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| **COSATU Submission:**  **Compensation of Injury on Duty**  **Amendment Bill**  **05 March 2021** |
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1. **Introduction**

COSATU welcomes and supports the Compensation of Injury on Duty Amendment Bill.

It is a progressive Amendment Bill that will introduce many progressive and long overdue provisions to the Act that will benefit millions of workers.

COSATU’s support is based upon the following provisions in the Bill.

COSATU notes that the Bill is the first substantive set of amendments to the Act in the post-apartheid era. It is imperative therefore that the Bill should fulfil the rights and values of the Constitution, meet South Africa’s international obligations and advance the rights of workers.

Whilst supporting this progressive Bill, COSATU has two main issues of concern which we request the Portfolio Committee to address: the right to rehabilitation and the licensing of persons to carry on the business of insurance of employers against their liabilities under the Act. We address our concerns in greater detail below.

1. **Areas of Support in the Bill**
   1. **Compensation**

COSATU welcomes the inclusion of medical costs or constant attendance care allowance and funeral costs. These will assist many workers with unforeseen and often unaffordable costs at a moment of distress or the loss of a bread winner for a family.

* 1. **Dependents**

COSATU supports the expanded definition of dependents to include life partners, spouses under different marital regimes, live in partners, children as well as adult children, parents, siblings and grandparents. These are necessary to reflect the family and cultural norms of most South Africans.

* 1. **Domestic Workers**

COSATU strongly welcomes the long overdue inclusion of domestic workers under the coverage of the Compensation Fund. This will benefit the almost 1 million domestic workers who have unconstitutionally been excluded to date.

* 1. **Post-Traumatic Stress Disorder**

COSATU welcomes the inclusion of PTSD. This is critical for many workers exposed to violent or other horrific workplace incidents. This will benefit security guards and many other workers exposed to such incidences.

* 1. **Board Membership**

COSATU supports the provisions setting out Board membership and Nedlac’s role in facilitating nomination from organised labour and business. This is an employer and employee scheme and needs to reflect that reality.

* 1. **No Fault Rule**

COSATU welcomes the introduction of the no fault rule when determining compensation. This is important to avoid the unfair exclusion of workers. Accidents will frequently include some degree of fault.

The point of the Compensation Fund is to assist those workers with their medical costs, rehabilitation, reintegration etc. as well as their families. It should be used to punish them during already difficult conditions.

* 1. **10% of Earnings Penalties**

COSATU supports the provision for fines of up to 10% of earnings to offending employers in certain instances. These are necessary to ensure that employers take compliance seriously and that those who blatantly break the law are dealt with firmly.

* 1. **Prescription**

COSATU welcomes the extension of the time to submit claims from 12 months to 3 years. This will assist workers battling to recover, those unaware of their rights or lacking the means to submit claims.

Government, employers and unions will need to each play their respective roles in ensuring that all employers and employees are aware of the provisions of the Act.

* 1. **Additional Time to Lodge Objections**

COSATU welcomes the additional 6 months provision for workers to submit objections when good cause can be shown. Often workers struggle to gather the required documentation and this provision will then provide additional space to do so if needed.

* 1. **Inspectors**

COSATU welcomes the provisions providing for the duties and powers of inspectors, in particular to issue compliance orders. This is critical to ensuring the effective implementation of the Act and to protect the rights of workers to work in a safe environment.

# **COSATU’s Proposed Amendments to the Bill**

# **The Right to Rehabilitation (Section 70A)**

# **Relevant national and international obligations**

## The International Labour Organisation’s (“ILO”) Employment Injury Benefits Convention, 1964 (“the Convention”) requires member countries to provide rehabilitation services to disabled persons arising from industrial accidents and / or occupational diseases. Article 26 of the Convention provides that:

## *“1. Each Member shall, under prescribed conditions –*

## *Take measures to prevent industrial accidents and occupational diseases;*

## *Provide rehabilitation services which are designed to prepare a disabled person wherever possible for the resumption of his previous activity, or, if this is not possible, the most suitable alternative gainful activity, having regard to his aptitudes and capacity; and*

## *Take measures to further the placement of disabled persons in suitable employment.”*

## South Africa ratified the United Nations Convention on the Rights of Persons with Disabilities in 2007 (“the Convention”). Article 26 of the Convention titled “*Habilitation and rehabilitation*” provides that:

## *“1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:*

## *Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;*

## *Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including rural areas.*

## *2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.*

## *3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.”*

## South Africa’s Rehabilitation Policy forms part of the Integrated National Disability Strategy (White Paper) to improve the quality of life of people with disabilities. The Rehabilitation Policy provides that the goal of the policy is to improve accessibility to all rehabilitation services in order to facilitate the realisation of every citizen’s constitutional right to have access to health care services. The policy is also designed to serve as a vehicle to bring about equalisation of opportunities and to enhance human rights for persons with disabilities, thereby addressing issues of poverty and disparate socio-economic circumstances.[[1]](#footnote-1)

## Rehabilitation and access to rehabilitation should therefore be regarded as a human right and an extension of the constitutional right of access to health care. Rehabilitation and the provision of rehabilitation services form part of the ILO and UN Conventions which South Africa has ratified, requiring South Africa to meet the obligations in articles 26.

# **The Bill’s approach to the right to rehabilitation**

## The Bill seeks to introduce a right for employees who suffer permanent disablement as a result of an occupational accident or disease, to receive rehabilitation to reduce the disability caused by the occupational accident or disease and to allow them to return to being fully productive and independent members of society and to work.

## This approach is evident from the proposed new definition of “*rehabilitation*” in terms of which the concept is defined as -

## *“measures, services and facilities, also in the form of clinical, vocational and social rehabilitation provided for in Chapter VIIA of the Act, provided with a view to the reintegration of employees exposed to an occupational injury or disease, back into work and to enable them to attain and maintain where reasonable and practicable, maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life;”*

## It is evident from the new definition that the purpose of the amendments is to provide employees with the right to receive such rehabilitation as is reasonable and practicable to enable them to regain social and economic independence.

## Such an approach is consistent with the Constitution and South Africa’s obligations in terms of international law.

## COSATU acknowledges that it is presently the practice of the Compensation Fund and the mutual associations to provide rehabilitation benefits on a discretionary basis. This is not prohibited by the Act. The purpose of the amendment is to regulate right to rehabilitation.

## This is further clear from the wording of the Explanatory Memorandum accompanying the Bill, the relevant portions of which read as follows –

“*The amendments seek to -*

*…*

*(g) 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.*”

…

“***Clause* *41***

*Clause 41 seeks to insert Chapter VIIA in the Act in order to provide for the rehabilitation, reintegration and return to work, in order to address the tendency of some employers to dismiss employees on the basis of occupational injuries and diseases. Chapter VIIA seeks to introduce the concept of a multi-disciplinary employee-based process of rehabilitation and reintegration of injured employees or employees who contracted occupational diseases. This means an employer will have to exhaust all rehabilitation and reintegration processes before laying off an employee. Employers will be incentivised for full compliance with the provisions of this chapter by way of rebates on their annual assessments.*”

## Unfortunately, there are certain features of the drafting of section 70A which would, if enacted by Parliament, undermine the clear purpose of the amendments to provide for the right to rehabilitation in accordance with the Constitution and South Africa’s international obligations.

## As presently drafted, section 70A –

### gives the Compensation Fund and its licensees a discretion to provide rehabilitation rather than imposing an obligation on them to do so;

### section 70A(1)(c) restricts the concept of rehabilitation to an employee returning to their previous employment; and

### section 70A(2)(b) can be interpreted as restricting the purpose of rehabilitation to providing for the employee to return to work as an employee rather than enabling an employed person to be rehabilitated so as to perform work either as an employee, an independent contractor or self-employed person.

# **COSATU’s proposed amendments on rehabilitation**

## COSATU is of the view that the following minor suggested amendments to the text of section 70A will ensure that its wording is consistent with the purpose of the amendment.

***“Compensation Fund to provide rehabilitation***

***70A.*** *(1) Subject to the provisions of this Act, the Compensation Fund, employer individually liable or licensee as the case may be,* ***[may]*** *must provide facilities, services and benefits aimed at rehabilitating employees suffering from occupational injuries or diseases to return to* ***[their]*** *work or to reduce any disability resulting from their injuries or diseases.*

*(2) The rehabilitation benefits provided in subsection (1) may consist of-*

1. *clinical rehabilitation and the provision of assistive devices for the purpose of physical and psychological recovery of the employee and to reduce any disability resulting from an occupational injury or disease;*
2. *vocational rehabilitation to assist an employee to maintain employment, obtain* ***[employment]*** *work, regain or acquire vocational independence; and*
3. *social rehabilitation to assist in restoring an employee’s independence and social integration to the maximum extent practicable.*”

# **3.2 Issuing of Licences to Carry on the Business of Insurance (Section 30)**

# **The Bill’s approach to licensing**

## The Bill proposes to amend section 30 of the Act to allow for the issuing of licences to carry on the business of the insurance of employers against their liabilities under the Act.

## This is a very significant departure from the traditional arrangement in terms of which the Compensation Fund, together with two mutual associations that had been established prior to the enactment of the 1941 Workmen’ Compensation Act, administered insurance.

# **COSATU’s concerns**

## It must be emphasised that workers’ compensation is a unique form of insurance in that employees are prevented from being bringing civil claims of any form against their employers by section 35 of the Act.

## The prospect will now arise that a wide range of organisations, including insurance companies, will apply for licences to insure employers in particular sectors of the economy.

## It is the experience of many employees that insurance companies have an approach of rejecting claims wherever possible, often on technical grounds. Such an approach would be incompatible with the administration of workers’ compensation which is a remedial scheme.

## In terms of the proposed section 30(7) it is stated that a licensee shall be accountable to the Minister. While this is important, it is an inadequate basis for dealing with the difficult issue of how the operation of a license will be supervised to ensure that workers receive appropriate compensation and that claims are not inappropriately rejected.

## It is COSATU’s view that –

### a licence should only be issued to an organisation that is subject to the control of a board consisting of an equal number of representatives of employers and registered trade unions within the relevant sector of the economy. In this regard, we refer to the fact that pension funds are under the control of boards consisting of equal numbers of representatives of trade unions and employers; and

### appropriate procedures must be built into the Act to ensure that the awarding of claims is appropriately monitored; that the rights of employees under the Act are not undermined and that there are transparent and fair procedures for objections and appeals against decisions of licensees.

# **COSATU’s proposed amendments on licensing**

## COSATU proposes the following suggested amendments to the text of section 30(7) to address these concerns:

*“(7) Any licensee issued with a licence in terms of this Act shall-*

1. *be accountable to the Minister****[.]****;*
2. *be under the control of a board consisting half of members representing organized labour and half of members representing business;*
3. *comply with any conditions determined by the Minister or as may be prescribed; and*
4. *conduct their business transparently and in a manner that gives full effect to the rights of employees and their dependants under this Act.”*
5. **Conclusion**

# COSATU thanks the Portfolio Committee for the opportunity to comment on the Bill and looks forward to the opportunity to make an oral presentation to the Committee in due course.

COSATU supports the Compensation of Injury on Duty Amendment Bill. It is progressive and will assist in seeking to address many gaps in the Act.

These will benefits millions of workers and their dependents. It will provide cover to almost one million domestic workers.

COSATU hopes that the Committee will consider its two sets of proposed amendments to further strengthen and clarify the rehabilitation and the licensing provisions.

COSATU urges Parliament to prioritise and pass this Bill as soon as possible. It has taken too many years to reach Parliament.

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1. National Rehabilitation Policy (November 2000) pg.2. [↑](#footnote-ref-1)