



WOMEN'S LEGAL CENTRE

SUBMISSIONS BY THE WOMENS LEGAL CENTRE TO THE DEPARTMENT OF LABOUR ON THE COIDA AMENDMENT ACT

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INTRODUCTION

1. The Compensation for Occupational Injuries and Diseases Act (COIDA) was enacted in 1993 to provide for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected herewith.¹
2. COIDA afforded occupational protection to all “employees” and defined employee to mean “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”. Although this protection was a great advance in terms of our labour law, the Act still specifically excluded “a domestic employee employed as such in a private household”.
3. The proposed COIDA amendments seek to now include domestic workers into the definition of an employee as described in the Act.
4. In principle the Women’s Legal Centre supports the proposed amendment to afford occupational protection to domestic workers who work in private

¹ Compensation for Occupational Injuries and Diseases Act, 130 of 1993

homes, and applauds the Department for the consideration and effort in affording protection to domestic workers who work in private homes.

5. We are however concerned with the fact that the Act merely contains a sentence which now includes domestic workers without setting out the requirements or clarifying what the new process will entail for claims made by domestic workers who are employed in private homes. Our second concern is that the amendment is forward looking and will not provide the necessary relief or clarity to those domestic workers who may have suffered occupational harm before the amendment came into effect. We will attempt to assist the Department by posing different scenarios and recommendations in our submission below.
6. Our submission will focus on the following:
 - 6.1 Defining the Women's Legal Centre and its mandate;
 - 6.2 We will briefly discuss the historical background and nature of domestic work based on academic research;
 - 6.3 We will examine the human rights framework including regional and international obligations that South Africa has in respect of domestic work;
 - 6.4 We will briefly discuss the consequences of the prospective effect of the amendment;
 - 6.5 And lastly, we will outline the WLC recommendations in relation to the amendment.



7. The Women's Legal Centre is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. We aim to develop feminist jurisprudence that recognises and advances women's rights in South Africa.

8. Our mission is to develop law, policy, and feminist jurisprudence based on an intersectional approach with substantive equality as its foundation. We want to drive a feminist agenda that appreciates the impact that discrimination has on women within their different classes, race, ethnicity, sexual orientation, gender identity and disability. We further seek to empower women across sectors to demand access to their rights.

9. The Women's Legal Centre works within four strategic programmes, one of which focuses on vulnerable workers and women's right to work. This programme's core objectives are: to develop the law to ensure that vulnerable workers' human rights are recognised, protected, promoted and fulfilled; to hold the state and private bodies accountable for violating vulnerable workers' human rights; to engage with national, regional and international structures to promote the interest of vulnerable groups and to ensure compliance with human rights standards; and to collaborate and partner with strategic and relevant organisations to promote the interests of vulnerable groups. It is in this context that we make this submission and aim to aid the Department in implementing this amendment in a manner that affords true protection to women and girls who conduct domestic work in private homes.

CONSTITUTIONAL BACKGROUND AND CONTEXT

10. Although we recognise the Department's attempts to set minimum standards which afford domestic workers labour protection in South Africa, we acknowledge that there is still a long way to go to achieve substantive equality and protection for domestic workers, especially those who work in private homes.
11. Across the world, women and girls commit substantially more time than men to unpaid care work which includes Domestic work. "This heavy and unequal responsibility for unpaid care is a barrier to women's greater involvement in the labour market, affecting productivity, economic growth and poverty reduction."²
12. It is important to understand the historical context of domestic work to truly appreciate the vulnerability most domestic workers face daily. It is also important to note upfront that while both male and female persons conduct domestic work it is predominantly women who engage in domestic work. "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"³ and we submit that any amendment made without the necessary gendered and intersectional lens will result in a failure to consider the impact of domestic work on women and girls, especially those who work in private homes.
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. The history of domestic work is that it was able to function in a system where people of colour, oppressed through apartheid laws and stripped of any ownership were allowed to work in a manner that was degrading and often inhumane. During the apartheid era, domestic workers were oppressed and lead difficult and straining lives. Domestic

² Report on Special Rapporteur on extreme poverty and human rights: Women's unpaid care work; the human rights framework, par 7

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

work often included long hours including weekends and public holidays yet the remuneration still falls within the lowest income brackets for employment in our country.⁴

14. The use of intersectionality as a concept of analysis is significant in understanding the multiple forms of vulnerability and oppression experienced by female domestic workers: as women, black, seen as servants rather than employees, and belonging to the poor working class in particular (with some as foreign nationals). Because of their multiple identities, their day-to-day realities and varied experiences are least considered when labour policies have been enacted or initiated.⁵
15. Domestic work has acted as a vehicle which allows women of colour to remain largely vulnerable and to work in an informal space with their labour rights and occupational protection vulnerable to abuse and denial by both the employer and State. The “slow progress of transformation in the domestic realm can be linked to two key factors. First, in several areas, central labour policies and gender rights in South Africa's new democracy have failed to extend protection to domestic workers. Second, those policies specifically designed to address the sector are not implemented because of the severe power asymmetries that continue to privilege employers and to protect the private household employment space.”⁶

REGIONAL AND INTERNATIONAL HUMAN RIGHTS FRAMEWORK

REGIONAL HUMAN RIGHTS FRAMEWORK

16. Our Constitution contains the Bill of Rights which affords everyone the rights to equality and dignity. It seeks to recognise International law and although

⁴ www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn

⁵ Effects of Domestic Workers Act in South Africa: A Steep Road to Recognition Author(s): Thenjiwe Magwaza

⁶ Journal of Southern African Studies, Vol. 32, No. 1, Women and the Politics of Gender in Southern Africa (Mar., 2006), pp. 107-127

it does not specifically provide for domestic workers in the Constitution itself, it affords protection to domestic workers by providing rights which are applicable to everyone and all workers.

17. Section 9 and 10 of the Bill of Rights in our Constitution⁷ provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected.
18. Section 23 of the Constitution speaks to the rights of workers and provides that everyone has a right to fair labour practice which includes the right to join a trade union and participate in its activities including the right to strike.
19. Although the Constitutional right to dignity and equality applies to domestic workers, it has to be recognised that domestic work is still deeply entrenched in a Master and Slave relationship that places women in a particular vulnerable group when conducting domestic work in private homes where occupational protection was to date refused by legislation.
20. The Labour Relations Act⁸ (LRA) and the Basic Conditions of Employment Act⁹ (BCEA) was both enacted to give effect to the labour rights provided for in S23 of the Constitution and to ensure economic development, social justice and labour peace. The LRA applies to domestic workers in its application and protection and covers domestic workers as all employees.
21. In 2002 the Sectoral Determination Seven was promulgated. It seeks to especially regulate the working conditions of domestic workers in South Africa and provide a legal framework for the protection of domestic worker rights. The sectoral determination speaks to basic working conditions for domestic workers, including among others, working hours, remuneration

⁷ The Constitution of the Republic of South Africa, 108 of 1996

⁸ Labour Relations Act, 66 of 1995

⁹ Basic Conditions of Employment Act, 75 of 1997

and the minimum wage applicable to domestic workers, working conditions and permissible deductions.

22. Our regional labour framework illustrates that to a large extent domestic workers have been recognised and protected in terms of labour laws with the only exclusion having remained the exclusion of domestic workers who work in private homes to receive occupational protection in terms of COIDA.

INTERNATIONAL HUMAN RIGHTS FRAMEWORK

23. Our Constitution provides for the consideration of international law when any Tribunal or Forum interprets the Bill of Rights. It further stipulates in section 233 of the Constitution 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”.
24. South Africa is a signatory to the Convention on the Elimination of all forms of Discrimination against Women, and the International Labour Organisation Convention no 189. These conventions not only speak to issues of decent domestic work but also speak to the protection and consideration of women who conduct domestic work and seek to ensure substantive equality and eliminate all forms of discrimination against women. These laws are discussed below.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

25. South Africa has signed and ratified the Convention on the Elimination of all forms of Discrimination against Women (‘CEDAW’) which strives to ensure that women enjoy equality and have access to all economic, social, cultural, civil and political rights.



26. In Article 2 of CEDAW, all the states who ratified the convention agree to:
- 26.1 Embody the principle of the equality of men and women in their national constitutions;
 - 26.2 To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
 - 26.3 To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
 - 26.4 To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
 - 26.5 To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
 - 26.6 To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and
 - 26.7 To repeal all national penal provisions which constitute discrimination against women.
27. Most importantly, Article 3 of CEDAW provides that “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

28. CEDAW highlights in Article 11 (f) the need for equality within the workplace and provides for the protection of health and safety in working conditions, including the safeguarding of the function of reproduction. The COIDA amendment to include domestic workers who work in private homes is therefore in line with International laws and our State obligations.

INTERNATIONAL LABOUR ORGANIZATION CONVENTION NO 189

29. South Africa has also signed and ratified the International Labour Organization Convention No 189 which speaks to decent work for domestic workers. The Convention includes protection to all domestic workers who work in private homes or through a form of recruitment and includes migrant domestic workers.
30. The convention specifically provides for the occupational protection of domestic workers in Article 13 where it states that:
 - 30.1 Every domestic worker has the right to a safe and healthy working environment and that each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers.
 - 30.2 The measures referred to in the preceding paragraph may be applied progressively, in consultation with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.
31. Article 14 of Convention 189 reinforces the need for substantive equality for domestic workers as it states the need for a progressive and consultative approach by the State to take all appropriate measures to ensure that

domestic workers enjoy conditions that are not less favourable than those applicable to workers generally.

THE PROSPECTIVE EFFECT OF THE AMENDMENT

32. For many years, advocacy groups, domestic workers and even the South African Law Reform Commission has recommended that domestic workers who work in private homes be afforded protection in terms of COIDA and that the exclusion amounts to discrimination against women of colour.¹⁰
33. Almost ten years after COIDA was enacted and twenty years post democracy, this COIDA amendment is welcomed, but, it cannot be sincerely accepted without consideration of its prospective effect and due consideration of retrospective claims which may arise.
34. Many domestic workers who work in private homes have suffered occupational injury but to date, have been unable to claim under the Act. These workers and their family have had to resort to instituting civil claims against their employer when most domestic workers do not have the resources to pursue civil litigation and its accompanying costs.¹¹
35. We submit that it is essential for the Department of Labour to consider what qualifications it could apply to those domestic workers who have worked in private homes and have suffered occupational injuries before the amendment will come into effect.
36. We further submit that an outright rejection of claims occurred before the amendment comes into effect will be a grave injustice to many women and families who do not have the resources to pursue civil litigation.

¹⁰ <http://www.wiego.org/sites/default/files/resources/files/Inclusion-of-S-African-Domestic-Workers-Occupational-Injuries-Act-Law-Case-Study.pdf>

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37. Our Constitutional Court has held that where legislation is inconsistent with the Constitution, it may be just and equitable to declare an order which allows for retrospective claims¹².
38. We are aware of a case currently before our courts, which specifically deals with the exclusion of a domestic worker who passed away in her employer's home. The surviving daughter of Mrs Mahlangu¹³, who had passed, is challenging the constitutionality of the Compensation for Occupational Injuries and Diseases Act (COIDA). This case is currently still pending but we have no doubt that this amendment and its operation will be considered in the hearing and further conduct of the matter.
39. It is our recommendation that the Department strongly considers retrospective claims which may arise when the amendment comes into effect. We recommend that the Department develop a criteria for persons who suffered occupational harm before the amendment to make application for compensation and their applications to be considered based on a number of criteria which are not limited to but include the following:
- 39.1 The length of their employment at the time of their injury;
 - 39.2 The date the injury was suffered;
 - 39.3 The nature of their injury;
 - 39.4 The claimants dependants and household circumstances;
 - 39.5 The work environment in which the injury occurred;
 - 39.6 The severity of the injury;
 - 39.7 Medical expenses occurred as a result of the occupational injury; and
 - 39.8 Loss of income occurred due to the occupational injury.
40. Our Constitutional Court has justified retrospectivity in instances where the discrimination was so severe that it would justify the claim¹⁴. We submit that

¹² Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008)

¹³ Mahlangu and Another v Mahlangu and Others (341/2016) [2017] ZASCA 81 (2 June 2017)

¹⁴ Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008)

the discrimination of domestic workers who work in private homes have severely and negatively impacted women of colour and their families and that such discrimination on race, gender and class is so severe that it justifies the provision and consideration of retrospective claims.

41. It is our submission that the consideration of retrospectivity will further assist the Department to avoid litigation brought against it by those persons who were not protected before the amendment came into effect and will now seek retrospective relief.

THE WOMENS LEGAL CENTRE RECOMMENDATIONS

42. The Women's Legal Centre supports the inclusion of domestic workers who work in a private home. We submit that the exclusion of this category of women to a large extent has amounted to discrimination based on race; class and gender, as majority of this occupation are women of colour who live in poverty and come from disadvantaged backgrounds.
43. While the COIDA amendment will rightfully address an exclusion which for too long was discriminatory against women, we are concerned that the one line insertion will cause confusion to both employers and employees who conduct domestic work in private homes and the practical consequences will be adverse to women.

44. Section 22 (1) of COIDA sets out the rights of an employee to compensation and provides that “if an employee meets with an accident resulting in his disablement or death, such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.”
45. Our submission is that the new recognition and inclusion of domestic workers who work in private homes will need a detailed and specific section in the amendment act which clarifies, among other things, the following in relation to claims:
 - 45.1 When a domestic worker has more than one employer, which employer will have to contribute to the fund or be liable to lodge the claim; and
 - 45.2 When a domestic worker who works in a private home and also lives in the same home is injured, what qualifies it as an occupational injury?
46. These gaps in the process, definition and requirements will leave women who are injured while working in private homes vulnerable to further abuse and exclusion. Our recommendation is that the Department consult with domestic workers and stakeholders who work closely with domestic workers to establish guidelines to follow when the amendment is enacted. This will assist with clarity and ensure that the amendment provides for substantive equality and inclusion.
47. Our final recommendation is that the Department conducts outreach to all parts of the country to consult with domestic workers who work in different environments on what the process of claiming should look like for domestic workers and to ensure meaningful participation from the domestic workers who will be affected by the amendment.
48. Women are only able to access justice through knowledge and education. Those domestic workers who work in private households and are not aware of these amendments will not be equipped to meaningfully engage with their

employers or have access to the COIDA process and so therefore it is essential that the Department ensures that these amendments are communicated across the country with an opportunity for full participation.