. 1998. *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions*, ILO/SAMAT Policy Paper No. 7 (ILO Harare, Zimbabwe), pp. 18-19.

¹⁰⁹ Section 47 COIDA.

¹¹⁰ Section 80(1) ODMWA.

¹¹¹ Section 49(4) COIDA.

¹¹² Section 80(2) ODMWA.

However, as far as medical care is concerned, COIDA limits the provision of reasonable medical costs to a maximum period of 24 months from the date of injury or diagnosis of disease. This time period can only be extended if it can be shown that the medical treatment reduces the disability. Medical benefits under ODMWA are limited to free bi-annual medical examinations, but are provided throughout the worker's lifetime.

In terms of COIDA, the periodic benefit payable to the dependent spouse is paid throughout the dependent's life, and continues even after the surviving spouse remarries. However, ODMWA only pays a lump-sum benefit to dependants.

Convention No. 102 requires that all benefits granted in case of employment injury be provided throughout the contingency, which is the case for cash benefits under COIDA. Medical costs, however, seem to be covered for a duration of 24 months from the date of the injury or diagnosis of disease unless it can be shown that the medical treatment reduces the disability. In the absence of other provisions ensuring that beneficiaries receive necessary medical care throughout the contingency even where such treatment does not have the effect of reducing the disability, the national legislation would not be in compliance with Article 38.

With regards to benefits paid under ODMWA, these are limited to lump-sum payments. The Convention allows for benefits to be commuted for a lump sum where the degree of incapacity is slight. The ODMWA is therefore not in compliance with the requirements of the Convention where there are no periodical payments provided in case of permanent incapacity above a slight degree.

Waiting period

Article 38 of Convention No. 102 provides that the benefit in the case of incapacity for work need not be paid for the first three days. COIDA provides that no compensation is payable in respect of the first three days if disablement lasts no more than three days.¹¹³ Where the disablement lasts for four days or more, compensation is payable in respect of the entire period.

The waiting period provided by COIDA is in conformity with the requirements of Article 38 of Convention No. 102.

F. Family benefit (Part VII of Convention No. 102)

South Africa does not have a social insurance scheme that covers the extra costs involved in raising a family. Economically active and affluent parents and primary caregivers can, however, purchase private insurance to provide for future needs relating to, for example, education and health.

There are, however, a number of social assistance measures that address the needs of families and children. These are the child support, foster child, and care dependency grants. Only one of these grants, namely the foster child grant, is not means-tested. In terms of the number of beneficiaries, the child support grant greatly outnumbers the other two grants. In 2011-12, there were just under 11 million child support grants and 126,000 care dependency grant recipients, while 598,000 received foster child grants (National Treasury, 2012, p. 85).

¹¹³ Section 22(2) COIDA.

Contingency

The contingency covered shall be the responsibility for the maintenance of children (Article 40 of Convention No. 102). The term “child” means a child under school-leaving age or under 15 years of age (Article 1(e)). All of the three social assistance grants referred to above are aimed at maintaining children – especially children living in poor households, however this analysis will focus on the Child Support Grant and the Care Dependency Grant.

The eligibility conditions for the Child Support Grant are as follows: this means-tested grant is provided to the primary care giver of children not older than 18.¹¹⁴ If, however, some or all of the children are not the biologically or legally adopted children of the applicant, he or she is only entitled to such a grant in respect of a maximum of six children.¹¹⁵ “Primary care-giver” is defined as a person older than 16 years, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of that child.¹¹⁶

The Care Dependency Grant is also means-tested and can be applied for by the parent, primary care-giver or foster parent of a child under the age of 18 who, due to his physical or mental disability, requires and receives permanent care or support services.¹¹⁷ The child must be cared for at home and the disability confirmed by a medical assessment report. The applicant and the child must reside in South Africa at the time of the application.

The contingencies covered by the Child Support Grant and the Care Dependency Grant are in line with the definition laid down in Article 40 of Convention No. 102, i.e. responsibility for the maintenance of children.

Coverage

Article 41 of Convention No. 102 establishes three ways to assess whether family benefit schemes protect the required percentage of persons under the Convention, namely (a) prescribed classes of employees, constituting not less than 50 percent of all employees; or (b) prescribed classes of the economically active population, constituting not less than 20 per cent of all residents; or (c) all residents whose means during the contingency do not exceed prescribed limits.

Since the Child Support Grants and Care Dependency Grants are means-tested benefits, recourse will be had to subparagraph (c) meaning that information in the form set out in Title IV under Article 76 will be furnished.

Child Support Grants and Care Dependency Grants are provided to all South African citizens and permanent residents,¹¹⁸ whose income is below a fixed threshold. As in the

¹¹⁴ Section 28(2)(b) Social Assistance Regulations amended by the Government Notice of 12 March 2010

¹¹⁵ Section 6(1) Regulations.

¹¹⁶ Section 1 SAA.

¹¹⁷ Section 8 Regulations

¹¹⁸ Section 6(1)(f) and 8 Regulations

case of the older persons grant examined under Part V, it appears that the Social Assistance Act was extended to include all permanent residents,¹¹⁹ subject to a means test, and, eventually, to the completion of a qualifying period (one year of residence) which may be different from the qualifying period which should be met by citizens for entitlement to the benefit.¹²⁰

The formula for the determination of the income threshold for entitlement to family benefits is as follows:

$$A = B \times 10$$

where:

A= annual income threshold, and

B= annual value of the child support grant or the care dependency grant¹²¹

The means test is calculated according to the income of a single person or a married person. The income threshold in 2011 beyond which a person would not qualify for a child support grant was as follows:¹²²

- A single person should not earn more than ZAR31,200 per year; or ZAR2,600 per month;
- A married couple's joint income should not be more than ZAR62,400 per year, or ZAR5,200 per month.

The income threshold for entitlement to Care Dependency Grants in 2011 was as follows:

- A single person should not earn more than ZAR136,800 per year; or ZAR11,400 per month;
- A married couple's joint income should not be more than ZAR273,600 per year, or ZAR22,800 per month.

The income of a spouse is taken into account whether or not the applicant is married in or out of community of property. However, if the applicant has been deserted by his or her spouse for more than 3 months, then the marital status of the applicant is not taken into account.¹²³

At 1 April 2011 the Child Support Grant was ZAR260 and the Care Dependency Grant was ZAR1,140.

¹¹⁹ *Khosa and Others v The Minister of Social Development and others* [2004] ZACC 11.

¹²⁰ Article 41(c), 43 and 68(1), Convention No. 102.

¹²¹ Annexure (B) and (D) of the Social Assistance Regulations

¹²² The asset and income thresholds are those at 1 April 2011 so that they are on the same time basis as the wage of a standard beneficiary, determined according to the Quarterly Labour Force Survey for 2011.

¹²³ Annexure A(3) Regulations.

Where the Child Support Grant and the Care Dependency Grant are provided to *all residents* whose means during the contingency do not exceed a prescribed limit, in such a manner as to comply with the requirements of Article 41(c) (assessed here below), such family grants would be in conformity with the Convention. Since judicial precedence would have the effect of extending the scope of personal coverage of the Social Assistance Act to permanent residents, it could be concluded that the national legislation is in compliance with this Article of the Convention No. 102.

Nature of the benefit

According to Article 42(a) of Convention No. 102, the benefit can be a periodic payment granted to any person having completed the prescribed qualifying period and whose income is below a certain threshold. Article 42(b) specifies that benefits in kind (food, clothing, housing etc.) can also be considered, or a combination of in-cash and in-kind benefits (Article 42(c)).

The Child Support Grant and the Care Dependency Grant take the form of periodic (monthly) payments. Their respective values at 1 April 2011 were ZAR250 and ZAR1,140 per month per child respectively (National Treasury, 2012, p. 85).

Family benefits in South Africa are in compliance with the requirements of Article 42 of Convention No. 102 in that they take the form of periodic payments.

Qualifying period

Article 43 of Convention No. 102 provides that the family benefit shall be secured at least to a person protected who, within a prescribed period, has completed a qualifying period which may be three months of contribution or employment, or one year of residence, as may be prescribed.

Section 5 of the Social Assistance Act stipulates that in order to be eligible for any social grant, a person must be resident in the Republic and at least be a citizen of South Africa.¹²⁴ However, as mentioned here above, eligibility appears to have been extended to permanent residents in respect of the Child Support Grant and the Care Dependency Grant pursuant to a decision from the Constitutional Court.¹²⁵ (see subsection (J) on “Equality of treatment” for more detail).

Neither grant requires the satisfaction of a qualifying period. Provided the applicant meets the eligibility criteria set out in section 5 of the Social Assistance Act, and has applied for the benefit in the manner prescribed by section 14 of the same Act, the benefit will be awarded.

Since there is no qualifying period for entitlement to family benefits, the national legislation is in compliance with Article 43 of Convention No. 102.

¹²⁴ Section 5(1)(b) and 5(1)(c) SAA.

¹²⁵ Section 6(1)(f) Regulations.

Amount of benefits

Article 44 of Convention No. 102 prescribes that the total value of the benefits granted to the persons protected shall be such as to represent either (a) 3 per cent of the wage of an ordinary adult male labourer, as determined in accordance with the rules laid down in Article 66, multiplied by the total number of children of persons protected; or (b) 1.5 per cent of the said wage, multiplied by the total number of children of all residents. In presence of a scheme that protects residents, subject to a means test, option (b) should be used.

In this report, recourse will be had to Article 66(5) to determine the “wage of the ordinary male labourer”, or that of “a person employed in the major group of economic activities with the largest number of economically active male persons protected in the contingency in question.”

The Quarterly Labour Force Survey suggests that the largest number of ordinary adult male labourers in South Africa falls into what Statistics South Africa classifies as “elementary” occupations (Statistics South Africa, 2011a, Average Monthly earnings by occupation and sex (15-64)). In 2011, 1,441,000 out of the 6,230,000 employees fell into this category; representing 23 per cent of all employees. The average monthly salary for men in this group was **ZAR2,679**. This amount will therefore serve as the benchmark for the analysis to follow.

One and a half (1.5) per cent of the benchmark wage of ZAR2,679 is ZAR40.19. In terms of Article 44(b), this amount must be multiplied by the total number of children of all residents. Since family benefits in South Africa are granted to children until they attain the age of 18, the total number of children of all residents should represent all children until their 18th birthday.

Where the total number of children under the age of 18 in 2011 was 18,094,358 (Statistics South Africa, 2011b), the total value of the family benefits calculated according to Article 44 would be approximately **ZAR727,121,776** (1.5%(ZAR2,679) x 18,094,358). However, it would appear that the actual total value of family benefits in 2011 amounted closer to **ZAR2,777,980,000**,¹²⁶ far exceeding the minimum required by Convention No. 102.

The amount of family benefits in South Africa is largely in conformity with the requirements of Article 44 of Convention No. 102.

Duration of the benefit

Convention No. 102 provides that where the benefit consists of a periodical payment, it shall be granted throughout the contingency (Article 45), i.e. the maintenance of children,

¹²⁶ This value of was determined according to the total number of Child Support Grant recipients in 2010-11, namely 10,154,000, and the total number of Care Dependency Grant recipients, namely 121,000. Since the value of the Child Support Grant and the Care Dependency Grant during that same time basis was ZAR260 and ZAR1,140, respectively, it would appear that the total value of all child support grants in that period amounted to ZAR2,777,980,000 (ZAR2,640,040,000 + ZAR137,940,000).

where a child is defined as a child under school-leaving age or under 15 years of age, as prescribed.¹²⁷

Both the Child Support Grant and the Care Dependency Grant are granted up until the child attains the age of 18 years, or dies.¹²⁸

The duration of family benefits is in conformity with the requirements of Article 45 of Convention No. 102 in that the Child Support Grant and the Care Dependency Grant are granted throughout the contingency, and even beyond the minimum requirement of the Convention, i.e. until the child reaches 15 years of age.

G. Maternity benefit (Part VIII of Convention No. 102)

In the same way as sickness benefit, maternity is provided under the UIA, although treated as a separate contingency. The result of this arrangement is that only women employed in the formal economy can obtain a benefit in respect of suspension of earnings due to pregnancy. The South African social security system provides no social assistance (or maternity assistance) to women who become pregnant. However, the public health system provides pregnant and lactating women with medical care in public health establishments.¹²⁹

Contingency

Section 24 of the UIA states that a contributor who is pregnant is entitled to maternity benefits for any period of pregnancy or delivery and the period thereafter, if application is made in accordance with prescribed requirements. However, according to ILO Convention No. 102, “maternity benefits” refer not only to cash allowances but also to medical care.¹³⁰ To comply with the minimum standard, a maternity benefit should therefore provide both maternity allowances in respect of suspension of earnings resulting from pregnancy and confinement as well as medical benefit for pregnancy and confinement and their consequences. In respect of medical care for pregnancy and confinement, section 4(3)(a) of the National Health Act (NHA) provides that pregnant and lactating women not covered by private medical aid schemes are entitled to free health services in public health establishments.

The contingencies covered by the UIA (maternity allowances) and the NHA (medical care) are in conformity with Article 47 of Convention No. 102, in that maternity benefits shall include medical care in case of pregnancy and confinement and their consequences, and a benefit to remedy a suspension of earnings resulting therefrom.

Coverage

Compliance with Part VIII of Convention No. 102 may be effected on the basis of compulsory insurance or of a public service, or a combination of these, which separately or

¹²⁷ Articles 1 and 40, Convention No. 102.

¹²⁸ Section 28(2) and (4) Regulations.

¹²⁹ See Government Notice 657 of 1994, 1 July 1994.

¹³⁰ Article 49 Convention No. 102.

jointly secure both medical care and maternity allowances to the women protected and medical care to the wives of men covered by the scheme or schemes concerned.

Recourse in this analysis will be had to Article 48(a) of Convention No. 102.

Maternity allowance:

Article 48(a) of Convention No. 102 prescribes that coverage of the maternity benefit scheme (maternity allowance in this instance) should comprise “all women in prescribed classes of employees, which classes constitute no less than 50 per cent of all employees”.

Calculation of the coverage of South Africa's maternity benefit scheme (maternity allowance) under the Unemployment Insurance Act: ¹³¹	
A. Number of employees protected (men and women):	11 364 000 ¹³²
B. Total number of employees (men and women):	17 742 000 ¹³³
C. Number of employees protected as percentage of total number of employees:	64%

Medical care:

Applying the standard of Article 48(a) to the provision of maternity medical care in respect of maternity in South Africa is complex, because female workers in the formal economy are often members of private medical aid schemes, which makes them ineligible for health services under the public health scheme.¹³⁴ The compulsion for workers in the formal economy to join private medical aid schemes is not a legal obligation, but often a contractual one, where membership of a private medical aid scheme is a condition of employment. According to the General Household Survey of 2011, roughly 30 per cent of all employees were members of private medical aid schemes (Statistics South Africa, 2011b).¹³⁵ Given the presumption that employees not covered by private medical schemes resort to the public health scheme, it is estimated that approximately 70 per cent of all persons (men and women) working for a wage, commission or salary received medical care under the public health scheme.

Since the NHA provides health services to persons not already covered by private medical schemes as a condition of employment, the wives of male employees not covered by private medical aid schemes through employment in their own right are presumed to be entitled to maternity medical care under the public health scheme.

¹³¹ See Title I, Article 76 of Convention No. 102.

¹³² Department of Labour, 2011, p. 25.

¹³³ Statistics South Africa, 2011a, p. vi. This figure is made up as follows: 9, 616,000 employed in the formal sector (non-agricultural); 630,000 employed in agriculture; 2,134,000 employed in the informal sector (non-agriculture); 1,118,000 employed in private households, and 4,244,000 unemployed.

¹³⁴ Section 4(3)(b) NHA

¹³⁵ In other words 3,859,171 of 12,836,721 persons working for a wage, commission or salary declared belonging to a private medical aid scheme.

From the above it is possible to conclude that statutory personal coverage under the UIA is in conformity with the requirements of Articles 48(a) in that the persons protected in respect of maternity allowance constitute 72.8 per cent of all persons protected in the formal economy.

Furthermore, it appears that approximately 70 per cent of employees are also covered for medical maternity benefits under the NHA together with all the wives of men employed in the formal economy who are not otherwise covered under private medical schemes through employment.

Extent of the medical care benefit

Article 49 of Convention No. 102 prescribes that the medical care should at least include pre-natal, confinement and post-natal care either by qualified medical practitioners or midwives, and hospitalization where necessary. In addition, it specifies that the beneficiary should not be required to share in the cost of the medical benefit provided. Finally, the medical care provided must be aimed at maintaining, restoring and improving the health of the woman protected, and the institutions or government departments administering the maternity medical benefit must encourage the women protected to avail themselves of the general health services placed at their disposal.

In South Africa, the National Health Act, 2003, provides that pregnant and lactating women who are not members of private medical aid schemes are entitled to free health services. Health services include pre-natal, confinement and post-natal care at different levels (clinics, community health centres and hospitals) and by different medical practitioners (including nurses, community health workers, and midwives) (Department of Health, 2007).¹³⁶ The care provided is comprehensive and provided throughout the contingency, and includes prevention of mother-to-child HIV transmission (Department of Health, 2007, pp. 128 ff.). Depending on the type of hospital involved (level 1, 2 or 3), services include at least the following:

- Antenatal care for high-risk women including on-site routine blood testing;
- Antenatal ultrasound service;
- Treatment of pregnancy problems, including admission to hospital;
- 24-hour labour and delivery service for intermediate and high risk women;
- Vacuum extraction, caesarean section and manual removal of placenta;
- Regional and general anaesthesia;
- Blood transfusion;
- Essential special investigations;
- Postnatal care including complications and postoperative care;
- Postpartum sterilization;
- Referral centre for clinics and community health centres in the district;

¹³⁶ See Department of Health (South Africa). 2007. *Guidelines for Maternity Care in South Africa: A manual for clinics, community health centers and district hospitals*, 3rd edition.

- Supervision of clinics and community health centres in the district;
- Referral of complicated problems to level 2 or level 3 hospitals;
- Counseling and support;
- Genetic screening and counseling services.¹³⁷

Medical care lasts from the time the pregnancy is diagnosed to forty-two days after the pregnancy has terminated, or if a complication has developed as result of the pregnancy, until the patient has been cured or the conditions as result of the complication has stabilised.¹³⁸ The Department of Health has embarked on a number of publicity campaigns in order to promote free health services not only to pregnant women, but also to children under the age of six.¹³⁹

Pregnant and lactating women in South Africa receive medical care in a manner that complies with Article 49 of Convention No. 102.

Amount of the maternity benefit

Article 50 of the Convention states that the amount of the maternity benefit must be calculated in conformity with the rules established in Articles 65, 66 or 67 of Convention No. 102. Article 65 is applicable in the case of earnings-related benefits and Article 66 in the case of flat-rate benefits, while Article 67 applies to means-tested benefits.

In terms of Schedule 2 of the South African UIA, maternity benefits are calculated in one of two ways, depending on a contributor's income prior to becoming unemployed:

In the first place, contributors who earned less than a particular amount (known as the "benefit transition income level") are entitled to a percentage of their previous income. Instead of using a fixed percentage of the remuneration earned prior to the period of maternity in order to calculate benefits, the South African UIA introduces a graduated scale of benefits that differentiates between higher-income contributors and lower-income contributors. Schedule 2 of the South African UIA, read with section 12(3)(b), sets the maximum income replacement rate at 60 per cent and the maximum amount of the benefit at ZAR3,077.62.

Contributors who earned more than the benefit transition income level are entitled to the maximum benefit amount, i.e. ZAR3,077.762, "equal to the entitlement of a contributor

¹³⁷ See Department of Health (South Africa). 2007. *Guidelines for Maternity Care in South Africa: A manual for clinics, community health centers and district hospitals*, 3rd edition, p. 15. Level 2 and 3 hospitals include additional, more sophisticated services such as advanced prenatal diagnosis and management of extremely ill or difficult obstetric patients.

¹³⁸ See Government Notice 657 of 1994, 1 July 1994. Also see Department of Health. 2012. *Uniform Patient Fee Schedule For Paying Patients Attending Public Hospitals, Annexure H*, 11 April 2012. Available at <http://www.doh.gov.za/list.php?type=Uniform%20Patient%20Fee%20Schedule> [last accessed on 17 April 2012].

¹³⁹ See Department of Health website: <http://www.doh.gov.za>.

who was previously paid at the benefit transition income level.”¹⁴⁰ According to Schedule 2 of the UIA, the “benefit transition level” is linked to the wage of a skilled manual worker. In other words, the wage of a “skilled manual worker” corresponding to a fictitious amount fixed under the UIA, determines the income level at which to set a ceiling for benefit calculation purposes. The current income ceiling is set at ZAR8,099.00 per month. Contributors who earn more than this amount and whose earnings are suspended as a result of pregnancy and confinement will receive the capped benefit of ZAR3,077.62.¹⁴¹

In this regard, it must be noted that Article 50 of Convention No. 102 (read with Article 65, para. 3, as well as the Schedule to Part XI entitled Periodical Payments to Standard Beneficiaries) allows that a ceiling be fixed on the rate of the benefit or on the earnings taken into account for the calculation of the benefit, in so far as this ceiling should not be set below the earnings of a skilled manual male employee or at least not in such a way that the benefit of a skilled manual male employee does not reach the prescribed replacement rate. Hence, the maternity benefit of a beneficiary with earnings less or equal to those of a skilled manual employee, as defined in Convention No. 102, and determined accordingly, must not correspond to less than 45 per cent of his previous earnings.

The benchmark used in this analysis is that of the earnings of a skilled manual employee, established according to Article 65(6)(b) of Convention No. 102, namely “a person deemed typical of skilled labour selected among the major group of economic activities with the largest number of persons protected”. According to data from the Quarterly Labour Force Survey 2011, the skilled male labourer among the occupation with the largest number of persons protected appears to be either an employee in craft and related trade (comprising roughly 18 per cent of all male employees) or an employee who is a plant and machine operator (comprising roughly 15 per cent of all male employees). The weighted average monthly earnings of someone falling in these categories are approximately ZAR4,662.


According to Schedule 3 of the UIA, which defines the income replacement rate and benefit (see below), a person whose earnings are equal to ZAR4,662 would receive a benefit at an approximate income replacement rate of 42 per cent, which falls just below the replacement rate of 45 per cent required by the Convention for a maternity benefit.

Schedule 3 of the UIA sets out the calculation of the benefit as follows:

Income	IRR	= UI benefit
150.00	58.64	87.96
300.00	57.39	172.17
500.00	55.88	279.41
700.00	54.53	381.69
1 000.00	52.74	527.35
1 500.00	50.25	753.79
2 000.00	48.24	964.87
3 000.00	45.19	1 355.74
3 075.57	45.00	1 384.01

¹⁴⁰ Schedule II, Part 1(2) UIA.

¹⁴¹ See Schedule III UIA.

	4 000.00	42.98	1 719.30
	5 000.00	41.31	2 065.49
	6 000.00	40.00	2 399.95
	7 410.00	38.57	2 857.99
	8 099.00	38.00	3 077.62
	10 000.00	30.78	3 077.62

With reference to Schedule 3 of the UIA, only a person receiving an income of ZAR3,075.75 or below is entitled to benefit at the replacement rate required by the Convention (at least 45 per cent). Although this schedule is meant to represent the wage of a skilled manual labourer, ZAR3,075.75 does not appear to be an income representative of a person deemed typical of skilled labour according to Convention No. 102 since the analysis here above has determined that the wage of such a person falls closer to ZAR4,662. It is therefore recommended that a parametric adjustment be undertaken to bring the listed incomes and related income replacement rates and benefits in line with the wage of a skilled manual labourer. The parametric adjustment required would entail increasing the replacement rate granted to persons earning the equivalent of the wage of a skilled manual male employee (i.e. ZAR4,662) by approximately 3 per cent to meet the replacement rate required by the Convention (i.e. 45 per cent).

The current level of maternity benefit set out in the UIA nearly meets the requirement of Article 50 of Convention No. 102, in that the maternity benefit of a beneficiary whose earnings are less or equal to those of a skilled manual male employee, as defined in the Convention, would correspond to a replacement rate of approximately 42 per cent, whereas the Convention requires a replacement rate of 45 per cent. A parametric adjustment increasing the replacement rate of a person deemed typical of skilled labour by approximately 3 per cent is therefore recommended.

Qualifying period

Section 13(3) of the UIA provides that benefits under the UIA accrue to a contributor at the rate of one day's benefit for every completed six days of employment as a contributor, subject to a maximum accrual of 238 days benefit in the four-year period immediately preceding the date of application for benefits. This means that the qualifying period required for entitlement to maternity benefit for the minimum duration prescribed in Article 52 of the Convention would be approximately 16.6 months. In this regard, Article 51 of Convention No. 102 provides that the goal of any qualifying period for benefits must be to "preclude abuse."

It should also be noted that there is no qualifying period for the maternity medical care provided to pregnant and lactating women under the NHA.

The length of the qualifying period for maternity benefits under the UIA as well as the rules concerning the computation of the qualifying period in addition to the absence of a qualifying period for entitlement to maternity medical care under the NHA, appear to be therefore in conformity with the requirements of Article 51 of Convention No. 102.

Duration of the (maternity) cash benefit

Article 52 of Convention No. 102 provides that the maternity benefit must be provided throughout the contingency. However, the periodical payment may be limited to 12 weeks unless a longer period is required or authorised by national laws or regulations.

Benefits under the South African UIA accrue to a contributor at the rate of one day's benefit for every completed six days of employment. However, section 24(4) of the UIA provides the maximum period of maternity leave in respect of which benefits may be paid is 17.32 weeks. It must be pointed out that a contributor who has received maternity benefits in a particular cycle in terms of the UIA does not thereby lose her entitlement to claim any other category of benefits such as unemployment or illness benefits.¹⁴² Said otherwise, the maximum 34-week benefit cap, within a 4-year cycle, may be reduced by the number of days of unemployment, illness, adoption or dependant's benefits however it cannot be reduced by the receipt of maternity benefits (Section 13(3)).

The period of maternity benefits provided under the UIA is also in line with the provisions of the Basic Conditions of Employment Act 75 of 1997 (BCEA), which provides that an employee is entitled to at least four consecutive months' (unpaid) maternity leave.¹⁴³ The BCEA states that maternity leave may be taken at any time from four weeks before the expected date of birth or on another date necessitated on medical grounds. The Act further stipulates that no employee is allowed to work for six weeks after the birth of her child unless she is medically certified to do so.

Medical care is provided throughout the contingency. Pregnant women are entitled to health services free of charge for the period commencing from the time the pregnancy is diagnosed to forty-two days after the pregnancy has terminated, or if a complication has developed as result of the pregnancy, until the patient has been cured or the conditions as result of the complication has stabilized.¹⁴⁴

From the above it appears that the duration of maternity benefits under the South African legislation is in conformity with the requirements of Article 52 of Convention No. 102 in that the maximum duration of benefits of 17.32 weeks is in excess of the minimum duration (12 weeks) prescribed and that maternity medical care is provided throughout the contingency.

H. Invalidity benefits (Part IX of Convention No. 102)

In South Africa, there is no public scheme in existence that provides for invalidity benefits. As is the case with survivors' benefits, (see below), benefits arise under different legislative schemes.

A number of retirement funds in South Africa make provision for the payment of disability benefits, referred to as invalidity benefits under Convention No. 102. However, there is no provision in the Pension Funds Act that requires retirement funds to provide such cover. Whether invalidity benefits are provided is therefore dependant on the rules of each retirement fund. Thus, while Article 6 of Convention No. 102 allows Members to satisfy most parts of Convention No. 102 by means of voluntary social insurance (including Part IX), the fact that retirement funds in South Africa are not required to provide invalidity benefits combined with the diversity of approaches that retirement funds adopt in respect of this benefit, means that occupational or voluntary retirement funds (both statutory and non-statutory) will receive no further attention in this report.

¹⁴² Section 13(5) UIA.

¹⁴³ Section 25 BCEA.

¹⁴⁴ See Government Notice 657 of 1994, 1 July 1994. Also see Department of Health. 2012. *Uniform Patient Fee Schedule For Paying Patients Attending Public Hospitals, Annexure H*, 11 April 2012, p. 4.

In addition, it is clear that this part of the Convention can only be satisfied by means of periodic payments (or “invalidity pensions”) (ILO, 1952b, p. 215). In contrast with employment injury benefits,¹⁴⁵ payment of lump-sum benefits are not allowed as an exception to the general rule that only periodic benefits can satisfy the requirements of Convention No. 102.¹⁴⁶ While the Road Accident Fund (RAF) provides for compensation for injury or death that result from the negligent driving of a motor vehicle (and therefore deals with the risk of disability), compensation only takes the form of a lump-sum payment (damages of a patrimonial and non-patrimonial nature). Because lump-sum payments cannot satisfy the requirements of this part of Convention No. 102, the RAF will thus also not be discussed any further in this part of the report. The same goes for ODMWA, which also only provides for lump-sum payments in cases of injuries stemming from work in mines (see Part VI on Employment injury benefits).

Finally, the definition of invalidity in Convention No. 102 is based on the concept of general invalidity, namely a general lack of earning capacity in relation to any gainful activity rather than that of occupational invalidity, which is assessed according to the person’s inability to perform his or her previous job. This means that invalidity benefits in terms of occupational injury benefit schemes, like COIDA, cannot be considered in assessing compliance with Convention No. 102.

This means that the report will focus exclusively on the disability grant provided in terms of the Social Assistance Act 13 2004 (SAA).

Contingency

Article 54 of the Convention provides that the contingency covered shall include inability to engage in any gainful activity, which inability is likely to be permanent or persists after the exhaustion of the sickness benefit.

The Social Assistance Act provides for the payments of a disability grant to persons older than 18 years who suffer from a physical or mental disability for a period longer than 6 months. A distinction is drawn between permanent disability (one that continues longer than 12 months) and temporary disability (one that continues for a period between 6 months and 12 months).¹⁴⁷ The disability must render the person “unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.”¹⁴⁸

The SAA appears to be in conformity with the requirements of Article 54 of Convention No. 102 in that the invalidity scheme provides benefits for permanent and total invalidity.

¹⁴⁵ Article 36(3) of Convention No. 102 provides that lump-sum payments will be allowed in the case of unemployment injury benefits if the degree of the disability is “slight”. No such exception is allowed in the case of invalidity benefits.

¹⁴⁶ Article 56 of Convention No. 102 provides that “the benefit *shall be* a periodical payment...” (emphasis added).

¹⁴⁷ Section 3(b)(i)-(ii) Regulations.

¹⁴⁸ Section 9(b) SAA.

Coverage

Article 55 of Convention No. 102 provides that the persons protected shall comprise:

- (a) prescribed classes of employees, constituting not less than 50 per cent of all employees; or
- (b) prescribed classes of the economically active population, constituting not less than 20 per cent of all residents; or
- (c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

The disability grant is a mean-tested universal grant, and thus the requirements of Article 55(c) (read with the requirements of Article 67) will be used to determine the extent of its coverage.

It is necessary to assess if an amount of the means test excludes a resident altogether from entitlement to an invalidity benefit. Disability grants are provided to all South African citizens and permanent residents,¹⁴⁹ whose income is below a fixed threshold. As for the older persons grant, examined under Part V, it appears that the Social Assistance Act was extended to include all permanent residents,¹⁵⁰ subject to a means test, and, eventually, to the completion of a qualifying period (one year of residence) which may be different from the qualifying period which should be met by citizens for entitlement to the benefit.¹⁵¹

Where permanent residents are included in the personal scope of the Social Assistance Act 13 of 2004, disability grants appear to be awarded equally to all residents who meet the following means test, irrespective of nationality.

The means test is calculated according to the income and assets of the individual or of the couple. The threshold in 2011 beyond which a person would not qualify for a disability grant is as follows:

Assets threshold:

- A single person should not have assets totaling more than ZAR752,400;
- A couple's joint assets should not total more than ZAR1,504,800.

The value of a house that a person lives in is not taken into account for the calculation of total assets, regardless of whom it belongs to.

Income threshold:

- A single person should not earn more than ZAR4,4880 per year; or ZAR3,740 per month;
- A couple's joint income should not be more than ZAR89,760 per year, or ZAR7,480 per month.

¹⁴⁹ Sections 6(1)(f) and 8 of the Social Assistance Regulations

¹⁵⁰ *Khosa and Others v Minister of Social Development and Others*, [2004] ZACC 11.

¹⁵¹ Art. 41(c), 43 and 68(1), Convention No. 102.

The income of a spouse is taken into account whether or not the applicant is married in or out of community of property. However, if the applicant has been deserted by his or her spouse for more than 3 months, then the marital status of the applicant is not taken into account.¹⁵²

Applicants whose income and assets are below the threshold qualify for the disability grant, but the maximum value of the grant (consisting of ZAR1,140 at 1 April 2011) may be adjusted in terms of the formula for determining disability grants (see below). However, the grant may in no cases fall below ZAR100 per month.

Where a disability grant (invalidity benefit) is provided to all *residents* whose means during the contingency do not exceed a prescribed limit, in such a manner as to comply with the requirements of Article 67 (assessed here below), the disability grant would be in conformity with the Convention. Since judicial precedence appears to have had the effect of extending the scope of personal coverage of the Social Assistance Act to permanent residents compliance with Article 55 of Convention No. 102 would be ensured. Clarification could nevertheless be sought to confirm this statement.

Amount of the benefit

Article 56 of Convention No. 102 provides that the invalidity benefit:

- (i) must be a periodic benefit; and
- (ii) must be calculated as follows:
 - where classes of employees or classes of the economically active population are protected, in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66;
 - where all residents whose means during the contingency do not exceed prescribed limits are protected, in such a manner as to comply with the requirements of Article 67.

Benefit must be a periodic benefit:

The disability grant is paid as a periodic benefit to persons who suffer from a physical or mental disability longer than 6 months. It therefore complies with the requirement of Article 56.

Calculation of invalidity benefit:

The value of the benefit must comply with the requirements of Article 67:

Article 67 prescribes that in respect of means-tested benefits:

- (a) the rate of the benefit shall be determined according to a prescribed scale or a scale fixed by the competent public authority in conformity with prescribed rules;
- (b) such rate may be reduced only to the extent by which the other means of the family of the beneficiary exceed prescribed substantial amounts or substantial amounts fixed by the competent public authority in conformity with prescribed rules;

¹⁵² Annexure A(3) Regulations.

- (c) the total of the benefit and any other means, after deduction of the substantial amounts referred to in subparagraph (b), shall be sufficient to maintain the family of the beneficiary in health and decency, and shall be not less than the corresponding benefit calculated in accordance with the requirements of Article 66;
- (d) the provisions of subparagraph (c) shall be deemed to be satisfied if the total amount of benefits paid under the Part concerned exceeds by at least 30 per cent the total amount of benefits which would be obtained by applying the provisions of Article 66.

In South Africa, the formula for the determination of the value of the disability grant is as follows:

$$D = 1,3A - 0,5B$$

Where:

A = maximum social grant payable per annum as approved;

B = the annual income of the applicant determined in accordance with the specific regulations issued in this regard;¹⁵³

D = annual social grant amount payable.¹⁵⁴

Various sources of income are taken into consideration in determining the applicant's annual income, including any compensation payable to an applicant, any profits, withdrawals or other benefits derived from a business concern, any payment from an inheritance or trust, and any payment that the applicant receives as an employee.¹⁵⁵ All these factors will reduce the value of the grant, but it cannot be reduced to below ZAR100 per month.¹⁵⁶

It appears that the determination of the rate of the invalidity benefit complies with subparagraph (a) and that the reduction of the grant possibly complies with subparagraph (b) of Article 67 of the Convention. Such reductions are only allowed by the Convention if the other means of the family (including the sources of income listed above) exceed substantial amounts, prescribed or fixed by the competent authority.

Sub-article 67(c) refers to Article 66, and establishes the provisions of Article 66, in conjunction with the Schedule to Part XI, as the benchmark against which the value of the means-tested benefit should be measured to assess conformity with Convention No. 102. More precisely, the benefit should correspond to at least 40 per cent of the wage of the unskilled male labourer, as defined in the Convention. In this report, regard will be had to Article 66(5) in order to determine the reference wage in terms of Article 66, i.e. that of "a person employed in the major group of economic activities with the largest number of economically active male persons protected in the contingency in question."

The Quarterly Labour Force Survey indicates that the largest number of ordinary adult male labourers in South Africa fall into what Statistics South Africa classifies as

¹⁵³ Section 19 and 20 Regulations.

¹⁵⁴ Annexure A; Regulations.

¹⁵⁵ Section 19 Regulations.

¹⁵⁶ Annexure A(5) Regulations.

“elementary” occupations (Statistics South Africa, 2011a, Average Monthly earnings by occupation and sex (15-64)). In 2011, 1,441,000 out of the 6,230,000 employees fell into this category, representing approximately 23 per cent of all employees. The average monthly salary for men in this group was **ZAR2,679**. This amount will therefore serve as the benchmark for the analysis to follow.

The value of the disability grant (invalidity benefit) in 2011 was **ZAR1,140**, which corresponds to a replacement rate of nearly **42.6 per cent** of the reference wage for a standard beneficiary (i.e. Man with a wife and two children). It would thus appear that the amount of disability grant is above the 40 per cent replacement rate required in terms of Article 67, in conjunction with 66(5).

The value of the disability grant complies with the requirements of Article 56 (read in conjunction with Articles 66 and 67) of Convention No. 102.

Qualifying period

Article 57 specifies that the invalidity benefit shall, in a contingency covered, be secured at least to a person protected who has completed, prior to the contingency, a qualifying period which may be 15 years of contribution or employment, or 10 years of residence; or a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he was of working age, the prescribed yearly average number of contributions has been paid. Where there is no qualifying period, this Article allows a reduced benefit corresponding to at least 30% of the wage of the unskilled worker to be provided.

The personal scope of the law appears to have been extended to include persons residing in the country for entitlement to the grant,¹⁵⁷ but there is no further requirement specified as to the duration of the period of residence required. As such it appears that a resident would be entitled to an invalidity benefit at roughly a 42.6 per cent replacement rate without being subjected to a qualifying period.

In view of this, and subject to non-national permanent residents being entitled to an invalidity benefit in the same manner as national permanent residents, it appears that the provisions of the Social Assistance Act in respect of a qualifying period are in compliance with the requirements of Article 57 of Convention No. 102.

Duration of the invalidity benefit

Article 58 of Convention No. 102 specifies that the invalidity benefit “shall be granted throughout the contingency or until an old-age benefit becomes payable.”

The disability grant is paid until the beneficiary reaches the age of 60, when he or she qualifies for the older persons grant (a grant equal in value to the disability grant).

However, according to the Social Assistance Act, disability grants are only paid where the disability extends for a period longer than 6 months, which could mean that another benefit

¹⁵⁷ Khosa and Others v Minister of Social Development and Others, [2004] ZACC 11.

is paid for temporary incapacity in the first six months (the equivalent of sickness benefit), or that the benefit is paid retroactively, once the permanent character of the disability is confirmed. This could also mean that disabled persons are left without any form of income protection for the first 6 months, which would resemble a waiting period. The Convention however does not allow for a waiting period in the case of invalidity benefits. As such, where no other type of benefit is provided to persons who are unable to engage in gainful activity prior to entitlement to disability grants, the national legislation would not be in conformity with Convention No. 102.

It appears that disability benefits under the Social Assistance Act are provided until the beneficiary reaches the age for entitlement to older persons grants, in conformity with Convention No. 102. Clarification as to whether another type of social benefit is paid to disabled persons during the initial period of disability of 6-month is needed to make a complete assessment of compliance of the national legislation with this Article of the Convention.

I. Survivors' benefits (Part X of Convention No. 102)

South Africa's social security system does not provide for the payment of death and survivors' benefits as a separate contingency or category. As a rule, these benefits are linked to the existence of principal beneficiaries. The protection of survivors and dependants therefore acquires a patchwork character.

The following statutory instruments in South Africa all provide for survivors' benefits:

- (i) Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA);
- (ii) Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA);
- (iii) Unemployment Insurance Act 63 of 2001 (UIA);
- (iv) Road Accident Fund Act 56 of 1996 (RAF);
- (v) Pension Funds Act 24 of 1956 (PFA).

As explained in the analysis under Part D (Old-Age Benefit), the PFA is excluded from this report. In addition, Convention No. 102 requires that survivors' benefits be paid *periodically* (see Article 62), which also excludes the RAF and ODMWA from consideration (compensation under both Acts are only paid as lump-sum amounts). Finally, survivors' benefits cannot be restricted to death of the breadwinner resulting from an employment injury, which also excludes COIDA from consideration. As a result, only survivors' benefits in terms of the UIA will be analysed in this part of the report in order to determine the compliance of South Africa's survivors' benefits with the requirements of Convention No. 102.

Contingency

Article 60 of Convention No. 102 provides that the contingency covered shall include the loss of support suffered by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be made conditional on her being presumed to be incapable of self-support.

In addition, it provides that the benefit may be suspended if such person is engaged in any prescribed gainful activity or that the benefit, if contributory, may be reduced where the

earnings of the beneficiary exceed a prescribed amount, and, if noncontributory, may be reduced where the earnings of the beneficiary or his other means or the two taken together exceed a prescribed amount.

The UIA provides survivors' benefits to the surviving spouse or life partner of a deceased contributor or – if there is no surviving spouse or life partner – to any dependent child of a deceased contributor.

The UIA does not make the right of a surviving spouse or life partner conditional upon him or her being incapable of self-support. In addition, it does not provide that the benefit may be suspended if the survivor is engaged in any gainful activity or that the benefit may be reduced where the earnings of the beneficiary exceed a prescribed amount. However, there is a maximum benefit payable under the UIA (discussed later under "Amount of benefit").

It therefore appears that the contingency covered under the UIA is in conformity with the requirements of Article 60 of Convention No. 102.

Coverage

All contributors to the Unemployment Insurance Fund are entitled to the benefits provided by the UIA, including dependants' (or survivors') benefits. The UIA applies to all employees defined as "any 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."¹⁵⁸ While the current UIA widened its scope of coverage to include domestic workers, seasonal workers and the so-called high-income earners, it excludes the self-employed and those employed in the informal economy.

Given the focus of South Africa's survivors' benefits on workers in the formal economy, recourse in this analysis will therefore be had to Article 61(a) of Convention No. 102, which prescribes that coverage of the unemployment system should comprise "prescribed classes of employees, constituting not less than 50 per cent of all employees". The total number of employees considered for the purposes of measuring the application of this Article must include, in the logic of the Convention, any insured persons who are normally engaged in an economic activity or normally work as employees, including those temporarily unemployed.

Calculation of the coverage of South Africa's survivors' benefit scheme:¹⁵⁹

A. Number of employees protected (in law):	11 364 000
B. Total number of employees:	15 608 000 ¹⁶⁰

¹⁵⁸ Section 1 and 3(1) UIA.

¹⁵⁹ See Title I, Article 76 of Convention No. 102.

¹⁶⁰ Statistics South Africa, 2011a, p. vi. This figure is made up as follows: 9,616,000 employed in the formal sector (non-agricultural); 630,000 employed in agriculture; 1,118,000 employed in private households; and 4,244,000 unemployed (official definition, which excludes discouraged work seekers). Here it should be mentioned, however, that the statistical data available on the number of unemployed does not distinguish between employees who are temporarily unemployed and insured under the UIA, and persons in other categories of the economically active population who are unemployed. The "total number of employees" considered for the purposes of measuring

C. Number of employees protected as percentage of total number of employees (in law): 72.8%

From the above it appears that the statutory personal coverage under the survivors' benefits scheme set out in the UIA is in conformity with the requirements of Article 61(a) of Convention No. 102 in that the persons protected constitute 72.8 per cent of the total number of employees, above the minimum requirement of "50 per cent of all employees" set out in the Convention.
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Amount of the benefit

Article 62 of the Convention states that the amount of the survivors' benefit must be calculated in conformity with the rules established in Articles 65, 66 or 67 of Convention No. 102. Article 65 is applicable in the case of earnings-related benefits and Article 66 in the case of flat-rate benefits, while Article 67 applies to means-tested benefits.

According to the UIA, the benefit payable to dependants in case of the loss of support is equal to the unemployment benefit that the deceased would have received had they been alive.

In terms of Schedule 2 of the South African UIA, unemployment benefits are calculated in one of two ways, depending on a contributor's income prior to becoming unemployed.

In the first place, contributors who earned less than a particular amount (known as the "benefit transition income level") are entitled to a percentage of their previous income. Instead of using a fixed percentage of the remuneration earned prior to the period of unemployment in order to calculate benefits, the South African UIA introduces a graduated scale of benefits that differentiates between higher-income contributors and lower-income contributors. Schedule 2 of the South African UIA, read with section 12(3)(b), sets the maximum income replacement rate at 60 per cent, and the maximum amount of the benefit at ZAR3,077.62.

Contributors who earned more than the benefit transition income level are entitled to the maximum benefit amount, i.e. ZAR3,077.62, "equal to the entitlement of a contributor who was previously paid at the benefit transition income level".¹⁶¹ According to Schedule 2 of the UIA, the "benefit transition level" is linked to the wage of a skilled manual worker. In other words, the wage of a "skilled manual worker" corresponding to a fictitious amount fixed in the UIA, determines the income level at which to set a ceiling for benefit calculation purposes. The current income ceiling is set at ZAR8,099.00 per month. Contributors who earn more than this amount and who become unemployed will receive the capped benefit of ZAR3,077.62.¹⁶²

In this regard, it must be noted that Article 62 of Convention No. 102 (read with Article 65, para. 3, as well as the Schedule to Part XI entitled Periodical Payments to Standard Beneficiaries) allows that a ceiling be fixed on the rate of the benefit or on the earnings taken into account for the calculation of the benefit, in so far as this ceiling should not be set below the earnings of a skilled manual male employee or at least not in such a way that the benefit of a skilled manual male employee does not reach the prescribed replacement rate. Hence, the survivors' benefit of a beneficiary with earnings less or equal to those of a

the application of Article 15 of Convention No. 102 may thus be lower, which would result in higher coverage at national level.

¹⁶¹ Schedule II, Part 1(2) UIA.


¹⁶² See Schedule III of the UIA.

skilled manual employee, as defined in Convention No. 102, and determined accordingly, must not correspond to less than 40 per cent of his previous earnings.

The benchmark used in this analysis is that of the earnings of a skilled manual employee, established according to Article 65(6)(b) of Convention No. 102, namely “a person deemed typical of skilled labour selected among the major group of economic activities with the largest number of persons protected”. According to data from the Quarterly Labour Force Survey 2011, the skilled male labourer among the occupation with the largest number of persons protected appears to be either an employee in craft and related trade (comprising roughly 18 per cent of all male employees) or an employee who is a plant and machine operator (comprising roughly 15 per cent of all male employees). The weighted average monthly earnings of someone falling in these categories are approximately ZAR4,662.

According to Schedule 3 of the UIA, which defines the income replacement rate and benefit (see below), a person whose earnings are equal to ZAR4,662 would receive a benefit at an approximate income replacement rate of 42 per cent, which falls above the replacement rate of 40 per cent required by the Convention for a survivors’ benefit.

Schedule 3 of the UIA sets out the calculation of benefit as follows:

Income	IRR	= UI benefit
150.00	58.64	87.96
300.00	57.39	172.17
500.00	55.88	279.41
700.00	54.53	381.69
1 000.00	52.74	527.35
1 500.00	50.25	753.79
2 000.00	48.24	964.87
3 000.00	45.19	1 355.74
3 075.57	45.00	1 384.01
 4 000.00	42.98	1 719.30
5 000.00	41.31	2 065.49
6 000.00	40.00	2 399.95
7 410.00	38.57	2 857.99
8 099.00	38.00	3 077.62
10 000.00	30.78	3 077.62

The current level of the survivors’ benefit set out in the UIA meets the requirements of Article 62 of Convention No. 102, in that the survivors’ benefit of a beneficiary with earnings less or equal to those of a skilled manual employee, as defined in the Convention, would correspond to a replacement rate of approximately 42 per cent, whereas the Convention requires a 40 per cent replacement rate.

Qualifying period

Convention No. 102 allows for a qualifying period of 15 years of contribution or employment for entitlement to survivors benefits according to Article 63.

Section 13(3) of the UIA, benefits accrue to a contributor at the rate of one day's benefit for every completed six days of employment as a contributor, subject to a maximum accrual of 238 days benefit in the four-year period immediately preceding the date of application for benefits. Pursuant to Article 64 of Convention No. 102, survivors' benefits should be provided throughout the contingency; at least until the child reaches the age of 15 and until the spouse remarries or is engaged in any prescribed gainful activity (Article 64 in conjunction with Article 1(e), Article 60 and Article 69). Since the accrual of days of benefits is capped to a four-year cycle, it appears that the qualifying period will be insufficient to provide a survivors' benefit according to the Convention.

The legislation links the duration of the benefit to a qualifying period and caps the accrual of benefits to 238 days within a four-year cycle. As such, it appears that the dependants' grant provided under the UIA is sooner an allowance rather than a long-term pension. The qualifying period and the accrual system giving entitlement to survivors benefits is therefore not in conformity with Convention No. 102.

Duration of benefits

As discussed above, Article 64 of Convention No. 102 specifies that survivors' benefits should be provided throughout the contingency. As regards the loss of support suffered by children, the Convention considers the term child to mean child under school-leaving age or under 15 years of age (Article 1(e) and Article 60). Survivors' benefits granted to spouses can be suspended where the spouse remarries or where they are engaged in any gainful activity (Articles 60 and 69).

Benefits under the South African UIA accrue to a contributor at the rate of one day's benefit for every completed six days of employment, subject to a maximum accrual of 238 days (or 34 weeks) for all benefits provided under this Act, with the exception of maternity benefits, in the four-year period immediately preceding the date of application for benefits.¹⁶³

It appears that the duration of survivors' benefits under the UIA is not in conformity with the requirements of Article 64 of Convention No. 102. In the first place, the benefit is capped at 34 weeks in a four-year cycle subject to the completion of 1,428 days of employment, and therefore is not provided throughout the contingency. Moreover, since the maximum 34 weeks applies to all benefits granted under the UIA (except Maternity benefits), it is possible that survivors' benefits are granted for even less than 34 weeks.

Since dependants' grants provided under the UIA are sooner allowances rather than long-term pensions provided throughout the contingency, the duration of survivors' benefits under the UIA is not in conformity with the requirements of Article 64 of Convention No. 102.

J. Equality of treatment of non-nationals (Part XII) and Common provisions (Part XIII)

Equality of treatment of non-nationals (Article 68)

Article 68(1) of Convention No. 102 provides that non-national residents shall have the same rights as national residents with the proviso that special rules concerning non-

¹⁶³ Section 13(3) UIA.

nationals and nationals born outside the territory of the member State may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds (and in respect of transitional schemes). Article 68(2) further stipulates that in the case of contributory unemployment schemes, the persons protected who are nationals of another Member who has accepted the obligations of this part of the Convention shall have the same rights as nationals of the Member concerned (subject to the existence of bilateral or multilateral agreements providing for reciprocity).

Benefits under the Social Assistance Act (old-age, family and invalidity benefits)

The Social Assistance Act 13 of 2004 provides at section 5 that a person is entitled to the appropriate social assistance if they are a resident and a South African citizen or 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. Section 2(1) of the same act states that the Social Assistance Act also applies to a person who is not a South African citizen, if an agreement, between the Republic and the country of which that person is a citizen, makes provision for this Act to apply to a citizen of that country who resides in the Republic. Furthermore, the Regulations relating to the application for the payment of social assistance and the requirement or conditions in respect of eligibility for social assistance of 2008, clearly mention “permanent residence” as an eligibility criteria for entitlement to older persons grant, disability grant, child support grant and care dependency grant. With reference to Section 2(e) on older persons grants, 3(a) on disability grants, 6(f) on child support grants and 7(c) on care dependency grant, the Regulations read “South African citizen, permanent resident or refugee” for disability and care dependency grants, “South African citizen or permanent resident” for child support grant and “permanent resident” for older persons grant. While the Social Assistance Act 13 of 2004 appears to limit its application to South African residents and non-national residents who belong to member States with bilateral agreements with the Republic of South Africa, the Regulations seem to extend the personal coverage to all permanent residents irrespective of existing bilateral agreements and nationality at least as regards disability grants, child support grants and care dependency grants. Such an interpretation would appear to be in conformity with jurisprudence emanating from the Constitutional Court which concluded that a similar provision in the Social Assistance Act 59 of 1992 (the predecessor to the Social Assistance Act 13 of 2004) limiting the personal scope to South African citizens was unconstitutional and should include residents¹⁶⁴ and refugees.¹⁶⁵

The older persons, family and invalidity benefits are paid wholly out of public funds. Despite the leeway that Convention No. 102 provides for member States to exclude non-nationals from tax-funded social assistance benefits, and the restrictions laid down in the law, it would appear that the aforementioned judicial pronouncements have ensured that social assistance benefits have been extended to different categories of non-nationals, the most significant of which are permanent residents and refugees.

Despite the discrepancies in the legislation, where permanent residents are included in the personal scope of the Social Assistance Act 13 of 2004, older persons, family and invalidity grants appear to be otherwise awarded equally to all residents who meet the prescribed means test, irrespective of nationality.

¹⁶⁴ *Khosa and Others v Minister of Social Development and Others*, [2004] ZACC 11.

¹⁶⁵ *Bishogo, C. and Two Others v Minister of Social Development and Four Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005;

Subject to the confirmation that non-nationals residents are effectively covered under the Social Assistance Act, including in respect of older persons, family and disability grants, in a manner equal to national residents, the national legislation would be in conformity with the requirements of Article 68(1) of Convention No. 102.

Benefits under the Unemployment Insurance Act (sickness, unemployment, maternity and survivors' benefits)

The South African UIA extends benefits only to those who qualify as “employees”. Section 19 of the Immigration Act specifies that persons who are not in possession of a valid work permit are not considered employees. A contrario, it would appear that non-national employees who hold valid work permits have all the rights granted to employees, including sickness, unemployment and maternity cash benefits, irrespective of nationality.

However, the UIA also specifically excludes persons who enter the Republic for the purpose of carrying out a contract if by law or as a result of a contractual agreement or undertaking there exists an obligation that such person must leave the country upon termination of the contract.¹⁶⁶ In essence, it excludes non-citizens working on the basis of a fixed-term contract from access to benefits under the Unemployment Insurance Act. And yet, it is evident from the same legislation that fixed-term contract workers, who are citizens of South Africa, are specifically included under UIF coverage.¹⁶⁷

While this situation may raise problems of discrimination under other international treaties and Conventions, it is not in contradiction with Article 68 of Convention No. 102 to the extent that these fixed-term foreign workers are not considered to be South African residents in virtue of the applicable legislation.

Based on this, it may be concluded that the UIA is in conformity with the provisions of Article 68 of Convention No. 102 concerning the equality of treatment of non-national residents with respect to the provision of sickness, unemployment, maternity allowances and survivors' benefits.

Benefits under the Compensation for Occupational Injuries and Diseases Act (employment injury)

All employees are entitled to the benefit under COIDA as stated in Section 22 of the law. Coverage include various categories of non-citizens, including permanent residents, temporary residents who are migrant workers on a work permit, refugees, asylum seekers and maybe irregular or undocumented migrants.¹⁶⁸

It would appear that the same holds true under the ODMWA.

¹⁶⁶ Section 3(1)(d) of the UIA; s 4 (1)(d) of the Unemployment Insurance Contributions Act 4 of 2002.

¹⁶⁷ Section 16(1)(a)(i).

¹⁶⁸ *Discovery Health Ltd v CCMA & Others* [2008] ZALC 86

It can be concluded that COIDA and ODMWA are in conformity with the provisions of Article 68 of Convention No. 102 concerning the equality of treatment of non-national residents with respect to the provision of employment injury benefits.

Benefits under the National Health Act (medical care)

Health services under the National Health Act are provided to “users” subject to rules on the participation of costs for medical services rendered. The public health care system distinguishes between three groups of patients for service fee determination. These groups are (i) full-paying patients; (ii) subsidised patients; and (iii) free-service patients. Only South African citizens are entitled to fully subsidised “primary health care services” (Department of Health, 2012, p. 5). In contrast, non-South African citizens appear to fall among the categories of full-paying patients of medical services provided they are not immigrants permanently resident who have not attained citizenship, non-South African citizens with temporary residence or work permits or persons from SADC states who enter South Africa illegally. The understanding is that such excluded categories of persons receive subsidised medical services on the same footing as South Africa citizens, except as far as primary medical care is concerned.

As far as maternity medical care is concerned, all categories of non-citizens are covered provided they “incidentally develop a health problem while in South Africa”. Such persons are entitled to health services rendered free of charge independently of whether they classify as full paying or subsidized patients (Department of Health, 2012, p. 4). However, it is not clear that the medical care provided “incidentally” includes pre-natal, confinement and post-natal care and hospitalisation where necessary, as required by the Convention.

Non-citizens who are visiting South Africa specifically for the purpose of obtaining health care are nevertheless excluded from free health services (Department of Health, 2012, p. 4).

Jurisprudence emanating from the Constitutional Court, in addition to South Africa’s obligations in terms of relevant international instruments, would have the effect of extending the right to health care to permanent residents, refugees and asylum seekers.¹⁶⁹ Although the National Health Act does not appear to have been updated accordingly, all residents, whether nationals or non-nationals, have a Constitutional right to health care.

The National Department of Health has expressly noted that “refugees and asylum seekers—with or without a permit—should be assessed according to the current means test as applied to South African citizens when accessing public healthcare”.¹⁷⁰ In addition, the most recent Department of Health guidelines explaining the classification of the fee structure expressly states that “persons from SADC states who enter the Republic of South Africa illegally” will not be required to pay full fees for health services (Department of Health, 2012, p. 1). While general consensus existed that irregular migrants are entitled to emergency medical care,¹⁷¹ these latest guidelines imply that they will also be able to

¹⁶⁹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11.

¹⁷⁰ BI 4/29 REFUG/ASY1 8 2007, 19 September 2007

¹⁷¹ In terms of section 27(3) of the South African Constitution, no one may be refused emergency medical treatment.

access other (non-emergency) medical services. In doing so, they will be subjected to the above-mentioned means test.

Section 27(3) of the Constitution provides that “no one may be refused emergency medical treatment.” This means that under South African law, everyone – regardless of nationality or legal status – is entitled to emergency medical treatment. Unlike the general right to access health care services, the right to emergency care is not subject to the qualifications pertaining to “progressive realisation” and “available resources”.¹⁷²

However, it must be noted that while permanent residents, refugees and asylum-seekers are *in principle* entitled to medical care in the public health system, there are a number of challenges that non-citizens face that may prevent them from utilising such services *in practice*. These include lack of implementation of Department of Health directives by public clinics and hospitals and refusal of treatment because of a lack of green bar-coded ID documents (IOM, 2009, p. 20).

It appears that national permanent residents and non-national permanent residents receive medical services rendered according to the National Health Act subject to the same means test and conditions for participation in medical costs. It is their Constitutional right.

More specifically, pregnant and lactating women and children under the age of 6 seem to be awarded medical care free of charge irrespective of nationality or residence. Clarification could however confirm that the types of maternity medical care provided free of charge to non-national permanent residents are the same as the types of maternity medical care provided to national residents.

As such, it would appear that South Africa's public health care system complies in law (if not always in practice) with the provisions of Article 68 of Convention No. 102 regarding the equal treatment of non-national residents. It would be advisable, nevertheless, that the National Health Act be brought in line with subsequent anti-discriminatory legislation to ensure a uniform interpretation and application of the right to health care for all residents.

Suspension of benefits (Article 69)

Article 69 of Convention No. 102 provides that suspension of a social security benefit is allowed:

- a) as long as the beneficiary is absent from the territory;
- b) as long as the person is maintained at public expense;
- c) when the person receives another social security benefit;
- d) in case of a fraudulent claim;
- e) when the contingency is caused by a criminal offence;
- f) when the contingency is caused by willful misconduct;

¹⁷² See sections 27(1) and 27(2) of the Constitution. Section 27(1)(a) of the Constitution provides that everyone has the right to have access to health care services. This right has already been extended to refugees and asylum seekers, and includes free access to anti-retroviral treatment (See CoRMSA (Consortium for Refugees and Migrants in South Africa). 2008. *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* (Johannesburg), p. 38, p. 40).

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- g) if the person neglects to make use of medical or rehabilitation services placed at his/her disposal, or fails to comply with the rules for verifying occurrence or continuance of the contingency, or for the conduct of beneficiaries;
 - h) if the person fails to make use of the employment services placed at his/her disposal;
 - i) if the person has lost his/her employment as the direct result of a stoppage of work due to a trade dispute or has done so voluntarily without a just cause;
 - j) in the case of survivors' benefit, as long as the widow is living with a man as his wife.

Benefits under the Social Assistance Act (old-age, family and invalidity benefits)

The first cause of suspension listed in Article 69 is the absence of the person / beneficiary from the territory of the member State. This matter is addressed in Section 16 of the Social Assistance Act, which provides that if a beneficiary intends not to be in South Africa for a period longer than 90 days, he must inform South African Social Security Agency (SASSA) thereof and his benefits shall be suspended until he returns, unless the beneficiary has requested that the benefits must still be paid due to circumstance as prescribed by the Minister in the Gazette. If a beneficiary has left South Africa for a period not exceeding 90 days, but may be absent for a period longer than 90 days, he must inform SASSA thereof and provide details upon which it must be decided if the benefits paid to the beneficiary must be suspended. If a beneficiary fails to inform SASSA that he will leave South Africa for longer than 90 days or may remain outside of the country for a period longer than 90 days, his benefits shall be suspended.¹⁷³

As regards subparagraph (b), the benefit may be suspended when a beneficiary is admitted to an institution funded by the State or six months after the date on which the beneficiary was admitted temporarily to a psychiatric hospital for observation or treatment and such beneficiary remains so admitted.¹⁷⁴

Concerning subparagraph (d), any grant may be suspended if obtained fraudulently or through misrepresentation, or if it was granted in error.¹⁷⁵ The Social Security Agency may also review a grant, and may suspend the grant due to the outcome of the review or if the beneficiary fails to provide the requested information or documentation.¹⁷⁶

In addition, family grants may be suspended if the parent, primary care-giver or foster parent is convicted of abuse or neglect of the child in respect of whom he or she receives the grant, or is found to be incapable of using a grant for the benefit of the child.¹⁷⁷ This is allowed by the wording of article 40 of Convention No. 102.

¹⁷³ Section 16 SAA

¹⁷⁴ Section 28 Regulations

¹⁷⁵ Section 29 (1) Regulations

¹⁷⁶ Section 27 Regulations

¹⁷⁷ Section 19(3) SAA

It appears that the provisions related to the suspension of the older persons, child and invalidity grants are in conformity with the requirements of Articles 69 and 40 of Convention No. 102.

***Benefits under the Unemployment Insurance Act
(sickness, unemployment, maternity and survivors
benefits)***

In respect of subparagraph (a), the UIA contains no specific provision regarding the payment of benefits to a contributor who is outside the country.

As far as causes (b) and (c) are concerned, section 14 of the UIA provides that a contributor is not entitled to benefits for any period that the contributor was in receipt of a monthly pension from the State, any benefit from the Compensation Fund as a result of a workplace injury or disease that caused total or temporary unemployment of that contributor, or a benefit under a bargaining or statutory council unemployment fund or scheme.¹⁷⁸ Moreover, Section 20(1) of the UIA provides that a contributor is not entitled to illness benefits for any period during which the contributor is entitled to unemployment benefits or adoption benefits.

Causes (d) and (f) are addressed by section 36 of the UIA, which provides that a contributor or dependant may be suspended for a period of up to five years from receiving a benefit if the contributor or dependant has either made a false statement in an application for benefits, or submitted a fraudulent application for benefits.¹⁷⁹ While Convention No. 102 provides that a person may be suspended from benefits if he or she caused the contingency “by wilful misconduct”, the UIA allows the payment of benefits in cases where the contributor has been dismissed *irrespective of the “wilfulness”* of the conduct that gave rise to the dismissal.¹⁸⁰ In other words, as long as the contributor has been dismissed as that term is defined in section 186 of the Labour Relations Act 66 of 1995, he or she will be entitled to the benefit.

As regards cause (g), section 20 of the UIA states that benefits are suspended where without just reason, the beneficiary refuses or fails to undergo medical treatment or to carry out the instructions of a medical practitioner, chiropractor or homeopath. Moreover, as far as cause (h) is concerned, section 16(2) of the UIA provides that an unemployed contributor is not entitled to benefits (i) if he or she fails to report to the employment office at the times and dates stipulated by the claims officer (in order to verify unemployment as well as availability for work) or (ii) if he or she refuses without just reason to undergo training and vocational counselling for employment under any scheme approved by the Director-General of Labour. In addition, section 36(1)(c) of the UIA states that a contributor may be suspended for up to five years from receiving benefits if he or she fails to inform a claims officer of the resumption of work during the period in respect of which benefits were being paid, or fails to comply with a written demand issued by the Unemployment Commissioner.

Finally, in respect of cause (i), section 16(1)(a) of the UIA requires that the loss of employment must be due to the termination of the contributor’s contract by the employer, the ending of a fixed-term contract, a dismissal, the termination of a fixed-term contract, an

¹⁷⁸ Section 14(a)(i), (ii) and (iii).

¹⁷⁹ Section 36(1)(a) and (b).

¹⁸⁰ Section 16(1)(ii) of the UIA.

insolvency, or, in the case of a domestic worker, the death of the employer. This implies that an employee who resigned or retired or deserted is not entitled to unemployment benefits. It should be noted however that Convention No. 102 allows for a suspension of an unemployment benefit where the beneficiary has “left voluntarily without just cause”. As such, where the beneficiary “resigned, retired or deserted” with just cause, such as due to harassment or where leave was effectively not voluntary, this would not give way to a case of suspension in conformity with the Convention.

Also, the UIA does not provide a suspension of benefits as the result of a “trade dispute”. In other words, if the underlying reason for the loss of employment is a dismissal due to strike action (either an unprotected strike or an operational requirement-dismissal as a result of a protected strike), the contributor will not forfeit his or her unemployment benefit.

The provisions regarding suspension of benefits contained in the UIA appear to be partially in conformity with the requirements of Article 69 of Convention No. 102. Suspension of the benefit for not carrying out the instructions of an homeopath or a chiropractor goes beyond what Convention No. 102 allows, which is restricted to cases where the beneficiary neglects to make use of the medical rehabilitation services provided. The duration of the suspension of benefits for up to five years set out in section 36(1) (c) of the UIA is also excessive and not in line with the Convention Clarification is also necessary as to whether “resignation, retirement or desertion” following a just cause still give way to a suspension of unemployment benefits.

Benefits under the Compensation for Occupational Injuries and Diseases Act (employment injury)

As regards paragraph (a), Section 60 of COIDA provides that an employee or dependant who is resident outside South Africa or is absent for a period of more than six months and to whom a pension is payable in term of COIDA, may be awarded a lump sum in lieu of such a pension.

In addition, causes listed under subparagraph (d) and (g), Section 26 of COIDA provides that compensation (or a part thereof) may be refused (i) if the employee falsely represented that he was not suffering from (or had not previously suffered from) a serious occupational injury or disease and the subsequent injury was caused by the disablement or was aggravated by the injury or disease; or (ii) the death or disablement was caused, prolonged or aggravated by the unreasonable refusal or wilful neglect of the employee to submit to medical aid in respect of any injury or disease.

Finally, COIDA provides that where an employee is guilty of serious and wilful misconduct that results in an accident, such an employee will forfeit his entitlement to compensation unless (i) the accident results in serious disablement, or (ii) the employee dies as a result of the accident leaving a dependant wholly financially dependent upon him or her.¹⁸¹ Serious and wilful misconduct is defined in section 1 as being under the influence of intoxicating liquor or a drug having a narcotic effect; a contravention of any law for the protection of the health of employees or for the prevention of accidents; or any other act or omission that the Director-General considers to be serious and wilful misconduct. These provisions are in line with paragraph (f) of article 69.

¹⁸¹ See sections 22(3)(a)(i) and (ii) of COIDA.

The provisions regarding suspension of benefits contained in COIDA therefore appear to be in conformity with the requirements of Article 69 of Convention No. 102.

Right of complaint and appeal (article 70)

Article 70(1) of Convention No. 102 prescribes that every claimant shall have a right of appeal in case of refusal of the benefit or complaint as to its quality or quantity.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has commented on the right to appeal as follows:

...The concept of appeal further implies the settlement of the dispute by an authority that is independent of the administration that reviewed the initial complaint. Merely guaranteeing the right to seek review of the decision by the same administrative authority would not therefore be sufficient to constitute an appeal procedure under Convention No. 102. In addition, in the absence of special appeal procedures against the decisions of an administrative authority responsible to the government which rules in the first and last resort, the Committee has previously observed that the safeguards provided for in the Convention could nonetheless be ensured by the application of the general rules governing the right of appeal to the ordinary courts in so far as these rules permit the review or annulment of any administrative ruling in the cases covered by Article 70 (ILO, 2011c, para. 406).

Article 70(2) of Convention No. 102 further stipulates that when a Government department responsible to a legislature is entrusted with the administration of medical care, the right of appeal may be replaced by a right to have a complaint concerning the refusal of medical care or the quality of the care received investigated by the appropriate authority.

Benefits under the Social Assistance Act (old-age, family and invalidity benefits)

Section 18(1) of the Social Assistance Act as amended by Section 2 of the Social Assistance Amendment Act of 2008 and Section 3 of the Social Assistance Amendment Act of 2010, provides for a “reconsideration” of the decision of the Social Security Agency. The application for reconsideration must be lodged with the Agency within 90 days of “gaining knowledge” of the decision.¹⁸² The Agency may uphold the application, dismiss the application, or vary the original decision.¹⁸³ Section 18(1A) regulates the appeal against the reconsidered decision and provides that a beneficiary who disagrees with the reconsidered decision may lodge a written appeal with the Minister within 90 days of gaining knowledge of the reconsidered decision. An Independent Tribunal consisting of a legal practitioner, medical practitioner and a member of civil society must consider the appeal.¹⁸⁴ The Tribunal may confirm, vary or set aside the reconsidered decision and must do so within a period of 90 days from the date on which the appeal was received.¹⁸⁵

¹⁸² Section 18(1) of SSA.

¹⁸³ Regulation 3(1) in GN 746 of GG 34618, 19 September 2011.

¹⁸⁴ See section 18(3) of SSA read with Regulation 5(1) in GN 746 of GG 34618, 19 September 2011.

¹⁸⁵ Regulation 16(2) in GN 746 of GG 34618, 19 September 2011.

It appears that the provisions under the Social Assistance Act related to the right of complaint and appeal are in conformity with the requirements of Article 70 of Convention No. 102.

Benefits under the Unemployment Insurance Act (sickness, unemployment, maternity and survivors' benefits)

Section 37 of the UIA regulates the question of appeals. It stipulates that a person who is entitled to benefits in terms of this Act may appeal to a regional appeals committee if that person is aggrieved by a decision of (i) the Unemployment Insurance Commissioner to suspend such person's right to benefits; or (ii) a claims officer relating to the payment or non-payment of benefits.¹⁸⁶ A person who is dissatisfied with the decision of a regional appeals committee may refer the matter to the National Appeals Committee for a decision.¹⁸⁷ A decision by the National Appeal Committee is final, subject to judicial review.¹⁸⁸

The provisions regarding appeals contained in the UIA therefore appear to be in conformity with the requirements of Article 70 of Convention No. 102.

Benefits under the Compensation for Occupational Injuries and Diseases Act (employment injury)

COIDA provides that a person affected by a decision of the Compensation Commissioner or a trade union or employer's organisation of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the Compensation Commissioner.¹⁸⁹ The decision on such an objection may be taken on appeal to the High Court by any person affected by the decision.¹⁹⁰ The specific appeal grounds are contained in section 91(5).

In the case of ODMWA, after the Certification Committee makes a finding, the person who is the subject of the certification, or any other person acting on his/her behalf or any organisation so acting, or, in the case of a deceased person, the dependants of the deceased or any person or organisation acting on behalf of such dependants, must lodge an application for review with the Reviewing Authority within 90 days from the date on which notice of the finding was given. Failure to lodge an application within the required 90-day period will invalidate a person's right to apply for a review, as the Reviewing Authority is not empowered to condone the late submission of an application for review to the Authority.¹⁹¹ The Reviewing Authority can only confirm the findings of the Certification Committee but cannot vary or rescind it. Where the Authority disagrees with

¹⁸⁶ Section 37(1)(a) and (b).

¹⁸⁷ Section 37 (2).

¹⁸⁸ Section 37(3).

¹⁸⁹ Section 91(1) of COIDA.

¹⁹⁰ Section 91(5) of COIDA

¹⁹¹ Section 50(1) of ODMWA.

a decision of the Certification Committee, the Chairperson of the Authority must request the Chairperson of the Certification Committee to submit the case for review to a joint meeting of the Certification Committee and the Reviewing Authority.¹⁹² It is only in the instance where a finding of the Certification Committee is reviewed by a joint meeting of the Certification Committee and the Reviewing Authority that a finding of the Certification Committee can either be confirmed or rescinded and substituted with a finding of the joint meeting.¹⁹³ It has been pointed out that the joint meeting of the Certification Committee and the Reviewing Authority portrays a conflation of review (first-level) and appeal (second-level) adjudication procedures, “which brings into question both the existence and effectiveness of the Reviewing Authority as an independent body set up to review the findings of the Certification Committee.”¹⁹⁴

It therefore appears that the appeal procedure provided for under COIDA is in conformity with the requirements of Article 70 of the Convention. However, it would appear that the procedure provided for in ODMWA is not fully compliant with the requirements of Article 70 in that the settlement of the dispute is not performed by an authority “that is independent of the administration that reviewed the initial complaint”.

Benefits under the National Health Act (medical care)

Section 18 of the National Health Act provides that every person has the right to lay a complaint about the way he/she was treated at any health establishment by any of the staff and to have the complaint investigated. The relevant member of the Executive Council and every municipal council must establish a procedure for the laying of complaints within those areas of the national health system for which they are responsible.¹⁹⁵

Furthermore, any hospital, clinic or other State or private health facility has a duty to display the procedure for the laying of a complaint at the entrance to the facility where it will be easily visible.¹⁹⁶

The right to lay a complaint contained in the National Health Act appears to be in conformity with Article 70(2) of Convention No. 102, which provides that in the case of medical care, the right of appeal provided for in Article 70(1) of the Convention “may be replaced by the right to have a complaint against the refusal of medical care or the quality of the care received investigated by the appropriate authority”.

¹⁹² Section 50(2) of ODMWA.

¹⁹³ Section 52(1) ODMWA.

¹⁹⁴ See Olivier, M.; Govindjee, A.; Nyenti, M. 2011. “The role of international and regional standards in the development of an appropriate rehabilitation, re-integration and return-to-work policy framework in South Africa”, paper delivered at the conference entitled Interaction Between International, Regional and National Labour Law and Social Security: Standards and Methods, Stellenbosch, October 2011, p. 9.

¹⁹⁵ Section 18(2) of the NHA.

¹⁹⁶ Section 18(3)(a) of the NHA.

Financing and general responsibility of the Member (article 71)

Article 71(1) of Convention No. 102 provides that the cost of the benefits provided and the cost of the administration of such benefits shall be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means and takes into account the economic situation of the Member and of the classes of persons protected.

Article 71(2) further stipulates that the total of the insurance contributions borne by the employees protected shall not exceed 50 per cent of the total of the financial resources allocated to the protection of employees.

Finally, article 71(3) states that the member State shall accept general responsibility for the provision of the benefits and shall ensure, where appropriate, that the necessary actuarial studies and calculations assessing financial equilibrium are made periodically.

Benefits under the Social Assistance Act (old-age, family and invalidity benefits)

The Older persons, Child support and Disability grants in South Africa are non-contributory and funded entirely from general revenue (taxes), and therefore comply with the requirement that the cost of benefits should avoid any hardship to persons of small means.

The benefits are paid out of the National Revenue Fund, which is a fund into which all money received by the national government is paid.¹⁹⁷ Budgets in each sphere of government must contain estimates of revenue and expenditure as well as proposals for financing any anticipated deficit for the period to which they apply.¹⁹⁸ The South African Treasury is responsible for the national budget, and an annual Estimates of National Expenditure details the spending estimates of the national departments. The Minister of Social Development is responsible for the payment of social assistance grants, and must do so with the concurrence of the Minister of Finance out of moneys appropriated by Parliament for that purpose.¹⁹⁹ Annual cost-of-living adjustments are made to the value of the grants (National Treasury, 2012, p. 84).

The South African Social Security Agency (SASSA) administers the social grants (for more details, see “Administration” below). The Chief Executive Officer of SASSA is required to keep “full and proper books of account” and must ensure that the Agency’s annual budgets, corporate plans, annual reports and audited financial statements are prepared and submitted in accordance with the Public Finance Management Act 1 of 1999.²⁰⁰

Each financial year, the Agency must submit an annual report on its activities and a statement of its income and estimated expenditure for the following financial year to the

¹⁹⁷ Section 213(1) of the Constitution.

¹⁹⁸ Section 215(3).

¹⁹⁹ Section 4 of the Social Assistance Act.

²⁰⁰ Section 10 of the South African Social Security Agency Act, 9 of 2004.

Minister for approval, and the books, records of account and financial statements of the Agency must be audited annually by the Auditor-General.²⁰¹

It appears that the provisions related to financing and general responsibility of old-age, family and invalidity benefits are in conformity with the requirements of Article 71 of Convention No. 102.

***Benefits under the Unemployment Insurance Act
(sickness, unemployment, maternity and survivors
benefits)***

The Unemployment Insurance Fund from which contributions towards sickness, unemployment, maternity and survivors' benefits are paid, receives its income mainly from contributions by and on behalf of employees, interest on late payment of such contributions, and penalties for failure to comply with the legislation.²⁰² As far as contributions are concerned, both the employer and the employee have to contribute 1 per cent of the employee's remuneration during any month.²⁰³ In other words, employers and employees contribute equally to the UIF.

In terms of section 9 of the UIA, an annual review of the financial soundness of the Fund is undertaken by an actuary who provides an actuarial valuation report to the Director-General of Labour, in addition to an annual report and financial statements as required by the Public Finance Management Act 55 of 1999.²⁰⁴ Moreover, in this regard, a business plan must be filed with the National Treasury.²⁰⁵

Should the actuarial valuation referred to above indicate that the difference between income and expenditure of the Fund is "insufficient or not increasing at a sufficient rate to meet payments for benefits that may reasonably be anticipated"²⁰⁶ the Minister of Labour may request the Minister of Finance to adjust the national budget in order to cover any such anticipated deficit in the Fund.

The provisions regarding financing and general responsibility of sickness, unemployment, maternity and survivors' benefits contained in the UIA and UICA appear therefore to be in conformity with the requirements of Article 71 of Convention No. 102.

²⁰¹ Section 11.

²⁰² Section 4(2) of the UIA. Additional sources of income are interest or return on investments and movable or immovable property purchased by the Fund.

²⁰³ Section 6(1) of the *Unemployment Insurance Contributions Act* 4 of 2002 (hereinafter UICA).

²⁰⁴ Section 11 of the UIA.

²⁰⁵ Section 11(1)(a) and (b).

²⁰⁶ Section 10(1)(b) of the UIA.

Benefits under the Compensation for Occupational Injuries and Diseases Act (employment injury)

The Compensation Fund established in terms of COIDA requires employers to contribute to a centralized state fund on the basis of risk assessments. The assessment paid by employers to the Compensation Fund is determined by two principal factors: the remuneration paid to employees and the class of industry in which the employer operates. Other sources of revenue include penalties by employers and interest on investments.²⁰⁷ Employees do not contribute to the Fund.

In terms of ODMWA, the owners of so-called “controlled mines” and “controlled works” are obliged to pay a risk levy to the Compensation Commissioner for Occupational Disease (CCOD), who in turn administers the Compensation Fund. Employees are not required to contribute to the fund.

In terms of section 20 of COIDA, the Auditor-General on annual basis audits the accounts of the Compensation Fund.²⁰⁸ The same holds true for the accounts of the Compensation Fund under ODMWA.²⁰⁹

The provisions regarding the financing and general responsibility of the respective Compensation Funds under both COIDA and ODMWA appear to be in conformity with the requirements of Article 71 of Convention No. 102 in that employees do not share in the insurance contributions. In addition, the annual audits comply with the requirements of Article 71(3) of the Convention.

Benefits under the National Health Act (medical care)

In terms of the Public Finance Management Act 55 of 1998, both internal and external audits of the financial statements of the Department of Health must take place. The internal audit is performed by the Accounting Officer, and the external audit by the Auditor-General of South Africa.²¹⁰

The provisions regarding the financing and administration contained of the public health scheme therefore appear to be in conformity with the requirements of Article 71 of Convention No. 102.

Administration and general responsibility (Article 72)

Article 72(1) of Convention No. 102 requires that the administration be entrusted to an institution regulated by the public authorities or to a Government department responsible to a legislature. Where not, representatives of the persons protected shall participate in the management, or be associated therewith in a consultative capacity, under prescribed conditions; national laws or regulations may likewise decide as to the participation of representatives of employers and of the public authorities. Article 72(2) further provides

²⁰⁷ Section 15(2) of COIDA.

²⁰⁸ Section 20(2) of COIDA.

²⁰⁹ Section 76(2) of ODMWA.

²¹⁰ See Department of Health (South Africa). 2011. *Annual Report 2010/11*.

that the member State shall accept general responsibility for the proper administration of the institution mentioned above.

Benefits under the Social Assistance Act (old-age, family and invalidity benefits)

The South African Social Security Agency (SASSA) is the agent responsible for the management, administration and payment of social assistance (which includes the grants classified as old-age, family and invalidity benefits), and is subject to the Public Finance Management Act 1 of 1999 (PFMA).²¹¹ The Chief Executive Officer of SASSA is appointed by the Minister of Social Development, and is responsible, *inter alia*, for the management of the Agency, the compilation of a business and financial plan and reports in terms of the PFMA.²¹² The Minister of Social Development nevertheless still assumes overall responsibility for the proper administration of social grants in South Africa.

It therefore appears that the provisions related to the administration and general responsibility of old-age, family and invalidity benefits in South Africa are in conformity with the requirements of Article 72 of Convention No. 102.

Benefits under the Unemployment Insurance Act (sickness, unemployment, maternity and survivors' benefits)

In South Africa, the administration of sickness, unemployment, maternity and survivors' benefits under the UIA is extensively regulated. The political responsibility for the UIA and therefore also the Unemployment Insurance Fund lies with the Minister of Labour.²¹³ With certain exceptions, the Minister may delegate or assign to the Director-General of Labour or any employee in the public service, any power or duty conferred or imposed upon the Minister by the UIA. The UIA confers powers and duties on the Director-General of the Department of Labour that are additional to those conferred on the Director-General as head of the Department of Labour.²¹⁴ Additional role players in the administration of benefits include the Unemployment Insurance Commissioner, claims officers (to process applications of claims), and the Unemployment Insurance Board (to, *inter alia*, advise and make recommendations to the Minister) whose members include representatives of labour, business, community and development interest and the State.²¹⁵

The provisions regarding administration and general responsibility of sickness, unemployment, maternity and survivors' benefits under the Unemployment Insurance scheme therefore appear to be in conformity with the requirements of Article 72 of Convention No. 102.

²¹¹ Section 2(2) and 3(a) of the South African Social Security Agency Act, 9 of 2004.

²¹² Section 6(1)(a) and 6(1)(b).

²¹³ Section 68 of the UIA.

²¹⁴ Section 58 of the UIA.

²¹⁵ Section 49 of UIA

Benefits under the Compensation for Occupational Injuries and Diseases Act (employment injury)

The administration of compensation for occupational injuries and diseases in South Africa remains fragmented. COIDA is administered by the Department of Labour, and the Compensation Fund is the central institution for the financial administration of the Act. The Commissioner administers the Fund.²¹⁶ There are two important exceptions to this. These are the Rand Mutual Assurance Company Limited, which operates in the mining industry, and the Federated Employer's Mutual Association, which operates in the building industry. They are allowed to perform the same functions as the Fund.²¹⁷

ODMWA, on the other hand, is administered by the Department of Health. The Compensation Commissioner for Occupational Disease (CCOD) administers the Mines and Works Compensation Fund, and disbursement of payment to claimants. The CCOD is also a responsibility of the National Department of Health.

However, despite the fragmented nature of the administration of the two pieces of legislation, and the legitimate calls for alignment of the two laws, and their integration within the broader occupational health and safety, and social security framework,²¹⁸ each statutory framework viewed in isolation appears to comply with the requirements of Convention No. 102 regarding administration of the benefit.

The provisions regarding the administration and general responsibility of COIDA and ODMWA appear to be in conformity with the requirements of Article 72 of Convention No. 102 in that both are entrusted to "a government department responsible to a legislature".

Benefits under the NHA (medical care)

In terms of section 3 of the National Health Act, the Minister of Health takes overall responsibility for the provision of health services in South Africa. In addition, the national department, every provincial department and every municipality must establish such health services as are required in terms of the Act. Such services must be provided equitably within the limits of available resources.

Given the above, it appears that the public national health scheme is administered by "a government department responsible to a legislature" as required by Convention No. 102.

²¹⁶ Section 4(1) of COIDA.

²¹⁷ Section 30(1). The mutual associations operate in terms of a licence issued by the Minister of Labour and are required to deposit securities with the Commissioner to cover their liability in terms of the Act. An employer who obtains a policy of insurance from a mutual association, for the full extent of its potential liability in terms of the Act, is exempted from paying assessments to the Compensation Fund. See section 84(1)(b).

²¹⁸ See Committee of Inquiry into a Comprehensive System of Social Security for South Africa. 2002. *Transforming the present – protecting the future. Draft Consolidated Report. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March 2002).

CHAPTER III: PROSPECTS OF RATIFICATION OF CONVENTION NO. 102 BY SOUTH AFRICA: CONCLUSIONS AND RECOMMENDATIONS

A. Overview

South Africa has succeeded, over the past years, in establishing the building blocks of a comprehensive social security system covering the nine classic contingencies set out in Convention No. 102 and offering protection against poverty, vulnerability and social exclusion. Through an efficient mix of contributory (social insurance) and taxed financed (social grants) schemes, South Africa has achieved statutory and effective coverage rates well above the region's average and comparable – or even beyond – those of other BRICS.

As noted previously, the social security system shows a number of gaps, including deficits in the scope and extent of coverage and in the adequacy of benefits provided under existing schemes. It must be noted, however that a reform process is underway, with the aim of remedying to some of these shortcomings. One of the key areas that are being examined is that of old-age benefits. At present, over two-thirds of South Africans who reach retirement age have to rely solely on social grants, in the absence of a national or public contributory old-age pension scheme. Proposals under discussion include the introduction of a mandatory earnings-related contributory public retirement scheme and the provision of the old-age grant on a universal basis.

Furthermore, the current health care system is composed, on the one hand, of a public system that serves the majority of the population, but which is not providing effective access to quality basic health care services to an increasing number of people; and on the other hand, of a highly-resourced private system, serving only a minority of South Africans. It is worth noting that the Government is proposing to introduce a National Health Insurance scheme as a solution to the issues posed by the current two-tier medical system, the details of which are still being discussed.

Amidst the backdrop of such reforms, South Africa is in an ideal position to consider ratifying Convention No. 102. The current two-tier social security system, the social insurance scheme and social grants scheme, are geared towards providing protection to the most vulnerable against destitution and poverty and to provide some income replacement protection, despite the gaps. As such, the system is still perfectible, but very much in line with the spirit of Recommendation No. 202 – horizontal coverage, especially in terms of number of people covered – but also that of Convention No. 102 – vertical coverage, especially in terms of the level of benefits. A comprehensive and coherent social security framework is, however, needed to fill in enduring gaps.

Recommendation No. 202 and Convention No. 102 provide an internationally agreed framework and standards that can be used in the drafting of a road map for reform of the social security system and the establishment a coherent system of protection. These two landmark ILO standards contain a number of principles that are required for systems to be effective and sustainable. They set standards that, amongst others, aim at guaranteeing the good governance of the system, its financial sustainability, the rights of the beneficiaries and the respect of the rule of law, equality of treatment, non-discrimination and policy coherence.

Alongside these principles and standards, the importance of administrative capacity for ensuring the establishment and maintenance of a comprehensive social security system must not be overlooked. South Africa has the administrative capacity required for the effective implementation of these standards and is applying the aforementioned principles

to different degrees. Despite some deficiencies in the coherence and governance of the system, ratification of Convention No. 102 can be envisaged, in line with the guidance provided by Recommendation No. 202.

The ratification of Convention No. 102 requires the acceptance of at least 3 of the 9 parts of the Convention, which correspond to the branches of social security including at least one long-term benefit, namely old-age (Part V), invalidity (Part IX) or survivors' (Part X), or unemployment benefits (Part IV). A ratifying State should consider accepting other parts of the Convention at a later stage in accordance with its national circumstances.

Finally, it must be underlined that the ratification of Convention No. 102, like any ILO Convention, entails for a ratifying State the obligation to ensure its application in law and in practice.

B. Conclusions and Recommendations

The legal analysis on the compatibility of the national legislation with the requirements of each Part (branch) of the Convention undertaken in Chapter II of this report leads to the following conclusions and recommendations.²¹⁹

Firstly, it is recommended that, given that under the below indicated categories of contingencies, the definition of the contingency, the scope of personal coverage, the amount of the benefit and the qualifying period as lay down in the applicable legislation are all in compliance with the requirements of Convention No. 102, South Africa begin by ratifying the following Parts:

1. **Old-age benefits (Part V)** on the basis of the older persons grant provided under the Social Assistance Act 13 of 2004.
2. **Family benefits (Part VII)** on the basis of the Child Support Grant and the Care Dependency Grant provided under the Social Assistance Act 13 of 2004.
3. **Invalidity benefits (Part IX)** on the basis of the Disability Grant provided under the Social Assistance Act 13 of 2004, *noting, however, that the 6-month waiting period for entitlement to the grant would not be in conformity unless another type of social benefit (e.g. sickness benefit) is paid to a disabled person during this period.*
4. **Employment injury benefit (Part VI)** on the basis of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, *subject to confirmation that the medical care provided comprises the list of care, services and treatments and where necessary that entitlement to such medical care be granted throughout the contingency (i.e. even after 24 months) as required by Convention No. 102.*

Secondly, given that the requirements concerning three other parts of the Convention, namely **Sickness (Part III)**, **Unemployment (Part IV)** and **Maternity (Part VIII)**, are almost met, ratification is possible, *subject to some parametric adjustments to the UIA, including:*

²¹⁹ It should be noted that this analysis does not attempt to make an assessment of the effective application of the Convention in South Africa and is limited, for the most part, to existing legal provisions. Furthermore, as indicated in the introduction, the conclusions of the present analysis do not constitute an authoritative statement of compliance or non-compliance, the competence for which belongs to the CEACR.

- *A slight increase in the replacement rate of the benefit granted to a standard beneficiary determined according to the wage of a skilled manual male employee (currently attaining approximately 42 per cent, according to ILO calculations²²⁰ so as to guarantee a replacement rate of 45 per cent of previous earnings as prescribed in the Convention.*
- *For Sickness benefits (Part III), a significant reduction of the qualifying period required for entitlement to benefits, deemed excessive as it currently stands at 36 months, following the guidance of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) which previously indicated that a qualifying period of no more than 18 months could be allowed under Convention No. 102.*
- *For Sickness benefits (Part III) and Unemployment benefits (Part IV), a modification to the rules determining the duration of the benefits to ensure that these be provided in each instance for the minimum duration set in the Convention and a revision of the excessive 14-day waiting period giving rise to entitlement of benefits.*
- *A modification of the rules concerning the suspension of benefits under the UIA to ensure full conformity with Convention No. 102. More specifically, the suspension of a benefit where a person fails to carry out the instructions of a homeopath or a chiropractor should be removed and restricted to cases where the beneficiary neglects to make use of the medical rehabilitation services provided. The duration of the suspension of benefits should also be reduced, so that the suspension is limited in time and in scope to the cases which meet the requirements for suspensions specified in the law.*

Such parametric adjustments could be undertaken without major impact on the level of contributions or financial sustainability of the Unemployment Insurance Fund (UIF). In this respect, it should be noted that the ILO is available to provide the necessary technical assistance to the Government for ensuring conformity with the relevant requirements of Convention No. 102, in particular as regards the modification of parameters of the respective scheme and of the relevant legislative and regulatory texts.

South Africa is however not yet in a position to ratify **Medical Care (Part II)** and **Survivors' benefits (Part X)**. The current public health care scheme pursuant to the National Health Act does not appear to provide all the types of medical care required by the Convention. Furthermore, the obligation of certain categories of persons to participate in the costs of medical care may constitute a barrier to effective access for many, due to the financial consequences of accessing such care, reducing coverage below the Convention's minimum requirements. Survivors' benefits, on the other hand, are currently awarded as dependants' grants under the Unemployment Insurance Act, however these grants are not provided in the form of long term pensions as required by the Convention but instead as temporary allowances. Given the current reform process in South Africa, these conclusions can be reviewed and ratification of these parts reconsidered at a later date, in light of future developments.

The remarkable achievements of South Africa's social security system show that it has the existing infrastructure and capacity to establish a comprehensive social security extension

²²⁰ The reference earnings used as benchmark for assessing the level of the benefit which a "standard beneficiary", according to Convention No. 102, would receive, against the requirements of the Convention, may be subject to further consultations at national level, as noted in the Introduction of this report.

strategy through the guidance of Convention No. 102. With reference to the objective of achieving the progressive vertical and horizontal extension of social security according to Recommendation No. 202 and given that South Africa has achieved the range and level of benefits set out in Convention No. 102 in respect to a number of social security branches, the ILO would recommend the ratification of Convention No. 102.²²¹ The Government is recommended to adopt a gradual approach and begin by ratifying the parts for which the legislation is in full compliance with the Convention, and the parts in partial compliance, to the extent that the necessary adjustments could be initiated within one year following ratification.

The ILO is confident that the essential components of South Africa's social security system, in law and in practice, are consistent with Convention No. 102 and that ratification would establish a solid and sustainable basis for the development and progressive extension of social security coverage in the medium and long term. It should also be emphasized that Convention No. 102 can serve as a road map for the reform process currently underway in South Africa. In this respect, the ILO is available to provide the Government with technical assistance to align the reform process with the requirements of Convention No. 102 and Recommendation No. 202.

²²¹ Paras. 13, 17 and 18, Recommendation No. 202

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