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**ATTENTION: Mr Zolani Sakasa**

Portfolio Committee on Employment and Labour  
coidabill@parliament.gov.za

19 February 2021

Dear Mr Sakasa

**RE: THE CALL FOR COMMENTS ON THE COMPENSATION FOR  
OCCUPATIONAL INJURIES AND DISEASES AMENDMENT BILL, B21 2021**

The above matter has reference.

**INTRODUCTION**

1. The Women's Legal Centre ("**the Centre**") hereby expresses its gratitude to the Portfolio Committee for the opportunity to engage with the Compensation for Occupational Injuries and Diseases Amendment Bill B21 2020 ("**the Bill**") currently before parliament.
2. The Women's Legal Centre is an African feminist strategic litigation law centre based in Cape Town, but which has a national footprint. Our key focus and objectives are to work towards substantive equality for womxn<sup>1</sup> in South Africa.

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<sup>1</sup> The WLC uses the term "womxn" throughout these submissions as the term is inclusive of all persons who identify themselves as womxn. It further serves as a feminist reminder of the rejection of patriarchal values attached to the gender binary.

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The Centre conducts its work through the utilisation of different methodologies including education and training, a legal advice unit where womxn can obtain legal advice as well as litigation of strategic cases that have the potential to achieve substantive equality. A key methodology is strategic advocacy and these submissions form part of our strategic advocacy.

3. The Centre has five strategic focus areas which include addressing violence against womxn, womxn's rights to land, housing and tenure security, equality in relationships, access to sexual, reproductive health and rights, as well as womxn's rights to work in just and favourable conditions of work. The work of the Centre is done in an intersectional manner as we recognise that womxn are not a homogenous group and thus experiences intersecting forms of discrimination differently.
4. These submissions form part of the work being undertaken by our womxn's rights to work in just and favourable conditions. The womxn who the WLC assists in this focus area are womxn who work in precarious working conditions and occupations. Womxn who find that their vulnerability in society is often compounded because of the nature of the work that they do and the conditions under which they do this work.
5. The Centre welcomes the introduction of the Bill into parliament by the Department of Labour as it is critically important legislation that seeks to address discriminatory practices present in our existing labour framework. The Centre has previously engaged the Department of Labour on the content of the Bill when it was at the stage of internal departmental development.
6. The Centre was also an *amici curia* in the Constitutional Court litigation in the case of Sylvia Mahlangu and Others v The Minister of Labour and Another<sup>2</sup> The analysis that the Centre provided to the Court of the facts in the case contributed to the Court utilising a feminist intersectional lens to reach its judgment and make

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<sup>2</sup> <http://www.saflii.org/za/cases/ZACC/2020/24.html>

the appropriate order. It is with this lens that the Centre makes these submissions.

7. Our submissions will be divided into three parts to highlight where we support amendments and where we recommend additional aspects to the amendments. The submissions will be as follows:
  - 7.1 Part A briefly deals with the overview of the bill and highlights the historical discrimination that womxn experience in the workplace,
  - 7.2 Part B deals with the COIDA Bill amendments and seeks to provide the Portfolio Committee on Employment and Labour with an overview and context of the work the WLC does and the context in which it makes these submissions,
  - 7.3 While Part C sets out specific recommendations by the WLC.

## PART A

### OVERVIEW OF THE BILL:

8. The Bill seeks to amend the Compensation for Occupational Injuries and Diseases Act, 1993 (the Act), so as to amend, substitute, insert, delete and repeal certain definitions and sections; to provide for matters pertaining to the Board and its members; to provide for the Commissioner to perform certain functions that were previously performed by the Director-General; to further provide for matters pertaining to the rehabilitation, re-integration and return to work of occupationally injured and diseased employees; to regulate the use of health care services; to provide for the Commissioner to review pension claims or awards; to provide for administrative penalties; to regulate compliance and enforcement and to provide for matters connected therewith.
9. The amendments further seek to extend the coverage for occupational injuries and diseases to previously excluded vulnerable workers as well as the improvement of compensation benefits to employees; link to key target Chapters 10 and 11 of the National Development Plan 2030; align the Act with the requirements of other legislation and to remove ambiguities on some of the provisions of the Act.

10. The amendments also seek to empower the National Economic Development and Labour Council to nominate persons from whom members of the Board, may be appointed by the Minister to represent the interests of organised business, organised labour and the State; to provide for the term of office of a Board Member to be limited to two terms; to provide for the disqualification from membership of Board Members, resignation and removal from office; and introduce rehabilitation, reintegration and return to work in order to address the tendency of some employers to dismiss employees on the basis of occupational injuries or diseases.

### HISTORICAL DISCRIMINATION AGAINST WOMXN IN THE WORKPLACE

11. For the Department to adequately implement legislation for the protection of workers in the workplace there needs to be an appreciation that not all workers are the same. Many of our professions still carry the weight and stigma of our discriminatory past and are very present in the lived reality of especially womxn in the workplace. In addition, many professions remain gendered and those which are considered to be “womxn’s work” forms of labour often involve work that is undervalued, underappreciated and under paid. It is therefore important to understand the historical context in terms of which the Bill will find practical application.
12. An example of a sector that is largely gendered in nature is domestic labour whether conducted as domestic work outside of the individual's home or unpaid care work conducted inside of the home. “Domestic work remains a highly feminized sector where 80 per cent of all domestic workers are women who lack access to any kind of social security coverage”<sup>3</sup>.
13. Domestic work can be described as the backbone of our society and economy; it is a type of employment deeply rooted within an apartheid and patriarchal context. Domestic work and the way in which it is treated and viewed in society has compounded the poverty of women of colour who remain vulnerable in an

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<sup>3</sup> <https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm>

informal workspace. Their work circumstances leave them vulnerable to denial of their labour rights and occupational protection.

14. We further submit that the South African context to womxn in precarious working conditions such as domestic workers, (seasonal) farm workers community health care workers and those employed in the sex industry must be considered especially in the implementation of the proposed amendments. These are womxn who have historically suffered discrimination because of the work that they do and the conditions under which it is done. They have historically struggled to access social security benefits and are often overlooked completely when such measures are put in place.
15. Meaningful access to rights realisation is critical for the achievement of substantive equality. It would therefore be a key consideration to the members of the Portfolio Committee but also for the Committee to put to the Department.

## PART B

### RELEVANT COIDA BILL AMENDMENTS

16. The stated purpose and objective of the COIDA Bill is to extend the coverage for occupational injuries and diseases to previously exclude vulnerable workers as well as the improvement of compensation benefits to employees.
17. We welcome clause 1 of the Bill which seeks to amend section 1 of the Act by specifically extending social protection and occupational compensation to domestic workers. Domestic workers were a class of workers who were excluded from social security and protection because section 1 (xix)(d)(v) of COIDA specifically excluded domestic workers who work in private homes from the definition of employee.
18. Domestic workers were unfairly discriminated against since the enactment of COIDA because of who they are, the position they hold in society, the stigma attached to the work that they do and the overall patriarchal nature in which the world of work operates. The enactment of the amendment gives the Department

and us as a society an opportunity to rectify the historical damage that has been done to this category of womxn workers.

19. We however wish to note that the mere inclusion of domestic workers as a means to “solve the unfair problem of the exclusion of domestic employees”<sup>4</sup> without substantive consideration of practical steps that need to be implemented for domestic workers to access these social protections will not be enough.
20. The Constitutional Court in the case of Mahlangu further ordered that the inclusion of domestic workers would have retrospective effect dated back to 27 April 1994. The current amendment in the Bill and its inclusion of domestic workers is silent on the issue of retrospectivity. This highlights a big gap in the considerations of the amendments and is misleading on the part of meaningful participation as womxn who are not aware of the judgement would not know that they are able to claim compensation for injuries which have occurred before these amendments.
21. We encourage the Committee to address the Department of labour and employment on what practical steps they have put in place to ensure that domestic workers are now aware of both the Constitutional Court judgement and its implications along with the effect of these amendments, as we maintain that for these amendments to be meaningful in its implementation and to provide for true substantive equality, it must be communicated clearly to the womxn affected by it.
22. The Bill also seeks to amend the definition of “*dependant of an employee*” to include life partners of the employee and to limit the age of children who can claim dependant benefits to 25 years of age if they are attending tertiary education.
23. We support the amendment to the extent that the definition of dependant includes life partners. South Africa as a society has continued to change with

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<sup>4</sup> Clause by clause analysis of the Bill, Clause 1 (d)

more people identifying themselves as living in domestic partnerships. Although not married these couples adopt a lifestyle like that of marriage accepting a reciprocal duty to maintain and care for one another. There can and should be no lawful reason such domestic partners should not be entitled to the same or similar recognition and benefits as spouses. The law in this regard has been recognised in several cases before our Courts<sup>5</sup> most recently by the Western Cape High Court in the case of *Bwanya v The Master of the High Court*<sup>6</sup>.

24. However, we are concerned that this amendment does not go far enough to provide substantive equality and protection to the beneficiaries of womxn who the sole bread winners and financial providers for their families are. Historically the income derived from professions such as domestic work and care work within communities have stopped many families from falling into abject poverty.
25. Certainly, many of the womxn who approach the Centre often have various levels of financial dependence on their income. They are far too often the head of households where children who may be older than 18 years are still fully dependant on them financially. In too many instances a dependant does not cease dependency once they reach the age of majority or because they are studying at a tertiary institution. The cycles of poverty in family compositions are often compounded because of several factors including the elevated levels of unemployment and lack of gainful employment opportunities in the country.
26. South Africa's system of financial dependency in families of colour are uniquely placed and linked to our historical discrimination and disposition under apartheid. The Mahlangu case illustrated what dependency looks like in many of our

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<sup>5</sup> In the *Paixao and Another v The Road Accident Fund* the Court recognised the right of a domestic partner to maintenance following the death of her partner in a car accident. The Court recognised that there was during their relationship a reciprocal duty to maintain based on their lifestyle and that marriage was not a requirement to be a beneficiary to claim in terms of the fund rules.

<http://www.saflii.org/za/cases/ZASCA/2012/130.html>

<sup>6</sup> In this matter the Western Cape High Court found that the Intestate Succession Act was unconstitutional in as far as it did not recognise a domestic partner in a heterosexual relationship as a "spouse" for inheritance in terms of the Act. This decision has been referred to the Constitutional Court for certification and judgment has been reserved. <http://www.saflii.org/za/cases/ZAWCHC/2020/111.html>

families where a major daughter and her minor child were completely financially and otherwise dependent on their mother who conducted domestic work.

27. Statistics South Africa's Quarterly review in June 2020 tells us that our unemployment rate in the country was at 30.1%<sup>7</sup>. Joblessness under the youth of our country between the ages of 15 – 34 years of age has been consistently as high as 63.3%. This category of persons is financially dependent on their adult parents or grandparents. By September 2020 Statistics South Africa told us the economy had shed 2.2 million jobs<sup>8</sup>.
28. People of colour who come from poor and marginalised backgrounds often do not have the financial means or opportunity to attend tertiary education. There is a range of reasons for this which include having to care for siblings and family members while their parents work to provide an income for the family. The fact that they do not attend tertiary education however does not mean that they are not completely and financially dependent on their parent and in need of the same social protection relief.
29. It is our submission that social security benefits are a right not a privilege and there can be no justification for the age limit set by the Department in respect of when someone is worthy to be financially dependent on a parent. In fact, this goes against the States obligation both in terms of s27 of our Constitution, which is the supreme law of South Africa, and our international obligations in terms of section 39 of the Constitution and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which South Africa is a party.
30. Section 27 of the Bill of Rights in our Constitution provides for the right to health care, food, water and social security. It states in section 27(1)(c) that everyone has a right to have access to social security, including, if they are unable to support themselves, and their dependants, appropriate social assistance. It

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<http://www.statssa.gov.za/?p=13411#:~:text=According%20to%20Statistics%20South%20Africa,the%20first%20quarter%20of%202020.>

<sup>8</sup> <http://www.statssa.gov.za/?p=13633>



further provides in section 27 (2) that the State must take reasonable, legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

31. Section 39 further provides that any court, tribunal or forum, must consider international law when interpreting the rights in the bill of rights and further that they should promote the spirit, purport and objects of the bill of rights when interpreting legislation.
32. Article 9 of the ICESCR states that "the States Parties to the present Covenant recognise the right to social security, including social insurance" and the General comment 19, which was adopted on 23 November 2007, deals with the international obligations on states in terms of article 9 and expands on these obligations.
33. The general comment 19 importantly sets out the elements of the right to social security as a system that is available, the social security system should cover social risks and contingencies which include family and child support in realising the rights of children and adult dependants, that the benefits provided be adequate and accessible and that beneficiaries of social security schemes must be able to participate in the administration of the social security system.
34. Surely with dependency much like in any other relationship, the question is whether there was a duty to maintain or whether such a duty existed because of the nature of the relationship between the parties. Each application must be considered and weighted based on the facts of the dependant submitting the claim. This approach will ensure that the state meets its obligations to provide social security benefits to those most in need, and social security is treated as a basic human right rather than a privilege.
35. The Centre therefore does not support attaching a qualification in terms of age or education to when an individual can claim to be a dependant under the legislation, and we further submit that this requirement is not in line with our Constitution or international obligations.

36. We further support the amendments which have broadened the definition of occupational disease in section 1 (xxxi) of COIDA to include post-traumatic stress disorder as an occupational disease<sup>9</sup>, as it recognises the mental and psycho-social well-being of workers.
37. The workplace can and is often a volatile and hostile space for many womxn. They are far too often subjected to sexual harassment and other forms of violence. In 2020 Hlanganisa and Iswi released a report detailing the harrowing accounts of sexual harassment and other forms of violence experienced by domestic workers in South Africa<sup>10</sup>. There is a critical need to include the harmful effects of violence against womxn in the workplace both physically, mentally, and emotionally and provide womxn with the necessary benefits to heal themselves.
38. The International Labour Organisation in 2019 adopted Convention C190<sup>11</sup> which expressly speaks to hostile and often violent work environment. It makes specific recommendations on how workplaces can and should be made safer by employers and sets out the responsibility of the State in this regard.
39. We welcome the Departments efforts to eradicate patriarchal notions of male superiority in the world of work by deleting references to “him” throughout the Bill. This symbolic gesture does in fact go a long way in ensuring that the workplace becomes a substantively more gender equal environment. It is an important amendment as it will ensure that the language of the Act and the protection that accompanies it is no longer *hetro* normative in assuming that only men deserve recognition and social protection.
40. We further support the amendment of section s22 (5) of the Act, to reflect the protection to employee’s who are injured while being transported “by or on behalf of the employer” to or from their workplace for the purpose of their employment.

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<sup>9</sup> Occupational disease means any disease contemplated in section 65(1)(a) or (b), and includes post-traumatic stress disorder

<sup>10</sup> [http://www.hlanganisa.org.za/wp-content/uploads/2020/09/Domestic\\_Workers\\_\\_GBV\\_Research\\_Report.pdf](http://www.hlanganisa.org.za/wp-content/uploads/2020/09/Domestic_Workers__GBV_Research_Report.pdf)

<sup>11</sup> Convention C190 Violence and Harassment Convention  
[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190)

It also provides that any mode of transportation in furtherance of the business of the employer shall be deemed to take place during such employee's employment.

41. The Centre operates from the Western Cape and the surrounding rural areas in the Cape Town area has little to no public transport systems. Farm workers (and their families) are often wholly reliant on their employers to transport them to and from or between farms, town, schools, or other business hubs. Without a functioning transport system these (seasonal) farm workers are left completely at the mercy of their employers for transportation. They are often required to sit on the back of open flatbed trucks. As recently as 6 January 2021 there was a fatal accident involving 38 farm workers traveling on an open truck outside Worcester in the Western Cape. The media reports that one farm worker died and 12 were left injured<sup>12</sup>.
42. This amendment goes some way to addressing the vulnerability of workers who rely on their employers for transportation. Although much needs to be done to address transportation access to workers in rural and peri-urban areas. The issue of transportation is especially critical as it speaks directly to accessing the rights set out in the legislation and brings us back to questions around the implementation of the Bill.

## PART C

### KEY RECOMMENDATIONS

43. We note that although we support the amendment and extension of the definitions in section 1, we recommend that the requirement for dependants older than 25 needing to attend tertiary education to claim dependant benefits be removed as this will discriminate against and exclude a particular class and group of persons based on their gender, race and socio-economic background and circumstances. We recommend that the Department be asked to explain to

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<sup>12</sup> <https://www.iol.co.za/capeargus/news/farm-worker-killed-12-injured-in-truck-crash-e9574faa-7eab-4321-b897-96a2af3791bd>

the Committee the rationale behind restricting the right to social security protection.

44. We wish to highlight and recommend the importance of social dialogue and public participation which include the voices of marginalized women who work in vulnerable and precarious positions. COVID 19 has frustrated many attempts at public participation around a range of issues, but we encourage the Department and the Portfolio Committee to ensure that the voices of those most impacted by the legislation is heard and included in this process.
45. We also recognize the need for effective policy action which is inclusive and transformed and will result in legislation which is not only in line with international labour standards but also meet the needs of the women on the ground who are directly affected by this law reform. This is essential to ensure that the law reflects the lived reality of women and is meaningful in its impact and implementation.
46. To ensure meaningful social dialogue and participation, we recommend that the Portfolio Committee consider the capacity of the Department of Labour in bringing these amendments to life. We strongly suggest that the Department ensure that they have sufficient capacity to effectively address claims from domestic workers that will be brought to them as there may an influx of claims from domestic workers who were previously excluded. The Department has been under severe pressure with the roll out of the TERS provisions and we are concerned that with the passing of this legislation and without a clear implementation plan, workers will struggle to access their rights.
47. We recommend that the Department adopt a proactive approach in creating awareness around these amendments and the Constitutional Court judgement, specifically in relation to retrospectivity, which these amendments do not speak to. A way to do this would be to advertise these amendments extensively in all media platforms including social media, but more importantly to do so in different languages to ensure that women on the ground are able to read the amendments comprehensively and understand its implications.

48. We would also recommend that the Department be encouraged to travel to rural areas and areas on the urban periphery where women are far removed from access to basic services and would struggle to reach a department of labour to report an injury or to report an employer and create spaces that make it accessible for women to access their social protections and rights.
49. Most of the women who seek our assistance, work in domestic settings in private homes. They report the difficulty and complexity they find themselves in relation to lodging any complaints against their employer due to the fear of further victimisation. Their work is conducted in close and intimate spaces and intimidation at work and the fear of losing their work should they lodge a complaint is a very real fear and risk. This is an additional consideration the Portfolio Committee and department of labour should consider in implementing these amendments especially in relation to the powers it affords Labour inspectors.
50. As stated above, the WLC looks forward to an invitation to make oral submissions to the Portfolio Committee and the opportunity to expand on the submissions above but also to address any specific questions that the Committee may have.

Yours faithfully,



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**PER: THE WOMEN'S LEGAL CENTRE**  
**CHRISCENTIA BLOUWS / CHARLENE MAY**