



Re-integration, rehabilitation and return-to-work of disabled workers: A comparative legal enquiry

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Abstract

There are many employment positions in the labour market that could be filled by the disabled of whom most, given the right environment, could be productive in the workplace. However, there are employers who still labour under the misconception that Persons with Disabilities (PWDs) are unqualified and unproductive although their participation in the workplace could contribute to the national economy, while restoring their dignity and social integration. The *United Nations Convention on the Rights of Persons with Disabilities (CRPD)* entered into force on 3 May 2008. The CRPD is the first international legally binding treaty aimed specifically at protecting the rights of PWDs. It is expected of ratifying States Parties to either amend their domestic existing laws or to enact new legislation in order to meet their obligations, as set out in the CRPD.

In 2008, South Africa ratified the CRPD and the Optional Protocol, thus committing itself to the provisions relating to, *inter alia*, workplace integration. Article 26 of the Convention mandates States Parties to take effective and appropriate measures to enable PWDs to attain and maintain maximum independence, physical, mental, social and vocational ability, and to ensure their social inclusion. Article 27 stipulates, *inter alia*, that States Parties shall safeguard and promote the realisation of the right to work, including those who incur a disability during the course of employment. Legislation should make provision for, *inter alia* the following:

- enable PWDs to have effective access to general technical and vocational guidance programmes;
- placement services and continued vocational training;
- promote employment opportunities and career advancement;
- assistance in sourcing, obtaining, maintaining and returning to work; and
- reasonable accommodation in the workplace as well as vocational and professional rehabilitation.

Although the *Compensation for Occupational Injuries and Diseases Act 130 of 1993* was amended recently to include rehabilitation, re-integration and return to work (RTW) as part of its objectives, it will be argued that South Africa needs to initiate

targeted legislation and policies that make disability management functions mandatory. Employers' obligations need to be set out clearly in the Act, because, as it stands, the following *lacunae* exist:

- There is no obligation to appoint Case Managers;
- Dismissal protection is not provided for;
- The regulation of negative incentives to assist with RTW compliance is lacking; and
- The roles of different stakeholders in the RTW process require clarification. Without South Africa having an appropriate and detailed RTW framework, ill or injured employees stand the risk of losing their jobs and becoming dependent on family members and/or disability grants.

Against this background, a comparative analysis of international and regional law and the RTW practices of two foreign jurisdictions were made. This enabled the author to devise recommendations and identify the roles of the government, employers, employees and Case Managers.

The primary objective of this thesis is to determine how and to what extent regional and international standards and RTW programmes in other countries could assist in developing and amending the current legislative and policy framework in South Africa to promote the RTW of disabled employees.

Key concepts Persons with Disabilities- rehabilitation, re-integration - return to work- disability management- comparative analysis.

Opsomming

Die arbeidsmark bevat tans baie werkseleenthede wat gepas is vir persone met gestremdhede, en mits die omstandighede en die omgewing geskik is, kan hulle 'n produktiewe bydrae tot die samelewing maak. Vele werkgewers verkeer egter nog onder die wandindruk dat Persone met Gestremdhede (PMGs) nie gekwalifiseerd is nie en glo selfs dat hulle onproduktief is, alhoewel hulle 'n belangrike bydrae tot die werkplek en die ekonomie kan lewer, en terselfdertyd hul waardigheid en samehorigheid in die gemeenskap kan behou. Die Verenigde Nasies se Konvensie oor die Regte van Mense met Gestremdhede (*KRMG*) het op 3 Mei 2008 in werking getree en is die eerste internasionaal regsverpligtende verdrag wat spesifiek daarop gemik is om die regte van PMGs te beskerm. Dit word van Ledestate verwag om hul bestaande wetgewing te hersien en te wysig of nuwe wetgewing in te stel om sodoende hul verpligtinge soos in die *KRMG* uiteengesit, na te kom.

Suid-Afrika het in 2008 die *KRMG* en die "Optional Protocol" bekragtig, en sodoende homself verplig om die die bepalings wat betrekking het op, onder andere, integrasie in die werkplek na te kom. Artikel 26 van die Konvensie bekragtig Ledestate om doeltreffende en gepaste maatreëls toe te pas ten einde PMGs in staat te stel om fisies en sielkundig onafhanklik te kan funksioneer. Dit behels ook beroepsgeskiktheid wat groter inklusiwiteit en deelname in die gemeenskap sal bevorder. Artikel 27 verplig ledestate, *inter alia* om die moontlikheid vir PMGs om te kan werk, te verskans en te verwesenlik. Dit sluit in diegene wat beroepsbeserings opgedoen het. Dit moet vir hulle moontlik wees om toegang tot die volgende te hê:

- Arbeidsterapie;
- Plasing in poste en voortgesette opleiding; bevorderingsgeleenthede en bystand in die soeke na werk;
- Die behoud daarvan en terugkeer tot diens na besering; en
- Redelike wyses om in die werkplek geakkommodeer te word.

Alhoewel die *Wet wet op Vergoeding vir Beroepsbeserings en-Siektes 130 van 1993* onlangs gewysig is om voorskrifte vir die rehabilitasie, re-integrasie en terugkeer na diens in te sluit, kan daar geargumenteer word dat Suid-Afrika 'n meer doelgerigte

beleid en wetgewing benodig vir die bestuur van aangeleenthede rondom PMGs. Werkgewers se pligte behoort duideliker omskryf te word, aangesien die volgende leemtes in die wet, soos dit tans daar uitsien, bestaan.

- Daar word byvoorbeeld nie melding gemaak van 'Case Managers' nie;
- Daar is geen beskerming teen ontslag en die aansporing van werknemers om terug te keer na werkplek nie;
- Daar is geen melding van aansporing tot terugkeer na werk te bevorder nie; en
- Die funksies van die verskillende rolspelers behoort ook duideliker omskryf te word.

Solank Suid-Afrika nie oor gepaste en duidelik uiteengesette wetgewing beskik nie, sal siek en beroepsbeseerde werknemers die gevaar loop om hul werk te verloor en afhanklik wees van familie en/of vergoedingsfondse. Teen hierdie agtergrond, dek die tesis 'n regsvergelende studie van die praktyke van twee buitelandse regsgebiede. Dit stel die skrywer in staat om aanbevelings te maak en die funksie van verskillende rolspelers soos die regering, werkgewers, werknemers en Saakbestuurders ("Case Managers") te identifiseer.

Die hoofdoel van hierdie tesis is om vas te stel hoe en tot watter mate streek- en internasionale standaarde as voorbeelde vir Suid Afrika kan dien om bestaande wetgewing te wysig sodat beroepsbeseerdes en siek of gestremde werknemers weer in die arbeidsmark geïntegreer kan word.

Sleutelkonsepte – Persone met gestremdhede - rehabilitasie, re-integrasie - terugkeer na diens- bestuur van aangeleenthede rondom gestremdheid-regsvergelende studie.

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List of abbreviations

ADR	African Disability Rights Yearbook
AUILR	American University International Law Review
CICLASS	Centre for International and Comparative Labour and Social Security
COIDA	Compensation for Occupational Injuries and Diseases Act
CRPD	Convention on the Rights of Persons with Disabilities
DM	Disability Management
DPSA	Disabled People South Africa
EEA	Employment Equity Act
EJDR	European Journal of Disability Research
EJLF	European Journal of Law Reform
ESSA	Employee Social Security Act
ICR	International and Comparative Review
IJOHR	International Journal on Human Rights
IJSW	International Journal of Social Welfare
ILO	International Labour Organisation
INDS	Integrated National Disability Strategy
ISLP	Institute for Social Law and Policy
JPESS	Job placement and employment support services
LDD	Law Democracy and Development
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council

NIDMAR	National Institute of Disability Management and Research
OAU	Organisation of African Unity
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PPCFSA	Policy Prepared for the Compensation Fund of South Africa
PWDs	People with Disabilities
RAF	Road Accident Fund
RSLSSL	Role of Standard in Labour and Social Security Law
RTW	Return to Work
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SAJOT	South African Journal of Occupational Therapy
SJUSL	St John's University School of Law
SOSCO	Malaysia Social Security Organisation
SPDP	Social Protection Discussion papers
TAG	Technical assistance guidelines on the Employment of Persons with Disabilities
TJCLCR	Texas Journal on Civil Liberties & Civil Rights
UN	United Nations
WHO	World Health Organisation

Chapter 1: Introduction

1.1 Background to the study

The World Health Organisation has estimated that over half a billion individuals worldwide live with one or another form of disability.¹ People with Disabilities² represent nearly fifteen percent of the world's population.³ In 2011 an in-depth analysis by Statistics South Africa revealed that the national disability prevalence rate is seven and a half percent.⁴ The majority of disabled have always been the indigent and marginalised, rendered powerless by unemployment.⁵

Many employment possibilities exist that could be occupied by the disabled and given the right environment, most PWDs could be productive in the workplace. However, there are employers who still labour under the misconception that PWDs are unqualified and unproductive although their participation in the workplace could contribute to the national economy⁶ while restoring their dignity and social cohesion.

The United Nations Convention on the Rights of Persons with Disabilities⁷, entered into force in May 2008. The CRPD is the first international legally binding treaty aimed specifically at protecting the rights of PWDs. It is expected of ratifying States Parties to either amend existing laws or to enact new legislation in order to meet their obligations as set out in the CRPD.⁸ The CRPD underscores the vision that human rights are indivisible, inter-related and inter-connected. The treaty defines disability as being inclusive of, but not limited to long-term physical, mental, intellectual or sensory impairment.⁹ Furthermore, it firmly grounds the disability

¹ World Health Organisation World Report on Disability 2011 xi.

² People with disabilities, hereafter PWDs.

³ World Health Organisation 2011
https://www.who.int/disabilities/world_report/2011/report/en/.

⁴ Statistics South Africa 2011 <http://www.statssa.gov.za/?p=3180>.

⁵ Wigget-Barnard *Disability employment attitudes and practices in South African companies: A survey and case studies* 1 from Charlton, J. I. (2006). The dimensions of disability oppression: An overview. In L. J. Davis (Ed.), *The disability studies reader* (pp. 217-227). New York, NY: Taylor & Francis Group.

⁶ World Health Organisation *World Report on Disability* 235.

⁷ The United Nations Convention on the Rights of Persons with Disabilities 2008, hereafter CRPD 2008.

⁸ Devi et al 2011 European Journal of Disability Research 249.

⁹ Article 1 of the CRPD.

classification in the social model of disability. Article 4 of the treaty obliges States Parties to undertake measures aimed at ensuring the promotion and full realisation of all human rights and fundamental freedoms under the CRPD for all persons with disabilities. States Parties have to adopt, *inter alia* legislative, administrative and other measures to implement the Convention, abolish or amend existing laws, regulations, customs and practices that can constitute discrimination and consult with and involve persons with disabilities in developing and implementing legislation and policies in decision-making processes concerning rights under the CRPD. The Convention is further designed to initiate national-level engagement with disability legislation and policy. States Parties, including South Africa, must resolve vague interpretations of disability-related principles by addressing the rights implicit in the Convention, but not previously endorsed.¹⁰

In 2008 South Africa ratified the CRPD and the Optional Protocol, thus committing itself to the provisions relating to, *inter alia*, workplace integration. The main objective of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. Article 26 of the Convention mandates States Parties to take effective and appropriate measures 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. Article 27 stipulates, *inter alia*, that States Parties shall safeguard and promote the realisation of the right to work, including those who incur a disability during the course of employment, by taking appropriate steps, including legislation to *inter alia*: enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continual training; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

¹⁰ Stein and Lord 2009 https://media.law.wisc.edu/m/zdq3n/2-20-09_stein_lord_future_prospects_for_un_on_disability_rights.pdf.

and promote vocational and professional rehabilitation, job retention and return-to-work¹¹ programmes for persons with disabilities.

1.2 Problem statement

It is estimated that about ten percent of Africa's population is disabled.¹² However, the number may be higher because not all disabilities are reported. Research by the WHO suggests that the rate of disability in lower income countries, such as Africa is higher at eighteen percent than high-income countries, estimated at eleven point eight percent.¹³ Disability affects not only the individual, but also has an adverse effect on households with PWDs.¹⁴ Disability causes additional financial burdens, for example special medical care; rehabilitative and restorative equipment and services *et cetera*.¹⁵

In developing countries like South Africa, PWDs invariably become the responsibility of their families. It is also common for PWDs to face obstacles in the form of inadequate and inappropriate transportation and learning opportunities, which adversely affect their employment and education, reducing their role in society.¹⁶ Disability affects society as a whole and the state has a responsibility to protect itself and the disabled against the disadvantages and possible eventualities caused by impairment.¹⁷

PWDs have diverse needs that have an impact on their general well-being and opportunities in life. A holistic and sensitive social security system will recognise that even though people have similar disabilities, they may have unique social, financial and physical environments that influence their capacity to function according to full potential.¹⁸

¹¹ Return-to-work, hereafter RTW.

¹² Disabled World 2019 <https://www.disabled-world.com/news/africa/>.

¹³ Oyaro 2015 AUILR 351.

¹⁴ Watermeyer et al *Disability and Social Change* 213.

¹⁵ Watermeyer et al *Disability and Social Change* 214.

¹⁶ Watermeyer et al *Disability and Social Change* 214.

¹⁷ Guthrie et al "The South African Federal Council on Disability Social security" 124.

¹⁸ Guthrie et al "The South African Federal Council on Disability Social security" 124.

The South African Human Rights Commission indicated in a report in 2002, that PWDs can live independent and even ample lives, if they have access to resources, opportunities and environments that allow them independence, self-sufficiency and responsibility.¹⁹ It is submitted that in order to minimise or even combat the consequences of disability (unemployment and dependency on disability grants), legislative reform is needed, as will be proposed in this study.

There is a misconception among some that disability equals no ability. This social stigma makes it difficult for PWDs to be re-integrated into the economy.²⁰ Some PWDs may need some support to allow them to do so in the form of reasonable accommodation, or affirmative action measures.²¹ Society faces the cost if PWDs are excluded from employment. A study conducted by the ILO projected an annual loss of between 3 and 7 percent in Gross Domestic Product as well as a loss of productivity and tax income resulting in a detrimental effect on consumer spending.²² Too many PWDs who are currently unemployed would choose to work if they had the option and the necessary support.²³ Escalating worker's compensation costs are experienced globally by industry. Disability management and RTW programmes may create an opportunity for the industry at large. Employers must seize opportunities to take control and to cut the economic and personal costs associated with injury and illness.²⁴ However, the current workers' compensation laws in South Africa focus mainly on compensation, rather than rehabilitation, re-integration and RTW programmes. During 2002, the Committee of Inquiry into a Comprehensive System of Social Security in South Africa²⁵ stated that "modern social protection policy-making is no longer merely curative – in the sense of providing compensation, but also preventive and remedial/rehabilitative in nature". However,

¹⁹ SAHRC 2002
https://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf.

²⁰ Mont 2004
<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1433&context=gladnetcolle>ct.

²¹ ILO 2013 http://www.ilo.org/skills/pubs/WCMS_229918/lang--en/index.htm.

²² ILO 2013 http://www.ilo.org/skills/pubs/WCMS_229918/lang--en/index.htm.

²³ ILO 2013 http://www.ilo.org/skills/pubs/WCMS_229918/lang--en/index.htm.

²⁴ Donald et al 2011 Encyclopaedia of Occupational Health and Safety 3.

²⁵ The Taylor Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present – Protecting the Future (2002).

rehabilitation and re-integration measures are not adequately provided for in the South African labour sphere.²⁶

As will be argued in Chapter 3 of this thesis, even though *Compensation for Occupational Injuries and Diseases Act 130 of 1993* (COIDA)²⁷ was amended in 2018 to make provision for RTW, the chapter in its current format, is not satisfactory and further amendments will be necessary in this regard. For instance, because it is not clear whether small employers will face disability management obligations; obligations need to be described in the Act, for instance:

1. There is no obligation for the appointment of case managers;
2. Dismissal protection is not provided for;
3. The regulation of negative incentives to assist with RTW compliance is lacking; and
4. The role of different stakeholders in the RTW process also requires clarification.

Thus, many of the provisions requires further clarification and possible amendments.

Finally, once amendments have been promulgated, it will be necessary to comment on how they compare to regional and international standards as well as best practices in foreign jurisdictions. An RTW framework will be proposed in the last chapter of the thesis. Furthermore, the Constitutional Court has yet to hear a case on the duty of employers to provide reasonable accommodation to employees with disabilities, and until such a precedent has occurred, more employees with disabilities will continue to suffer at the hands of their employers.

1.3 Aims and objectives

The primary aim of this thesis is to determine how and to what extent regional and international standards as well as the RTW programmes in other countries can assist in developing or amending the current legislative and policy framework in South

²⁶ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

²⁷ *Compensation for Occupational Injuries and Diseases Act 130 of 1993, hereafter COIDA.*

Africa in order to allow for disabled workers to be rehabilitated, re-integrated and returned to work.

In order to achieve the former aim, the following objectives are set:

1. A critical analysis of South African legislation to determine the obligations regarding the re-integration, rehabilitation and return to work of disabled workers;
2. A critical analysis of South Africa's international and regional obligations regarding the re-integration, rehabilitation and return to work of disabled workers;
3. A critical analysis of the RTW programmes of selected foreign countries to assist in developing or amending the current legislative position in South Africa on the rights of disabled workers to be re-integrated and rehabilitated in the workplace; and
4. Recommendations for developing a system to protect and promote the right of disabled workers to be re-integrated into the workplace.

1.4 Rationale and justification of the study

This study engages specifically with the rights of disabled employees and may contribute to further legal development in the field of labour law and social security rights in South Africa. It proposes a novel way of thinking about social security law.

1.5 Literature review

RTW offers a number of benefits for the disabled individual. In 2006 Burton and Waddell stated that work is beneficial for mental and physical well-being.²⁸ Being able to work contributes to financial security, an essential element in cultivating a

²⁸ Waddell and Burton "Is Work Good for Your Health and Well-Being".

positive self-image and social status. The negative health effects of being unemployed could also be reversed.²⁹

Olivier et al explains that an RTW system has many advantages, such as minimising the cost of disability for employer and employee since employees will either be able to remain at work or to return after an appropriate period, thereby creating a positive influence on morale and physical recovery. The disruption caused by illness and its effect on family, social and working life is reduced while further benefits are job security and financial stability. RTW allows for a smoother transition to regular duties and could also lead to the early identification of occupational illness or injuries, which in turn allows for timeous, safe and high-quality health care and rehabilitation. Being able to work and to be a productive member of society contributes to self-worth without being dependent on incapacity grants that are often not equal to remuneration received while employed.³⁰ Organisations benefit by not losing skilled workers, thereby maintaining productivity. The government will benefit from reduced compensation grants.

RTW aims to eliminate as many of the negative consequences of disability as possible, which may include the loss of self-esteem of employees, the loss of production for the employer and high compensation costs for insurers.³¹ RTW programmes could assist by returning workers back to work in a timely manner, instead of becoming dependent on disability grants³² (that are often not equal to the remuneration received whilst employed). Participation in RTW programmes could reduce the disruption that disability may have caused the worker's social, family and working life. When there is job security, it will be easier for the employee to make the transition back to work. When organisations have RTW programmes in place, occupational illnesses and injuries are often identified at an earlier stage. The fact that a disabled worker can regain employment, allows companies to retain a skilled

²⁹ ISSA Social Policy Highlight 22 2012 ISSN online 1818-5940 Return-to-work programmes.

³⁰ Olivier et al Return-to-work and Disability Management in the developing world: Developments in South Africa and Malaysia, with reference to the UN Convention on the Rights of Persons with Disabilities and comparative precedents 4.

³¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 18.

³² Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 19.

workforce, maintaining productivity. Early identification and proper monitoring of employees' illnesses or injuries by way of disability management, will help to reduce insurance costs. RTW programmes in general, are part of the extension of the social security net that eases the management of illness and injury, contributing to long-term social security sustainability.³³

It is important that employers, employees and medical practitioners are informed of the benefits of gainful employment, and its key role in the rehabilitation and recovery process. In many instances, work improves the recovery rate of the worker. Furthermore, being able to resume work has the potential to reduce psychiatric distress.³⁴ The Australasian Faculty of Occupational & Environmental Medicine compares returning to work to an athlete who needs to continue training and provides the following analogy:

An athlete will continue to focus on their training and condition while they recover from an injury or illness. Like athletics, working involves skills, attitudes and habits that are built up over the years. Staying "in-training" – even if this involves shorter hours or different duties than usual – can make the transition back to health and regular employment easier to manage and more successful.

The concept of injury management has not taken root in South Africa as yet. This provides for the integrated return of workers following injury or disease and is complementary to the twelve-month job protection provisions. In South Africa much still needs to be done regarding the re-integration and reskilling of injured workers.³⁵ South Africa, unlike other countries, does not yet have a dual system for the re-integration of employees who suffer from either occupational or non-occupational disabilities.

In the foreword of the Code of Good Practice: Key aspects on the Employment of PWDs, the importance of reasonable accommodation of PWDs is emphasised:

³³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 19.

³⁴ The Australasian Faculty of Occupational & Environmental Medicine 2010 <https://www.workcover.wa.gov.au/wp-content/uploads/sites/2/2015/07/helping-people-return-to-work-using-evidence-for-better-outcomes-28-05-2010.pdf>.

³⁵ Smit and Guthrie 2008 Obiters 329.

Disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation are provided, people with disabilities³⁶ can contribute valuable skills and abilities to every workplace, and contribute to the economy of our society.³⁷

Ngwenya and Pretorius³⁸ submit that PWDs are a historically marginalised minority, but they do possess the capacity to make a valuable contribution in the workplace.³⁹ Role-players such as employers and trade unions need to be made aware of the barriers that hinder PWDs in the workplace and strategies need to be developed and implemented to overcome them.⁴⁰

A report by the Commission for Employment Equity for the year 2016 indicated that since employment equity legislation was promulgated in 1998, little progress has been made regarding the employment of PWDs and when employed, they are often assigned menial tasks or appointed at entry-level positions. Employers are therefore urged to conduct research before making decisions about disabled employees.⁴¹

If one looks at recent case law (which will be discussed and analysed in Chapter 3 of the thesis)⁴² it is clear that South Africa needs disability-specific legislation providing more clarity regarding obligations relating to the rehabilitation, re-integration and the RTW process of disabled workers.

Cole and Van der Walt emphasise that even though the EEA, Codes of Practices and TAG are beneficial, they are not “sufficient to enforce and to effectively integrate persons with disabilities into the labour market”. These legislative and policy documents are “hardly ever used” to assist with disability in the workplace.⁴³

Based on the foregoing, I am in complete agreement with Watson’s submission:

³⁶ People with Disabilities, hereafter PWDs.

³⁷ Foreword to the Code of Good Practice: Key aspects on the employment of PWDs p iii.

³⁸ Ngwenya and Pretorius 2003 *ILJ* 1838.

³⁹ Ngwenya and Pretorius 2003 *ILJ* 1838.

⁴⁰ Ngwenya and Pretorius 2003 *ILJ* 1838.

⁴¹ SABPP 2017 http://sabpp.co.za/wp-content/uploads/2017/10/Fact-Sheet_October_v002-with-active-links.pdf 4.

⁴² For instance *Jansen v Legal Aid South Africa (C678/14) [2018] ZALCCT 17 (16 May 2018)*; *Smith v Kit kat Group (Pty) Ltd (JS787/14) [2016] ZALCJHB 362*; *[2016] 12 BLLR 1239 (LC)*; *(2017) 38 ILJ 483 (LC) (23 September 2016)*.

⁴³ Cole and Van der Walt 2014 *Obiter* 538.

What is absent from jurisprudence around the rights of persons with disabilities are not only key Constitutional Court cases on the duty of employers to provide reasonable accommodation (including limitations on such a duty), but specific guidelines on accommodating persons with particular disabilities.

Nxumalo submits that in order to truly give effect to the constitutional goal of substantive equality and human dignity for PWDs, South Africa needs to consider passing disability-specific legislation because of the complex nature of disability. Employers also need to be more pro-active and adopt designated policies on disability; psycho-social illness and incapacity in the workplace.⁴⁴ Nxumalo⁴⁵ correctly argues that although the Code does provide some guidance on reasonable accommodation it lacks in-depth clarification on employees with mental illnesses. Holness⁴⁶ argues that employers, employees and other service providers must have access to information on disability discrimination legislation and reasonable accommodation measures that are suited to both the individual and the workplace.

1.6 Data collection and Research Methodology

The study entails a critical review of relevant legislation, case law, textbooks, journal articles and electronic material to determine the current legislative position on the re-integration, rehabilitation and RTW of disabled people. This method will pave the way for a comparative study involving a critical evaluation of international and regional standards, followed by a limited discussion of the legal framework and best practices of selected countries, to add depth and context. The purpose of the study is to indicate what South Africa could learn from foreign jurisdictions that could be of value to South Africa's legislative and policy framework. The study falls within the broad scope of social security law.

1.7 Scope and limitations of the study

1.7.1 International and regional law

In the first half of the chapter, the international standards pertaining to the re-integration, rehabilitation and RTW programmes of disabled workers are explained.

⁴⁴ Nxumalo ILJ 1450.

⁴⁵ Nxumalo ILJ 1446.

⁴⁶ Holness SAJHR 536.

The discussion⁴⁷ is devoted to a discussion on the role of the United Nations⁴⁸ as well as all the relevant UN instruments and programmes that paved the way for the enactment of the most important disability-specific Convention, namely the United Nations CRPD,⁴⁹ the first international legally binding treaty specifically aimed at protecting the rights of PWDs. South Africa is a signatory to the CRPD and is committed to honour its duties relating inter alia to workplace integration. The most important provisions of the CRPD that South Africa must consider when developing an RTW framework will be discussed thereafter. The section continues with a discussion of the jurisprudence of the UN Committee on the Rights of People with Disabilities, since this may assist South Africa in coming to a better understanding and interpretation of the rights contained in the CRPD. A discussion on the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities will also be discussed, as it embraces significant international standards.

The chapter will continue with a discussion of the International Labour Organisation (ILO)⁵⁰ as well as its relevant instruments.⁵¹ The ILO is the only tri-partite UN agency which brings together representatives from government, employers and employees as social partners in debates, and the formulation of programmes and policies. The next part of the chapter is devoted to a discussion of the relevant ILO instruments related to the re-integration, rehabilitation and RTW of disabled workers. Thereafter, the supervisory procedure of the ILO will be considered. This discussion concludes with the ILO's Code of Good Practice on Disabilities in the Workplace, which contains valuable standards and benchmarks relating to several RTW aspects and remarks summarising the discussion of international law.

Regional instruments and standards relevant for the rehabilitation, re-integration and RTW⁵² will now be examined. It is important to consider these instruments and the duties imposed by them, since they contain crucial benchmarks for the development

⁴⁷ See paragraph 2.2.2.

⁴⁸ The role of the United Nations, hereafter UN as well its organs, is discussed in paragraph 2.2.2.

⁴⁹ Convention on the Rights of Persons with Disabilities, hereafter CRPD.

⁵⁰ International Labour Organisation, hereafter ILO.

⁵¹ See paragraph 2.3.

⁵² See paragraph 2.4

of an appropriate RTW framework for South Africa. This section commences with a discussion on the role of the African Union (AU) that aims at accelerating Africa's integration into the global economy, whilst also addressing various social, political and economic problems. Thereafter, the African Charter in Human and Peoples' Rights will be discussed, and it is argued that this Charter provides implicit support for PWDs to be rehabilitated, re-integrated and returned to work. South Africa, as member of the AU, must consider what needs to be done to honour its regional obligations.

The following section of this chapter will continue with a discussion on African human rights institutions as well as the reporting duties states have (including South Africa) to monitor the implementation of the African Charter. It will also be argued that South Africa needs best practices, strategies and a firm legislative and policy framework to truly integrate PWDs into employment and society at large. Thereafter, the developments after the adoption of the African Charter will be discussed as well as the Protocol on the Rights of Persons with Disabilities. This Protocol aims to compliment the African Charter and should be used by states as a framework when national legislation is developed or amended. The Draft Protocol was adopted by the African Commission as it aims to sketch PWDs in a continental context, also drawing from the CRPD. A brief discussion on three other AU treaties will follow to determine whether they provide support for RTW.

I will then briefly reflect on the African Court on Human and Peoples Rights after which concluding remarks on the continental position will follow. It will, inter alia, be argued that regional standards provide a comprehensive foundation to support RTW in South Africa.

The next part of the chapter⁵³ is dedicated to a discussion on the Southern African Development Community (SADC)⁵⁴ as well as the SADC Protocol on Employment and Labour, which contains several key provisions of importance for South Africa for the development and implementation of greater comprehensive social protection. Thereafter, the SADC Charter on Fundamental Social Rights and the Code on Social

⁵³ See paragraph 2.4.1.

⁵⁴ Southern African Development Community, hereafter SADC.

Security in the SADC will be examined, the purpose being to indicate that they set important regional standards and obligations for South Africa. The chapter will conclude with a reflection of the SADC standards and remarks on regional law, in which the main theme is highlighted – member states, including South Africa, need to have preventative and re-integrative measures in place to assist disabled workers to return to work, instead of becoming dependent on disability grants. The chapter in its entirety will then be concluded with recommendations drawn from both regional and international law discussions.

1.7.2 South African law

Chapter 3 of the thesis will deal with a discussion on the constitutional and statutory framework of South Africa, to determine whether provision is made for disabled workers to be rehabilitated, re-integrated and returned to work. The chapter will commence with general observations and background information to demonstrate that PWDs experience many barriers which may prevent them from making a valuable contribution in the workplace. Arguments will also be introduced to demonstrate that South Africa needs to follow a more comprehensive approach to social security. South Africa's domestic regulatory and policy frameworks⁵⁵ will then be discussed, commencing with an examination of the constitutional framework. More specifically, the right to social security its realisation will be unpacked. It will be argued that the state needs to ensure the widest possible enjoyment of this right and that it must adopt a more holistic approach to meet the needs of a disabled society. If necessary, the state will need to investigate measures to make additional resources available to allow for the progressive realisation of rights. It will be argued that South Africa must move away from the "reasonableness" qualifier, and more towards a minimum core requirement obligation relating to social security. Without an appropriate RTW framework, South Africa's disabled stand to lose their employment, and being a burden on their families and the state.

In this chapter it will be argued further that South Africa needs to adopt a uniform approach in developing its RTW framework, ensuring that all legislation is duly

⁵⁵ See paragraph 3.3.

aligned. The state will need to put concrete legislative measures in place to regulate the right of disabled workers to successfully return to employment, as supported by the Constitution. It will be argued further that South Africa needs to be mindful of the right to equality, as enshrined in the Constitution.

A discussion on the legislative framework will follow and arguments will be raised to indicate that the rehabilitation, re-integration and return to work of disabled workers are areas in need of reform, even though piecemeal protection is given at times. The discussion will commence with reference to the *Employment Equity Act 55 of 1998*⁵⁶ and two of its core elements – prohibition of unfair discrimination and reasonable accommodation. Brief mention will also be made of affirmative action measures. Thereafter, the Code of Good Practice on Key aspects on the employment of PWDs will be explored, as well as its inter-relatedness with the *Labour Relations Act 66 of 1995*.⁵⁷ To add to this discussion, case law will be analysed in order to determine the current scope/status quo of employers to reasonably accommodate disabled employees. Arguments will be raised on how South Africa can involve different role-players (such as trade unions and especially large employers) to support the development of RTW programmes.

The Technical Assistance Guidelines⁵⁸ and what they require will also be investigated. Thereafter, relevant jurisprudence on the duty to reasonably accommodate employees will be scrutinised. It will be argued that there is a need for a legislative framework with mandatory RTW obligations. To add to the above discussion, it will further be argued whether the provisions of COIDA makes provision for disabled workers to be rehabilitated and successfully returned to work. For this, all the relevant provisions of COIDA will be scrutinised and recommendations will be made, where applicable, in order to ensure that RTW is made a reality. In the next part of the chapter, it will be highlighted that comprehensive social security reform is on the state's national agenda and is currently being debated at the National Economic Development and Labour

⁵⁶ *Employment Equity Act 55 of 1998, hereafter EEA.*

⁵⁷ *Labour Relations Act 66 of 1995, hereafter LRA.*

⁵⁸ See paragraph 3.3.3.4

Council.⁵⁹ Even though it is commendable that discussions are under way, robust engagement is needed to ensure buy-in from stakeholders.

In the next section⁶⁰ it will be argued that should COIDA indeed be amended, it will be necessary to determine how other legislation will be influenced by such amendments. The relevant policy framework will thereafter be unpacked, commencing with a discussion of the White Paper on an Integrated National Disability Strategy⁶¹ and it will be argued that the INDS contains important RTW directives which will need to be aligned with the amendments of other legislation, such as COIDA. Other governmental policies⁶² providing direct support for will also be discussed. Once legislation is amended, it will be necessary to determine the inter-action between Acts and Codes of Good Practice. The penultimate part of the chapter is devoted to a discussion of best practices in the form of institutional RTW models that may raise awareness on the importance and advantages of RTW programmes. The chapter will then be concluded with a general summary and the need for the current legislative framework to be amended, will be emphasised.

1.7.3 Comparative perspectives from some foreign jurisdictions

In chapter 4 of the thesis, an investigation into the RTW programme, which was successfully implemented in Malaysia as well as two Australian jurisdictions will be discussed. Existing RTW systems in other countries are worth investigating, as they provide useful ideas on how South Africa can develop an early RTW system within a South African context. This chapter will analyse RTW practices from other jurisdictions in terms of national policies and legislation and how these have been implemented successfully. The characteristics of foreign national policies and the legalisation of foreign jurisdictions are relevant for the implementation of an RTW system in South Africa.⁶³

⁵⁹ The National Economic Development and Labour Council, hereafter NEDLAC.

⁶⁰ See paragraph 3.3.3.7

⁶¹ White Paper on an Integrated National Disability Strategy, hereafter INDS. See paragraph 3.3.1.1

⁶² See paragraph 3.3.1.2

⁶³ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 35.

When emulating practices from other countries, it is important to consider the unique political, social and economic conditions of each country. One country's successful rehabilitation practice does not necessarily predict the same for others, as all countries have different definitions of disability and diverse payment structures.⁶⁴

Despite this caution, the author will argue in chapter 4 that South Africa could learn from Australia and Malaysia regarding RTW legislation and policies.

Malaysia's RTW system is particularly informative, as it is also a developing country. Like South Africa, Malaysia's RTW system is a public scheme like the proposed South African system and has seen a number of social and cost benefits.⁶⁵ Malaysia's legislation provides a broad framework of support for rehabilitation and re-employment and helps to ensure the successful RTW of a disabled or injured individual. The chapter will commence with a discussion on the rationale behind the introduction of the programme. The second part of the chapter contains an investigation into Malaysia's legislative framework, which is the foundation of its RTW programme. The first Act which will be discussed is the *Employee's Social Security Act 1969*⁶⁶ and it will be indicated that its provisions provide a firm mandate to SOSCO⁶⁷ to provide the necessary support for disabled workers to return to work. Thereafter, the *Income Tax Act 53 of 1967*⁶⁸ will be scrutinised in order to investigate whether it provides any incentives to promote the employment and retainment of PWDs. This will be followed by a brief discussion of the Employees Social Security (General) Regulations, 1971 which make provision for vocational rehabilitation and physical rehabilitation. Reference is also made to the Federal Constitution of Malaysia⁶⁹ and the provisions which may be relevant for the employment of PWDs. The *Persons with Disabilities Act, 2008*, which closely resembles the CRPD will be attended to and the discussion will further aim to emphasise some cardinal aspects of a successful RTW programme, such as high quality and multi-faceted rehabilitation services.

⁶⁴ Sim 1999 Social Security Bulletin 41.

⁶⁵ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 35.

⁶⁶ See paragraph 4.3.2.

⁶⁷ Malaysia's social security organisation, hereafter SOSCO.

⁶⁸ See paragraph 4.3.3.

⁶⁹ See paragraph 4.3.5.

The next part of the chapter contains discussions on the key features of SOSCO's RTW programme. This is justified, because it informs the development of South Africa's RWT programme. For instance, it will be argued that a case management system is important for the success of an RTW programme. Further, the importance of stakeholder buy-in and active participation of employees will be discussed. In the next part of the chapter, the areas in need of improvement will be indicated and it will be argued that the recommendations flowing from this discussion may also be of direct relevance for South Africa and its implementation of an RTW programme.

The second part of the chapter is concerned with a comparative study of the jurisdiction of Victoria, Australia. Victoria has designated RTW legislation, which sets out the duties of role-players involved. The section commences with a discussion of Australian federal legislation and case law which illustrate how Australian employers have a duty to reasonably accommodate their employees' disability, failing to do so, amounting to discrimination. It will also be indicated that such duty entails positive action, like making reasonable adjustments. The RTW duties of the different role-players in Victoria will be discussed, by setting out the detailed RTW provisions of the *Workplace Injury Rehabilitation and Compensation Act 67 of 2013*. It will be shown that successful RTW requires extensive consultation and an exchange of information, necessary for determining the worker's capacity and workplace support. The employer's duty to provide pre-injury employment or suitable employment will also form part of the discussion. It will also be indicated that employers have other RTW duties, such as the duty to draft RTW plans and to appoint RTW coordinators. The role health professionals and RTW coordinators play in order to return workers to work, will also be discussed, with the focus on workers' RTW obligations. Workers must cooperate with service providers and make all reasonable efforts to actively participate and cooperate in RTW. Additionally, other important RTW initiatives and legislation pertaining to RTW in Victoria, will be examined. A discussion of applicable case law will be unpacked, to emphasise the fact that employers and employees have duties that they cannot ignore.

The ultimate aim of the comparative chapter is to illustrate that South Africa could learn valuable lessons from other countries in order to formulate RTW duties for the South African context.

1.7.4 Concluding chapter

The first part of the chapter contains introductory remarks followed by a discussion of broad findings on regional and international law. In this section, reference was made of the relevant regional and international conventions and standards. The important themes and obligations emerging from the discussion in Chapter 2, were summarised. The next part of the chapter contained the broad findings of the comparative analyses of the two foreign law jurisdictions, Malaysia and Australia. Thereafter, the chapter concludes with specific recommendations, with a particular focus on proposed RTW obligations.

The focus of the study is limited to occupational illness, injury or disability.⁷⁰ The thesis incorporates the law until 1 June 2019.

1.8 Technical Terms defined

Identifying disability is not a simple task as it is a multi-faceted condition or conditions affecting different individuals in diverse ways. Disability is understood as a “multidimensional and dynamic phenomena, including the person’s physical and/or mental impairments, the functional limitations arising from them and the interaction with society and the environment.”⁷¹

Disability is mainly measured against medical and social standards that are used to define and classify the term.

The common model still in use is the medical one, which sees disability as an illness and therefore seeks a cure. This narrow scope is problematic since undue attention

⁷⁰ Even though the focus of this thesis is on occupational illness, injury and disability, it is argued that all people with disabilities, irrespective of the origin of the disability, should be entitled to be rehabilitated and reintegrated back to employment and society. The agent who will bear the responsibility to realise this, will differ from the instance of occupational injuries, illness and disability.

⁷¹ De Jong 2010 ESPC 3.

is paid to the healing of the individual instead of recognising that he/she may still have the capacity to continue living a fulfilling life. The policies prescribed by the medical model focus on improving the physical or mental state of the disabled person, rather than the removal of environmental barriers or supplying support structures.⁷²

Compared to the medical, the social model, which is more popular, originated in the United Kingdom.⁷³ Several authors have argued that impairment is not synonymous with disability and should therefore be defined separately. Impairment becomes disablement as a result of societal attitudes, reflected in inadequate provision of access to public structures, such as the erection of stairs instead of ramps.⁷⁴

The social model can essentially be described as follow:

...explores how ableism has shown up in social practices and institutions that have in turn portrayed people with disabilities as useless, marginal, abnormal, a burden on society and perhaps most offensively, as living a life that is not worth living.⁷⁵

The social model reflects the failure of society to provide appropriate services and facilities to ensure that the needs of disabled people are met. The social model defines disability to include "all factors that impose restrictions on people with disabilities, ranging from negative social attitudes to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to exclusion in work arrangements, *et cetera*".⁷⁶ With the paradigm shift from the medical to the social model, disability was thus re-classified as a human rights issue under International law.⁷⁷

It often happens that PWDs are judged on their disability rather than the skills they may possess and their ability to perform.⁷⁸ Each disability brings its own set of challenges. Different age groups are affected in different ways and a disability policy

⁷² Harpur 2012 Disability and Society.

⁷³ Harpur 2012 Disability and Society 2.

⁷⁴ Harpur 2012 Disability and Society 3.

⁷⁵ Harpur 2012 Disability and Society 3.

⁷⁶ Hiranandani Critical Social Work 6.

⁷⁷ Degener and Quinn date unknown <https://dredf.org/news/publications/disability-rights-law-and-policy/a-survey-of-international-comparative-and-regional-disability-law-reform/>.

⁷⁸ Marumoagae 2012 PELJ 355.

must therefore make provision for those entering and re-entering the workplace and those close to retirement age.⁷⁹ PWDs could develop to become well-adjusted and productive workers when supported by an atmosphere of generosity, acceptance and collaboration.⁸⁰ It is important to define the following concepts to gain an understanding of the role the following play in assisting disabled workers to return to work: Re-integration, RTW, rehabilitation and disability management.⁸¹ Re-integration can be described as the integration or re-instatement of a person in a particular society that may include both the community and the workplace, for example.⁸² There may be instances where it will not be possible for an employee to return to work, because of the severity of the disability or other relevant factors, and in such instances it should be possible for the person to be re-integrated as a rightful member of society. Disability management is the term used to describe interventions on behalf of individuals who develop a health condition or disability whilst employed and will consist of effective case management, education of supervisors; workplace accommodation and an early RTW with the necessary support.⁸³ It can further be described as follows:

...it provides a new treatment paradigm based on the lessons learnt from the disciplines of medicine, rehabilitation, psychology and business. Disability management attempts to co-ordinate individual care, benefit and case management components in such a manner that they complement each other, co-coordinating both occupational and non-occupational disability benefits.⁸⁴

Disability management comprises a variety of interventions critical for returning injured employees to work while minimising costs. Occupational therapists play a significant role in assisting the employee to transition to and to adjust to being back at work. Companies should realise that by accommodating their employees by investing in their health and safety they contribute to the organisation's productivity

⁷⁹ Mont 2004
<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1433&context=gladnetcolle ct>.

⁸⁰ Marumoagae 2012 PELJ 354.

⁸¹ Disability management, hereafter DM.

⁸² Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 18.

⁸³ World Health Organisation World report on Disability (World Health Organisation 2011) 244.

⁸⁴ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 8.

and financial goals. RTW cannot be successful without the assistance and cooperation of the employer. Management has a vital role in helping employees reach their goals, like the ability to support themselves and/or family members and to maintain a sense of pride. A hostile work environment may hinder a successful RTW. Longer absences from work increase the risk of an employee becoming permanently disabled and therefore dependent on disability benefits systems.⁸⁵ Olivier et al describes disability management as a new treatment paradigm based on the lessons learnt from other disciplines⁸⁶. They further assert that physical treatment is only part of the RTW process and will require the coordination of individual care, benefit and case management components in such a manner that they complement one another, for both occupational and non-occupational disability benefits.⁸⁷ The last two decades, have seen major developments in the field of disability management. The trend of paying cash benefits only is moving more towards assessing a disabled individual's capacity instead of focusing on incapacity.⁸⁸As a result, many social security systems have been modernised, with an increased emphasis on a client-centred case-work approach to support vocational and medical rehabilitation, employability and empowerment of PWDs.⁸⁹

Rehabilitation (for which a multi-faceted and inter-disciplinary approach are essential) combines and coordinates medical, social, educational and occupational (vocational) measures for training or retraining an individual to the maximum possible level of his/ her ability. The focus is always on the reintegration of the individual into society. ⁹⁰

The United Nations⁹¹ defines rehabilitation as follow:

⁸⁵ Ramano and Buys 2018 South African Journal of Occupation Therapy 9.

⁸⁶ The disciplines of medicine, rehabilitation, psychology and business.

⁸⁷ Olivier et al Policy, rehabilitation, reintegration and return-to-work of workers who have suffered occupational injuries or diseases prepared for the Compensation Fund of South Africa 28.

⁸⁸ Nidmar 2013 www.idmsc.org.

⁸⁹ Nidmar 2013 www.idmsc.org.

⁹⁰ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 8.

⁹¹ Rule 23 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

...it refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels, thus providing them with the tools to change their lives towards a higher level of independence. Rehabilitation may include measures to provide and/or restore functions, or compensate for the loss or absence of a function or for a functional limitation. The rehabilitation process does not involve initial medical care. It includes a wide range of measures and activities from more basic and general rehabilitation to goal-oriented activities, for instance vocational rehabilitation.

Rehabilitation measures seek to ensure that the following priorities are supported:

- Maintenance of the ill or injured employee; an early return of the employee to his/her duties at the original or alternative location within the workplace before the occupational illness or injury occurred;
- To take up alternative duties at the same or an alternative location within the workplace; and
- A return to alternative duties outside the organisation and/or a return to the community.⁹²

The rehabilitation process entails more than merely medical care and rehabilitation *per se*. Any RTW system will also call for occupational rehabilitation,⁹³ which requires a wider range of activities and processes aimed at returning an employee who has suffered a work-related injury or illness in the workplace. It must be combined with fostering the highest possible level of independent functioning.⁹⁴

Research has shown that there is a need to have a major shift from a medical model approach to a more client-centred, social model approach in rehabilitation. An evidence-based approach, whereas client notes and statistics are collected and stored is essential. Client-follow up procedures need to be put into place and adhered to. For clients using assistive devices, follow-up visits should be considered.

⁹² Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 27.

⁹³ Also known as vocational rehabilitation.

⁹⁴ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 28.

Service providers involved in the rehabilitation process need to receive guidance and mentoring on aspects such as inter-disciplinary teamwork and record-keeping.⁹⁵ It must be kept in mind that rehabilitation is only one component of the RTW process.⁹⁶

RTW can be defined as a policy or system which aims at benefitting a number of people by having a positive influence on injured employees, employers, and government compensation funds. The focus is on minimising the cost of disability to both employer and employee by assisting and encouraging injured or ill employees to be re-integrated into the workforce.⁹⁷ The concept is extensive and may include a broad variety of personal support measures with one explicit goal: the resumption of vocational activity.⁹⁸ RTW can also be described as a many-faceted process, which commences when the worker is on sickness absence and ends with "sustainable reintegration of the worker at his/her previous workplace or in a different workplace".⁹⁹ Opinions on RTW as well as how it is measured, vary. Some will see it as a process while others view it as an outcome measure.¹⁰⁰ Krause and others have described RTW as follows:

RTW could be 1) a process, such as graduated return to work; (2) working status, considered a final, measurable outcome related to disability, and its nuances including return to pre-injury employer and/or job and the use of accommodations; and (3) a variety of vocational outcome definitions, including length of work inability. Length itself can be measured through methods including cumulative length, categorical and days lost from work starting from injury date.¹⁰¹

The objective of an RTW system is to return workers to employment at the earliest date possible, after illness or injury. It further aims to speed up recovery from injury

⁹⁵ Frederiks and Visagie 2013 SAJOT 26.

⁹⁶ Belin *et al* Rehabilitation and return to work: Analysis report on EU and Member States policies, strategies and programmes: OSHA – European Agency for Safety and Health at Work 16.

⁹⁷ Olivier *et al* "Rehabilitation, Reintegration and Return-to-Work of Workers" 18.

⁹⁸ Olivier *et al* "Rehabilitation, Reintegration and Return-to-Work of Workers" 18.

⁹⁹ Belin *et al* "Rehabilitation and return to work: Analysis report on EU and Member States policies, strategies and programmes: OSHA – European Agency for Safety and Health at Work" 16.

¹⁰⁰ Schultz *et al* 2007 Journal of Occupational Rehabilitation 330.

¹⁰¹ Knauf and Schultz "Current Conceptual Models of Return to Work" 27.

or illness, to reduce compensation costs, while ensuring that the employee participating in such a programme does not experience prejudice.¹⁰² It is important that employees return to work as soon as their health allows even if it entails providing alternative or modified tasks. The provision of modified work will enable the employee to remain a productive member of the workforce whilst maintaining his/her human dignity.¹⁰³

Awareness of the RTW concept gained momentum in the 1990s when scientists and policy makers began to pay attention to it and has evolved over the years. From concentrating on the medical diagnosis and a treatment plan to restore work ability, the focus has shifted to the personal and contextual factors of disability.¹⁰⁴ Over the years, different RTW models emerged, including the biomedical and forensic models; ecological/case management and economic models; ergonomic Models; and the biopsychosocial models.¹⁰⁵

1.8.1 The Biomedical and forensic model

In terms of the biomedical model, an TRW decision is informed by a physician's evaluation, treatment and recommendations of an injury. The main tenet of this model is that illness can be attributed to a physical pathology, and reliance is then placed on scientific evidence and objectivity.¹⁰⁶ The forensic model aims at reducing the reliance on scientifically based information of the person's impairment, by focusing on individuals who may be exaggerating their symptoms.¹⁰⁷ It is therefore vital to obtain objective proof of impairment and disability, for the elimination of malingering.¹⁰⁸

¹⁰² Olivier et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries" 10.

¹⁰³ Olivier et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries" 10.

¹⁰⁴ Belin et al Rehabilitation and return to work: Analysis report on EU and Member States policies, strategies and programmes: OSHA – European Agency for Safety and Health at Work 17.

¹⁰⁵ Knauf and Schultz "Current Conceptual Models of Return to Work" 29.

¹⁰⁶ Schultz et al Models of Return to Work for Musculoskeletal Disorders 332-333.

¹⁰⁷ Knauf and Schultz Current Conceptual models of Return to Work 31.

¹⁰⁸ Schultz et al Models of Return to Work for Musculoskeletal Disorders 333.

1.8.2 Psychosocial model

This model regards occupational disability as a combination of complex activities, conditions and relationships as a result of an individual's social environment (including the workplace for instance). During the RTW process, psycho-social issues are attended to, and form part of the treatment process.¹⁰⁹

1.8.3 Ecological/case management and the economic model

In terms of the ecological/case management model, occupational disability is seen holistically in the context of the connection between the individual and the socio-political context of the workplace. For this model to function effectively, a system-based responsibility approach is followed, as well as a multi-disciplinary effort by stakeholders, with a strong focus on early disability prevention¹¹⁰. This model is mainly informed by the stakeholder's perspectives and the RTW process is assessed within the context of a complex inter-action amongst different role-players, such as the workplace; healthcare; disability grant- and insurance institutions..¹¹¹ The economic model focuses, for instance, on the impact of poor health and discrimination on the labour force in the long run.¹¹²

1.8.4 Biopsychosocial model

This model is concerned with the influence multiple factors such as pain; physical and psychosocial impairment and functional and social disability have on RTW.¹¹³

Recently other RTW models have emerged, and Schultz et al explains as follows: The traditional model has been replaced with the psycho-social model, which places emphasis on the individual's understanding of disability within a social context as well as cognitively mediated motivational factors. Secondly, stage-based models of RTW which entail that more emphasis is placed on the RTW process, including disablement patterns as well as temporal elements which interact with time and

¹⁰⁹ Schultz et al Models of Return to Work for Musculoskeletal Disorders 334.

¹¹⁰ Schultz et al Models of Return to Work for Musculoskeletal Disorders 336.

¹¹¹ Knauf and Schultz Current Conceptual models of Return to Work 31.

¹¹² Schultz et al Models of Return to Work for Musculoskeletal Disorders 338.

¹¹³ Schultz et al Models of Return to Work for Musculoskeletal Disorders 340.

medical recovery. Also, case management model changes can be observed, by making provision for the reciprocal interactions amongst stakeholders, for instance the worker, the employer, insurance organisations, society and healthcare. There has also been a reduction in the biomedical and forensic models, and the traditional forensic model's application is reserved for forensic applications within the court system. With reference to the insurance sphere, the forensic model has also shifted the focus away from questions of compensation to how healthcare costs could be reduced. Such an approach is more compatible with the case management model. The fact that more emphasis is placed on the complex relationship between individual factors (for instance motivation and social systems) and cognition indicates that there is a move towards the biopsychosocial model.¹¹⁴

As will be emphasised in the thesis, for vocational rehabilitation to be successful, multi-disciplinary teamwork is required. Research has shown that the International Classification of Functioning, Disability and Health,¹¹⁵ can be a useful tool for communication amongst stakeholders and to assist with the structuring of rehabilitation plans as well as the setting of goals and clarification of the roles of team members.¹¹⁶ The ICF has proven to be useful for RTW practices, however, other ICF-based interventions may also be developed by for instance, social support organisations.¹¹⁷

The ICF is a World Health Organisation¹¹⁸ framework that measures health and disability. It is regarded as the international standard definition to measure disability and health and was endorsed by 191 WHO Member States on 22 May 2001 during the fourth World Health Assembly.¹¹⁹ The ICF can be described as a "classification of health and health-related domains". It also includes a list of environmental factors, as a reminder that human functioning and disability does not occur in a vacuum. It was developed through a collaborative international effort, with the aim of producing

¹¹⁴ Knauf and Schultz Current Conceptual models of Return to Work 38.

¹¹⁵ The International Classification of Functioning, Disability and Health, hereafter ICF.

¹¹⁶ Finger et al 2015 *Physiotherapy Research International: The Journal for Researchers and Clinicians in Physical Therapy* 231.

¹¹⁷ Hoefsmit et al 2014 <https://www.ncbi.nlm.nih.gov/pubmed/23803441>.

¹¹⁸ World Health Organisation, hereafter WHO.

¹¹⁹ Resolution WHA 54.21.

a singular generic instrument to assess disability and health status in different settings and cultures.¹²⁰

With reference to the sectors which may benefit from using the ICF, the WHO submits as follows:

In both the health sectors and other sectors that need to take into account the functional status of people, such as social security, employment, education and transportation, there is an important role that ICF can play. It goes without saying that policy development in these sectors requires valid and reliable population data on functional status. Legislative and regulatory definitions of disability need to be consistent and grounded in a single coherent model of the disability creation process. Whether it is devising eligibility criteria for disability pensions, developing regulations for access to assistive technology, or mandating housing or transportation policy that accommodates individuals with mobility, sensory or intellectual disability, ICF can provide the framework for comprehensive and coherent disability-related social policy.¹²¹

The ICF is based on the biopsychosocial model of disability.¹²² The ICF's classifications focus is on human functioning and it aims at providing a unified standard language and framework to establish how people with medical conditions function in their daily lives, without focusing solely on their diagnosis or the absence or presence of a disease.¹²³ I concur with the submission by the WHO that medical diagnosis is not sufficient for disease or disorder management. The levels of functioning and disability that determine important aspects such as work performance; social integration; RTW potential *et cetera*¹²⁴ should also be considered. It will be proposed later in the study that South Africa must utilise the ICF as a measuring tool in order to move away from medical diagnosis only and more towards a holistic way of determining disability and health status.

¹²⁰ WHO 2019 https://www.who.int/classifications/icf/icf_more/en/.

¹²¹ World Health Organisation 2002
<https://www.who.int/classifications/icf/training/icfbeginnersguide.pdf> 7.

¹²² World Health Organisation 2002
<https://www.who.int/classifications/icf/training/icfbeginnersguide.pdf> 9.

¹²³ APTA date unknown <http://www.apta.org/ICF/>.

¹²⁴ World Health Organisation 2002
<https://www.who.int/classifications/icf/training/icfbeginnersguide.pdf> 4.

1.9 Ethical considerations

The prescribed ethics form has been completed and submitted. This study will utilise a review of specialised literature as primary and secondary sources. As such, no approval on research ethics is required.

Chapter 2: Surveying regional and international standards on the re-integration, rehabilitation and return-to-work of PWDs

2.1 Introduction

It is estimated that about ten percent of the world's population is disabled.¹²⁵ Worldwide, PWDs¹²⁶ experience higher rates of unemployment and under-employment than non-disabled persons and when employed, they are often in underpaid jobs with reduced career prospects. Unequal employment opportunities are the main causes of poverty and exclusion of PWDs.¹²⁷ Despite major progress, PWDs are still more at risk of social exclusion and poverty and they are often overlooked in data collection as well as policy formulation, which renders them socially invisible. Diverse practices relating to the retention of employment will ensure the right to PWDs to work but will also benefit the economy at large.¹²⁸

The majority of PWDs in Africa are indigent and their living conditions poor. They may have limited access to education and employment and face social and structural barriers hindering support.¹²⁹ PWDs are also more likely to become victims of harassment, violation and exploitation.¹³⁰ The disability rights in Africa have, for some time, been described as "benign neglect".¹³¹ However, there have been some significant improvements, as will be illustrated in this chapter.¹³²

PWDs can be a valuable asset in the workplace when they have access to employment and the appropriate training commensurate with their abilities and interests.¹³³ South Africa has ratified regional and international instruments that aim to protect and promote the re-integration, rehabilitation and return-to-work of disabled workers. These instruments are also a clear indication of South Africa's regional and international commitments relating to return-to-work.

¹²⁵ Disabled world April 2018 <https://www.disabled-world.com/disability/statistics/>.

¹²⁶ People with Disabilities, hereafter PWDs.

¹²⁷ ILO 2001 <http://www.ilo.org>.

¹²⁸ ILO 2001 <http://www.ilo.org>.

¹²⁹ Oyaro 2015 *AUJLR* 353.

¹³⁰ Oyaro 2015 *AUJLR* 353.

¹³¹ Combrinck 2013 *ADRY* 362.

¹³² Combrinck 2013 *ADRY* 362.

¹³³ Marumoagae 2012 *PELJ* 354.

In this chapter I discuss how and to what extent international and regional law may assist in promoting the re-integration, rehabilitation and return-to-work programmes of disabled workers in the South African labour market and the applicable international and regional conventions and standards relating to these programmes will be examined.

In order to achieve this, the first part of the chapter is devoted to a discussion on the role of the UN as well as its programmes and instruments relevant to the study. The first international Convention specifically aimed at protecting the rights of PWDs, will also be discussed. The discussion will also draw on relevant jurisprudence, which in turn aims to shed some light on the interpretation and enforcement of the rights contained in the CRPD. A discussion of the role the ILO plays as a role-player in the international agenda as well as its relevant instruments will thereafter be unpacked, with the goal to determine the extent of South Africa's international commitments to return disabled workers back to work.

South Africa's regional commitments will thereafter be analysed, by drawing on the provisions of relevant regional treaties and protocols. The chapter thus has at aim to determine whether international and regional standards set any benchmarks and/or impose duties for South Africa to assist with the rehabilitation, reintegration and return to work of disabled workers. These regional and international standards will also be used in the concluding chapter of the thesis, where a RTW framework will be proposed.

2.2 Exploring International standards pertaining to the integration, rehabilitation and return-to-work programmes of disabled workers

2.2.1 Introductory observations

International law regulates or binds states regarding their relationship with other states. Many countries incorporate international law into their municipal law systems.¹³⁴ International law also has an impact on how South African courts interpret national legislation and one of its sources is conventions or treaties.

¹³⁴ Govindjee, Olivier and Nyenti *The Role of Standards in Labour and Social Security Law* 218.

Treaties can be described as “international agreements entered into between states in terms of which they expressly agree to be bound by the terms of the treaty”.¹³⁵ The aim of a treaty is to codify international law in relation to the subject matter. When a country incorporates a substantive rule of international law into its national laws, it forms part of that country’s national law.¹³⁶

Section 39(1) of the Constitution states as follows:

...when interpreting the Bill of Rights, a court, tribunal or forum

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom
- b) must consider international law
- c) may consider foreign law.

Section 39(1)(b) thus makes it mandatory for courts, when interpreting the Bill of Rights, to consider International law. In *S v Makwanyane*,¹³⁷ Chaskalson P explained the approach that should be employed when interpreting the meaning of a provision in the Bill of Rights in the context of international law:

In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.¹³⁸

In *Grootboom*, Jacob J explained that international law is a guide to interpretation, but the weight attached to it, will vary. However, where South Africa is bound by a relevant principle of international law, it may be directly applicable.¹³⁹

Sections 231 and section 232 of the Constitution¹⁴⁰ govern the way in which international law is either adopted or incorporated into our national laws. When an international instrument is ratified, South Africa is bound to honour the provisions of

¹³⁵ Article 1 of the 1969 *Vienna Convention on the Law of Treaties*.

¹³⁶ Olivier et al 2015 *ISLP* 37.

¹³⁷ *S v Makwanyane* 1995(2) SACR 1 (herein after the *Makwanyane case*).

¹³⁸ Govindjee, Olivier and Nyenti *The Role of Standard in Labour and Social Security Law* 218.

¹³⁹ Para 26 of Grootboom judgment.

¹⁴⁰ Constitution of the Republic of South Africa, 1996 hereafter Constitution.

the treaty. It must be noted, as was emphasised in *Azapo v President of the RSA*,¹⁴¹ that if a country has ratified a treaty which has not yet been incorporated into municipal law by Parliament, courts cannot enforce international obligations under the treaties, and South Africa may be then be in breach of international law.¹⁴²

Section 233 of the *Constitution* that deals with the application of international law provides that:¹⁴³

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.

International law may be defined in a broader context, in that it not only regulates relations between states, but also between international organisations, states and individuals on an international level. The body of international law consists of various components, such as treaties, customary international law, judicial decisions, contributions made by jurists and general legal principles.¹⁴⁴

International law is important when interpreting the right of access to social security. Firstly, South Africa is bound by obligations imposed by the international agreements it has ratified. Further, even in instances where an instrument has not been ratified, section 39(1) as discussed above, requires that courts, tribunals or forums consider international law when interpreting rights as set out in the Bill of the Rights, such as the right to access to social security. Public international law thus comprises binding and non-binding international law. Even though courts are obliged to consider international law, they are not bound to follow it. It is also important to have regard to so-called soft law. Soft law consists of inexact standards as well as information generated by declarations, adopted at forums such as diplomatic conferences, or in

¹⁴¹ *Azapo v President of the RSA* 1996(8) BCLR 1015.

¹⁴² Govindjee, Olivier and Nyenti *The Role of Standard in Labour and Social Security Law* 218. Also see *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015) [2015] ZAGPPHC 402*; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015) para 37.7 where the court reminded the state that South Africa is bound by its international agreements, and even more so for those agreements South Africa has ratified.

¹⁴³ Section 233 of the *Constitution*.

¹⁴⁴ Olivier "Social Security Framework" 137.

the form of resolutions at international conferences and serves as guideline for countries, but lacks the status of "law".¹⁴⁵

Another source worth mentioning, which will be discussed later in the chapter, is the commentary available on the content and scope of socio-economic rights, such as the General Comments of the UN Committee on Economic, Social and Cultural Rights.¹⁴⁶

International cooperation requires that social and labour policy as well as international human rights need to be considered, together with the development of a substantial jurisprudence, policy considerations and extra-legal instruments.¹⁴⁷

It is important to consider the interplay between international and domestic law. Section 231 provides that for an international agreement to become law in the country, it needs to be signed by the national executive, both the National Assembly and the National Council of Provinces must approve it by resolution. However, it must be emphasised that even if an agreement were signed and ratified, but not implemented yet by the country adopting national laws to enforce it, it is still binding on South Africa within the international arena. It thus becomes important to clearly distinguish between international law as an interpretative tool and international law as a source of rights and obligations. An international instrument is an interpretative tool and even if not yet incorporated into South African law, it still has significant influence on the state's obligation to protect and fulfil the rights as listed in the Bill of Rights. It must further be noted that section 231 includes certain exceptions, for instance, a treaty may contain a self-executing provision, approved by Parliament, which will be binding on South Africa without having to be ratified first, unless it contravenes an Act of Parliament or the Constitution. Also, an agreement of a technical, administrative or executive nature, as well as an agreement which does not require ratification, and which has been entered into by the national executive,

¹⁴⁵ Olivier "Social Security Framework" 139. Also see Dugard et al International Law: A South African perspective 30-34.

¹⁴⁶ In particular, its General Comment on the right to social security embedded in article 9 of the United Nations International Covenant on Economic, Social and Cultural Rights of 1966 as well as the Limburg Principles of 1987 and the so-called Maastricht Guidelines of 1997.

¹⁴⁷ Olivier "Social Security Framework" 139.

will also bind South Africa without approval by the National Assembly and the National Council of Provinces. However, such agreement needs to be tabled at the National assembly and the National Council of Provinces within a reasonable period. Customary international law forms part of South African law unless it is in contravention with an Act of Parliament or the Constitution.¹⁴⁸

It is important to heed the implications flowing from a not yet ratified but signed treaty, which may entail that a country should refrain from acts defeating the object and purpose of the treaty and to review its national laws and policies to ensure that they will be in compliance with their obligations once the treaty is ratified.¹⁴⁹

In *Government of the Republic of South Africa v Grootboom*,¹⁵⁰ the Court observed as follows:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

Olivier et al¹⁵¹ summarise the position as follows:

...extent that South Africa has ratified any international and regional standards, they are binding on South Africa. If such standards have been incorporated in the South African legal system, they become law in South Africa and are enforceable as such. Even if some of the instruments have not been ratified, and are therefore, strictly speaking, not binding, but are nevertheless relevant for the interpretation of a fundamental right contained in the Bill of Rights in the South African Constitution, a court, tribunal or forum has to consider these instruments. Furthermore, 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

¹⁴⁸ Section 232 of the Constitution. Also see Dugard Dugard et al *International Law: A South African perspective* 42-79.

¹⁴⁹ Olivier "Social Security Framework" 156. See also Article 18 of *The Vienna Convention on the Law of Treaties, 1969*, which reads as follows: *Obligation not to defeat the object and purpose of a treaty prior to its entry into force* A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

¹⁵⁰ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 para 26.

¹⁵¹ Govindjee, Olivier and Nyenti "The Role of Standard in Labour and Social Security Law" 218. Also see Dugard et al *International Law: A South African perspective* 57.

international law over any alternative interpretation that is inconsistent with international law.

Several of the fundamental rights contained in Chapter 2 of the Constitution of South Africa are relevant from the perspective of an RTW programme.¹⁵² There are a number of international treaties, policies and standards that set the direction for the RTW, rehabilitation and re-integration of disabled workers. In the final chapter of the thesis, it will be proposed that international law provides a solid foundation for South Africa to build on and possibly adjust its law and policies in this regard. The international standards relating to RTW will be examined in the following paragraphs, commencing with the role of the United Nations and its relevant instruments.

2.2.2 The role of the United Nations¹⁵³ and relevant instruments

The UN is an international organisation and comprises the following main organs: General Assembly; the Security Council; the Economic and Social Council; the Trusteeship Council; the International Court of Justice; and the Secretariat. The UN has several aims, for example maintain international peace and security; take measures to strengthen universal peace; to promote international cooperation *et cetera*. There are several UN Conventions which are worthy of discussion and relevant to the topic.¹⁵⁴

During the 1970s the first international instruments that laid down human rights principles, relating specifically to PWDs were adopted, namely the *UN Declaration on the Rights of the Mentally Retarded* and the *Declaration on the Rights of Disabled Persons*.¹⁵⁵ At the time they were regarded as progress in terms of the situation of the rights of PWDs, however, the disabled community expressed it as paternalistic.¹⁵⁶

¹⁵² Olivier et al 2011 *PPCFSA* 31. These rights will be unpacked in the next chapter.

¹⁵³ United Nations, hereafter UN. See Article 7 of the United Nations Charter.

¹⁵⁴ Article 1 of the Charter of the United Nations.

¹⁵⁵ Proclaimed by General Assembly resolution 2856 (XXVI of 20 December 1971; Proclaimed by the General Assembly Resolution 3447 (XXX on 9 December 1975).

¹⁵⁶ Lord et al 2010 *SPDP* 3.

The disabled community preferred a social model of disability. During the 1980s, human rights-based approaches surfaced at international level. 1981 was declared the International Year of the Disabled, followed by the Declaration of the International Decade of Disabled Persons 1982-1991.¹⁵⁷ These UN-financed declarations had the aim to raise awareness on disability issues and to nurture the beginning of a global disability community. The importance of social development, including PWDs in programming and policy formulation was raised during this international dialogue.¹⁵⁸ The profile of disability was systematically enhanced to promote the emergence of a global disability community.¹⁵⁹ An on-going international dialogue on social development and the importance of including persons with disabilities in programming and policy formulation, followed.¹⁶⁰

In 1982 the General Assembly adopted the World Programme of Action Concerning Disabled Persons as a global strategy with the following core objectives: The enhancement of disability prevention; rehabilitation; and the equalisation of opportunities to ensure optimal participation of persons with disabilities in national development and in the sphere of social life. In 1999 the General Assembly adopted the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.¹⁶¹ These rules were developed from experiences from the programmes and instruments which preceded the rules.¹⁶² Even though the Rules are non-binding, they may become international customary rules when they are applied by a great number of States with the aim of respecting a rule of international law. These rules further imply a strong moral and political commitment from States and can act as an instrument for policy-making. They further provide a foundation for technical and economic cooperation between states, the UN as well as other international organisations.¹⁶³

¹⁵⁷ Lord et al 2010 *SPDP* 3.

¹⁵⁸ Lord et al 2010 *SPDP* 3.

¹⁵⁹ Lord et al 2010 *SPDP* 4.

¹⁶⁰ Lord et al 2010 *SPDP* 3.

¹⁶¹ Adopted by the General Assembly Resolution 48/96 of 20 December 1993.

¹⁶² See paragraph 13 of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.

¹⁶³ Paragraph 14 of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.

Before the commencement of the CRPD on 3 May 2008, the human rights of PWDs were provided for in other international instruments, including non-binding ones¹⁶⁴ as well as general international human rights instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹⁶⁵ Notwithstanding, PWDs were still subject to frequent human rights violations.¹⁶⁶ The CRPD was accordingly drafted to ensure that people with disabilities enjoy the same human rights as others.¹⁶⁷ The UN assisted with the drafting of the Standard Rules for the Equalisation of Opportunities for PWDs, which aim to guide governments on their role in disability management.¹⁶⁸ South Africa¹⁶⁹ was one of the first countries to ratify the Convention, thus indicating its commitment to its national and universal implementation.¹⁷⁰ The CRPD is one of the international conventions of direct practical value for South Africa in its quest to introduce an RTW framework.¹⁷¹

2.2.2.1 The International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights was adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI) and came into force on 3 January 1976. South Africa ratified the ICESCR on 18 January 2015.¹⁷² This Covenant is supported by the principles as laid down by the Universal Declaration of Human Rights. The right to work is referred to in Article 6 and States Parties are obliged to recognise this. Article 6(1) of the Covenant includes “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.” States Parties thus need to give

¹⁶⁴ For example, the Standard Rules on the Equalisation of Opportunities of People with Disabilities; The World Programme of Action Concerning Disabled Persons.

¹⁶⁵ The International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights are to be discussed in the paragraphs to follow.

¹⁶⁶ Msipa et al 2014 *SAJHR* 253.

¹⁶⁷ Msipa et al 2014 *SAJHR* 253.

¹⁶⁸ Van Staden *Strategy for the Employment of Persons with Disabilities* 85-86.

¹⁶⁹ UN 2017 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en South Africa signed both the Convention and Optional Protocol on 30 March 2007 and ratified same on 30 November 2007.

¹⁷⁰ Van Staden *Strategy for the Employment of Persons with Disabilities* 86.

¹⁷¹ Govindjee, Olivier and Nyenti *The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa* 225.

¹⁷² ESCR-Net 2015 <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>.

effect to this right, by way of: Provision of technical and vocational guidance and training; to have policies and techniques in place for a steady social, economic and cultural environment; and providing optimal and productive employment under such conditions that will guarantee the fundamental political and economic freedom of the individual.¹⁷³ Thus, the ICESCR does not only provide for the right to work, it goes further by requiring states to do more, for examples, technical and vocational guidance. Article 9 provides that States Parties recognise the right of everyone to social security, including social insurance.¹⁷⁴

Article 17 of the Charter remind States as follows:

It is important to note that the right to access to social security¹⁷⁵ is not limited to an "access to" qualifier, but its implementation is still limited because the rights need to be progressively implemented and States Parties need to report on the progress they have made in implementing the rights.¹⁷⁶

Article 2 specifically states that all States Parties are compelled to act as follows:

...take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources to with a view to achieving progressively the full realization of the rights recognised in the Covenant by all appropriate means, including particularly the adoption of legislative measures.

States must not use this clause as a measure to indefinitely postpone efforts to ensure the enjoyment of the rights as set out in the ICESCR. Olivier states that socio-economic rights, including the right to social security may not be subjected to "deliberately retrogressive measures".¹⁷⁷

¹⁷³ Mpedi and Nyenti 2015 *CICLASS* 12.

¹⁷⁴ Section 22 of the South African Constitution states that "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law". Section 27(1)(c) determines that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. Sub-section 2 continues to state that "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".

¹⁷⁵ Article 9 - The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

¹⁷⁶ Olivier "Social Security Framework" 157.

¹⁷⁷ Olivier "Social Security Framework" 157. Also see the reasoning by the Constitutional Court in *Grootboom*, para 46; para 83.

Ssenyonjo¹⁷⁸ observes that it is required of states to use “maximum available resources” to realise the economic, cultural and social rights, and this include resources made available through international cooperation and assistance. In the next chapter, the minimum core obligations versus reasonableness will be examined.

To gain a better understanding of the rights contained in the ICESCR, it is important to consider the work of the Committee on Economic, Social and Cultural Rights as well as the General Comments of The Committee on Economic, Social and Cultural Rights.

2.2.2.2 The United Nations Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights is responsible to monitor states’ compliance with implementation of rights and duties thereunder.¹⁷⁹ In the course of its monitoring and supervisory role, the Committee issues several General Comments, which can be regarded as an authoritative interpretative source of the ICESCR¹⁸⁰. These comments can assist countries, like South Africa, to establish the content and ambit of the right of access to social security, enshrined by the Constitution.¹⁸¹ Each of the UN Treaty Bodies publishes general comments and/or recommendations on its interpretation of the provisions of the relevant human rights treaty.¹⁸²

General Comments 5 and 19 of the Committee on the Economic, Social and Cultural Rights are of direct relevance to this study. General Comment 5 deals specifically with PWDs. In this Comment, the Committee highlights its disappointment at the under-reporting by states of the full enjoyment of rights by PWDs¹⁸³. Most countries still do not have effective measures in place to effectively improve the situation of PWDs. The aspect of “progressive realisation” is also addressed in this Comment.

¹⁷⁸ Ssenyonjo 2011 *The International Journal of Human Rights* 987.

¹⁷⁹ Olivier “Social Security Framework” 156.

¹⁸⁰ Olivier “Social Security Framework” 157.

¹⁸¹ Olivier “Social Security Framework” 158

¹⁸² OHCHR 1996-2018 <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>.

¹⁸³ CESCR General Comment No. 5: Persons with Disabilities Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, para 2.

The Committee states that the obligation of progressive realisation requires government to do much more than merely refrain from taking measures that may negatively impact PWDs. The obligation of government is described as follows:¹⁸⁴

The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

RTW arrangements are regarded as tailor-made processes to assist PWDs to be re-integrated into the labour market. Thus, for the South African government, to meet its international obligations, it will need to take positive measures, for example to increase its national and provincial budget to make sure that PWDs are rehabilitated and returned to work.

The Committee also emphasises that it is more important than ever, considering the increase in privatisation of services, for private employers, service providers and other non-public entities to address non-discrimination and equality norms and to ensure the equitable treatment of PWDs. However, the primary duty rests on governments to deal with the circumstances which may lead to failures.¹⁸⁵

In line with the recommendation which will be made in the following chapter, the Compensation Fund must take the lead role in implementing RTW measures, but the private sphere is also expected to contribute, to ensure that the rights of PWDs are realised.

The means of implementation are addressed as well, and States Parties need to determine the nature and scope of problems through regular monitoring and adopt appropriate policies and programme responses to any problems and, in close collaboration with representative groups of PWDs, adopt legislation where necessary.¹⁸⁶ The South African government, as will be discussed in the next chapter, has identified the need to ensure that disabled workers are re-integrated

¹⁸⁴ Para 10 General Comment 5.

¹⁸⁵ Para 12 General Comment 5.

¹⁸⁶ Para 13 and Para 14 General Comment 5.

into the labour market instead of becoming dependent on disability grants and aims to adopt legislative measures to address the return to work of PWDs.

Articles 6-8 of the ICESCR which deals with rights relating to work, is also interpreted in General Comment 5. The Committee states, *inter alia*, that the integration of PWDs into the open labour market must be “actively supported by States”. This entails more than “sheltered” employment facilities. PWDs, whether coming from rural or urban areas, must have equal opportunities to productive employment in the labour market. The Committee specifically calls upon all governments to develop policies which will promote and regulate the accommodation of reasonable measures, such as flexible and alternative work arrangements¹⁸⁷.

The Committee further calls upon all States Parties to consider ratifying the ILO Convention no 159 of 1983.¹⁸⁸ South Africa thus needs to consider ratifying this instrument, in order to commit to its international obligations relating to vocational rehabilitation and employment.

The Committee also commented on Article 9, which deals with social security. The emphasis here is on the provision of adequate income support to PWDs who have lost income whether partially or entirely and been denied employment opportunities. It is, however, stated that such support should also reflect the special needs for assisting PWDs as well as other expenses associated with disability.¹⁸⁹ Article 12 proclaims the right to physical and mental health, including the right to rehabilitation services that will enable PWDs to reach their optimal functioning and independence levels.¹⁹⁰ This submission by the Committee indirectly supports the provision of RTW arrangements, since rehabilitative services are one of the components of an RTW plan.

General Comment 19 is worthy of discussion, specifically the comments relating to employment injury and disability respectively. The Committee calls upon States

¹⁸⁷ Para 22 General Comment 5.

¹⁸⁸ Para 27 General Comment 5.

¹⁸⁹ Para 28 General Comment 5.

¹⁹⁰ Para 34 General Comment 5.

Parties to ensure that workers are protected when injured during employment or other productive work. Adequate benefits should be provided for such injury. This would include cash benefits as well as access to health care to ensure income security. The Committee states further that entitlement to benefits should not be subject to the length of employment, payment of contributions or duration of insurance.¹⁹¹ Disability was addressed, with reference to General Comment 5, discussed above. It states that support should be provided in a dignified manner and “reflect the special needs for assistance and other expenses” often associated with disability.¹⁹²

On 25 April 2017 South Africa submitted her first report on its obligations as set out in the ICESCR. It is important to consider this report to evaluate whether any reference was made of the proposed changes of COIDA to provide comprehensive social security measures. With reference to the right to work, it is disappointing to note that South Africa has not reported on any strategies to support the integration of PWDs into the open labour market. South Africa only submits that, as part of a comprehensive social security framework, the right to work “may not necessarily undermine the right to access to social security as the two can be complimentary”.¹⁹³ Accessibility to social assistance measures to alleviate poverty amongst vulnerable groups, is pointed out, but no mention is made of any specific strategies in this regard.

The right to just and favourable conditions of work is also reported on and reference is made to legislation regulating the health and safety of workers and will be discussed in the next chapter. No mention is made of any specific measures to assist disabled workers to return to work.¹⁹⁴

¹⁹¹ Para 17 General Comments 17.

¹⁹² Para 20 General Comment 17.

¹⁹³ ILO 2019

https://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102888

¹⁹⁴ ILO 2019

https://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102888.

The right to social security is also addressed, and a statement is made that Article 9 of the ICESCR is similar to Section 27 of the Constitution, which guarantees “everyone the right to have access to social security and, if they are unable to support themselves and their dependants, appropriate social assistance”.

I do not agree with this submission, since the qualification for the provision of social security is set at a higher benchmark in terms of the ICESCR, specifically Article 2(1) in which it is stated as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

If one considers Article 27(1)(2) of the Constitution one will see that it has a different qualifier:¹⁹⁵

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.

A discussion on the availability of the different grants then follows, among which the Disability Grant, and it is stated that a permanent disability grant is paid when the condition is expected to continue for longer than one year and a temporary grant for a period not less than six months but not exceeding twelve months. No mention is made of any reforms regarding the provision of comprehensive social security, while monetary compensation remains the norm.

In response to South Africa’s report, the Committee on Economic, Social and Cultural Rights published a document on 31 October 2017 relating to certain issues requiring clarity. ¹⁹⁶ With reference to the right to work, as embodied in Article 6, the Committee invited South Africa to respond specifically on the measures taken to

¹⁹⁵ A more detailed discussion on the constitutional position of South Africa follows in the next chapter.

¹⁹⁶ OHCHR 2018
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=162.

reduce the high unemployment rates, including PWDs. Information was also required on the social protection provided by those employed in the informal economy.

With reference to just and favourable conditions of work, the Committee further required that South Africa provides information on the measures taken or intended to be taken to ensure that *all*¹⁹⁷ workers not covered by COIDA, could claim compensation for occupational injury. With reference to social security, the Committee also required more information *inter alia*, on the amount, take-up rates and coverage of non-contributory benefits including a disability grant.

South Africa has yet to respond to the above requests and it is advised to do so and also include in future reports, the envisaged changes in legislation to address the re-integration of PWDs who suffer occupational injuries.

It is also important to note the Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986. States Parties are required at all times to act in good faith to fulfill their obligations in terms of the Covenant (para 7). Further, even though it is acknowledged that the realisation of rights of rights are to be progressively realized, some rights "can be made justiciable immediately" (para 8). States Parties are also reminded that, in order to progress in realising the rights as contained in the Covenant, a rigorous national effort will be required, with the involvement on participation of all sectors of society (para 11). Further, it is acknowledged that special measures may be required to protect the rights of minorities, in order to improve their standard of living (para 14). Further, the importance of vigorous efforts is also highlighted as follows:

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

Further, the obligation of progressive realisation "exists independently of the increase in resources", States thus need to effectively use the resources available (para 23).

¹⁹⁷ Own emphasis.

In terms of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, States are reminded that they cannot use the “progressive” realisation qualifier as an excuse for non-compliance (para 8). Further, resource scarcity does not exempt States to fulfill certain minimum obligations (para 10).

The following UN Conventions ratified by South Africa, are briefly mentioned because they are relevant to the study. First, the Convention on the Elimination of All Forms of Discrimination against Women, which was ratified on 15 December 1995.¹⁹⁸ Also of relevance is Article 11. Article 11(1)(e) which provides as follows:

The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

South Africa’s latest report on this Convention was due on 1 February 2015 and has not been submitted.¹⁹⁹ However, in an earlier report submitted²⁰⁰, it was acknowledged that there were still categories of women excluded from employment-related social security but that progress was being made with respect to domestic workers.²⁰¹

The International Convention on the Elimination of All Forms of Racial Discrimination was ratified by South Africa on 10 December 1998²⁰². Article 5 of the said Convention provides that States Parties undertake to prohibit and eliminate racial discrimination “in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”, also with relation to the right to public health, medical care, social security and social

¹⁹⁸ OHCHR 2018
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN

¹⁹⁹ OHCHR 2018
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN

²⁰⁰ Combined second, third and fourth report CEDAW/C/ZAF/2-4 Submitted 2 July 2009.

²⁰¹ Para 11.23 of the Combined Report.

²⁰² *The United Nations Convention on the Rights of People with Disabilities, hereafter CRPD*.
OHCHR 2018
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN

services, as listed in subsection iv. Thus, the right to social security should apply to all citizens, without discrimination on the base of gender or race.

2.2.2.3 The United Nations Convention on the Rights of People with Disabilities²⁰³

During December 2001 the UN General Assembly established an Ad-hoc committee²⁰⁴ that was tasked to consider proposals for a comprehensive and integral international convention, with the aim of protecting and promoting the rights of people with disabilities, as *per* the recommendations of the Commission on Human Rights and the Commission for Social Development, following a holistic approach in the area of social development.²⁰⁵ The work of the Ad-hoc Committee led to the CRPD²⁰⁶ and on 5 December 2006 it was presented to the General Assembly. On 13 December 2006 the General Assembly unanimously adopted the CRPD. This was followed by five years of negotiations by states and disabled peoples' organisations and the ratification of the Convention by member states. The CRPD came into force on 3 May 2008²⁰⁷ and is the first global human rights Convention of the 21st Century.²⁰⁸ At the time of writing there were 161 signatories to the Convention and 177 ratifications.²⁰⁹ The CRPD was adopted by the General Assembly of the UN on 13 December 2006. This Convention is one of the most signed and ratified Conventions of the UN and an impressive number of African countries have ratified it.²¹⁰

The CRPD entered into force in May 2008 and is the first international legally binding treaty specifically aimed at protecting the rights of PWDs. Ratifying States Parties are required to either amend their current laws or enact new legislation in order to

²⁰³ On 13 December 2006, the CRPD and its Optional Protocol, were adopted by resolution 61/106 of the General Assembly – UN 2019 http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf.

²⁰⁴ Through the adoption of resolution 56/168.

²⁰⁵ Lord et al 2010 *SPDP* 4.

²⁰⁶ Lord et al 2010 *SPDP* 4.

²⁰⁷ Harpur 2012 *Disability and Society* 3.

²⁰⁸ Quinn 2009 *TJCLCR* 33; see also Devi et al 2011 *EJDR* 249.

²⁰⁹ UN 2017 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (stats as per April 2018).

²¹⁰ Mpedi and Nyenti 2015 *CICLASS* 2. See UN 2017 <http://www.un.org/disabilities/documents/maps/enablemap.jpg> for a map dated September 2017 on the countries who have signed and/or ratified the CRPD and its Optional Protocol.

meet the obligations as stipulated in the CRPD.²¹¹ The CRPD upholds the concept that human rights are indivisible, inter-related and inter-connected. In terms of the treaty, disability is inclusive of, but not limited to long-term physical, mental, intellectual or sensory impairment. Article 4 of the treaty obliges States Parties to take measures aimed at “ensuring promotion and full realisation of all human rights and fundamental freedoms under the CRPD for all persons with disabilities”. Article 4 further provides that States Parties have to adopt, *inter alia* legislative, administrative and other measures to implement the Convention; abolish or amend existing laws, regulations, customs and practices that can constitute discrimination and consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning rights under the CRPD. The Article continues by stating that the Convention is designed to trigger national-level engagement with disability legislation and policy. States Parties, including South Africa must, amongst other things, resolve outstanding but unclear interpretations of disability-related principles and also familiarise itself with rights that are implicit in the Convention, but not previously endorsed.²¹²

Quinn argues that Article 4 of the Convention acts as a trigger for global disability reform. The values of the Convention are listed in Article 3 and provide for a paradigm shift.²¹³ They include *inter alia* the following: Dignity, individual autonomy; non-discrimination; full and active participation; equality of opportunity; accessibility *et cetera*.²¹⁴ These values are regarded as revolutionary in the sphere of disability.²¹⁵

The CRPD thus follows a human rights-based approach and prescribes the social model of disability reflecting the initial mandate of the Ad hoc committee. Such an approach recognises persons with disabilities as having fundamental rights and agency. It further stipulates that individuals with disabilities must enjoy all human

²¹¹ Article 4 of the CRPD.

²¹² Stein and Lord *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities* 17-36.

²¹³ Quinn 2009 *TJCLCR* 41.

²¹⁴ Quinn 2009 *TJCLCR* 42.

²¹⁵ Quinn 2009 *TJCLCR* 42.

rights and fundamental freedoms, regardless of economic standing or social status.²¹⁶

During 2007, South Africa ratified the *UN Convention on the Rights of Persons with Disabilities* and the Optional Protocol, and thus committed itself to the provisions relating to *inter alia*, workplace integration.²¹⁷ The provisions in the CRPD are therefore binding on South Africa, and they should be incorporated into its national laws. The CRPD contains several important provisions for developing an RTW programme, especially Article 27, pertaining to the right to work and employment of PWDs.²¹⁸ It provides as follows:

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties *shall safeguard and promote the realization of the right to work*, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through *legislation...*

Article 27 also lists eleven steps States Parties need to take to safeguard and promote the realisation of the right to work. The following are of direct relevance to the study.

In terms of Article 27, States Parties are required to

- a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

States Parties are required to promote employment opportunities as well as career advancement for PWDs in the labour market, including assistance in finding, obtaining, maintaining and *returning*²¹⁹ to employment.²²⁰

²¹⁶ Lord et al 2010 *SPDP* 4.

²¹⁷ UN 2017 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-15&chapter=4&clang=_en South Africa signed both the Convention and Optional Protocol on 30 March 2007 and ratified same on 30 November 2007.

²¹⁸ Olivier et al 2012 *IJSSWC* 6.

²¹⁹ Own emphasis.

²²⁰ Section 27(1)1(e).

States Parties also need to ensure that PWDs are reasonably accommodated at the workplace.²²¹ In the section that follows, we elucidate on the meaning and implications of the phrase “reasonable accommodation”.

2.2.3 The Reasonable Accommodation in the Workplace and Its Implementation

The most prominent application of the reasonable accommodation requirement remains in the field of work and employment. Article 27 of the CRPD requires States Parties to safeguard and promote the realisation of the right to work of persons with disabilities by taking appropriate steps to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. Under the Convention, employers have a legal obligation to provide reasonable accommodation to persons with disabilities.

Fina and Cera submits that in terms of this section, States have a legal obligation to provide reasonable accommodation and that Governments need to have legislation in place which will determine that both private and public sector employers will have the duty to reasonably accommodate employees with disabilities. Further, policies need to be developed which contains reasonable accommodation measures, such as flexible working arrangements; modifications to work equipment; modifying working time and organisation as well as the work environment. They further submit that States need to be pro-active in informing employers of their duties in relation to reasonable accommodation, also raise awareness amongst other role-players such as trade unions, and PWDs, and provide technical assistance to practically implement these measures. Reasonable accommodation can only be effectively implemented, if appropriate measures are put in place. They further recommend that in determining whether appropriate measures were deployed, attention must be paid to the following:

It can be argued that measures are appropriate if they facilitate access to and participation in working life, job advancement and training on an equal footing with others for a person with disabilities requesting them. The identification of appropriate measures must be made on the basis of an individual assessment of the specific job, the needs of the person with a disability and a realistic assessment

²²¹ Section 27(1)(i).

of what the employer is capable of providing. This process should be interactive and participatory to be effective, and all information related to the reasonable accommodation request should be handled with confidentiality.²²²

Further, it is required that States Parties promote vocational and professional rehabilitation, job retention and RTW programmes for PWDs.²²³

Article 26 deals with habilitation and rehabilitation and determines, *inter alia*, that States Parties need to take effective and appropriate measures to enable PWDs to attain and also maintain maximum independence, optimal mental and physical health, social and vocational ability and must be fully included and participate in all aspects of life. States Parties further need to have comprehensive habilitation and rehabilitation services and programmes in place, which will require several stages. Olivier and others submit that Article 26 requires multi-faceted rehabilitation services and programmes providing for, *inter alia* the following: Early intervention and a multi-disciplinary assessment of individual needs and strengths; the promotion of community and social participation and inclusion; and RTW services or programmes must be voluntary and available to people with disabilities as close to their own communities as possible, including rural areas.²²⁴ States Parties are required to make available assistive devices and technology and enable individuals to make use of it. This technology should be designed especially for PWDs and must be relevant to habilitation and rehabilitation.²²⁵ Article 26 also states that States Parties need to promote the development of initial and on-going training for professional rehabilitation and habilitation service providers.²²⁶ In that respect, South Africa must ensure that it introduces holistic rehabilitation services and sufficient staff capacity to ensure quality services. It will also require a multi-disciplinary approach to assess the needs and involvement of the community.

Article 28 makes provision for adequate standards of living and social protection. More specifically, Article 28(2) (a) of the CRPD determines that States Parties must

²²² Fasciglione "Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism" 151.

²²³ Section 27(1)(k).

²²⁴ Olivier et al 2011 *PPCFSA* 32. This is determined by Section 26(1)(a) and (b).

²²⁵ Section 26(3).

²²⁶ Section 26(2).

ensure that PWDs have access to, *inter alia*, assistance and devices for disability-related needs. Article 32 highlights the importance of international cooperation and suggests that States Parties need to facilitate and support capacity building by exchanging information, such as best practices and training programmes.²²⁷

The rights set out in Articles 27, 28 and 32 of the CRPD, make it clear that disability is now classified as a human rights issue, in that a separate instrument is devoted to promoting and protecting the rights of PWDs to be employed and integrated into the labour market. Before the enactment of the CRPD, the existing ILO instruments played a role in this regard, namely the ILO Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) (No.159) and recommendation (No. 168) of 1983. These instruments worked concurrently with one another to affect the universal policies and programmes relating to PWDs in the labour market. Article 27 can be classified as a detailed and thorough article dedicated to the employability and integration into the labour market of PWDs.²²⁸ The CRPD has thus not only confirmed rights set out in other conventions, but has also added moral, legal and political emphasis relating to the rights of PWDs to be employed and integrated into the labour market. The CRPD also subscribes to the social model of disability, which means that non-discrimination and equal opportunity principles are contained in the Convention. The CRPD does not only identify barriers that may hinder PWDs to be re-integrated, but also instructs countries who have signed or ratified the Convention worldwide to remove them. Some countries have made more of an effort than others to develop national policy frameworks to adopt the Convention so as to facilitate the integration of PWDs in society.²²⁹

Article 32 of the Convention requires a progressive realisation of the rights contained in the CRPD through international cooperation and States Parties taking appropriate measures; for example, by way of bi-lateral and tri-lateral agreements; development cooperation, domestication of international instruments and the development of mainstreaming standards and norms in line with international laws. According to

²²⁷ Article 32(1)(b).

²²⁸ Olivier "Social Security Framework" 19-20.

²²⁹ Majid 2011 <http://ripph.qc.ca/fr/node/48121>.

Article 33 of the Convention, states need to ensure the participation of civil society and ensure national focal points for the implementation of the CRPD. Coordination and implementation mechanisms will need to be in place as well as legal and administrative frameworks to monitor the implementation of the Convention.²³⁰

The CRPD promotes social development and recognises the risk of poverty and the discrimination that people with disabilities face.²³¹ The CRPD is not only a non-discriminatory convention; it also affords a network of substantive rights.²³² Quinn submits that the goal of the CRPD was not to create new rights, but rather to ensure, through non-discrimination, that the already existing rights are equally effective for all disabled people.²³³ The author does not agree with this submission, especially the detailed obligations stipulated in, for instance, Article 26 which were described above.

The CRPD recognises the right of PWDs to work, be accepted into the labour market and participate in an open, inclusive and accessible work environment. The Convention prohibits employment discrimination but goes one step further by advocating for vocational training, reasonable accommodation and self-employment. Unfortunately, many of these remedies are only available to employees in private and public sectors, as regulated by government. The informal sector is thus often unregulated, and people in many countries are self-employed, work from home or are engaged in the informal sector.²³⁴

The CRPD provides States Parties with guidance on the interventions required to enable PWDs to exercise their rights.²³⁵ Under this Convention people with disabilities are entitled to the same human rights as every other citizen, unlike the past, when traditional human rights instruments provided nominal protection only. Under the new dispensation, the rights of PWDs focus on true equality. Disability is

²³⁰ Olivier et al 2011 *PPCFSA* 32.

²³¹ Lord et al 2010 *SPDP* 4.

²³² Quinn 2009 *TJCLCR* 42.

²³³ Quinn 2009 *TJCLCR* 42.

²³⁴ Morris "Disability and Economics" Presentation: Disability and Economics: The nexus between disability, education, and Employment.

²³⁵ Harpur 2012 *Disability and Society* 4.

not merely regarded as a medical condition requiring assistance but rather as a component of social diversity.²³⁶

2.2.4 The CRPD as an agent of change

The CRPD is an example of international consensus on justice and disability.²³⁷ It has created a new disability rights environment, empowering persons with disabilities and giving them with a voice.²³⁸ Prior to the CRPD, there was significant emphasis on the “right to work”.²³⁹ It was necessary to build arguments for reform against the backdrop of the “right to work”. Such an interpretation is problematic due to the fact that it may either minimise or maximise social inclusion.²⁴⁰ The “right to work” appears in general terms and is applied in a uniform manner.²⁴¹

Article 23 of the *Universal Declaration of Human Rights* states as follows:

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 6(1) of the International Covenant on Economic, Social and Cultural Rights provides as follows:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

²³⁶ Harpur 2012 *Disability and Society* 5.

²³⁷ Quinn 2009 *TJCLCR* 52.

²³⁸ Harpur 2012 *Disability and Society* 5.

²³⁹ Harpur 2012 *Disability and Society* 5.

²⁴⁰ Harpur 2012 *Disability and Society* 5.

²⁴¹ Harpur 2012 *Disability and Society* 5.

The two key human treaties of the UN are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²⁴² These treaties were also particularised in other United Nations Treaties, for example the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child and the UN Convention on the Elimination of All Forms of Racial Discrimination. This raises the question of why it was necessary to adopt the CRPD.²⁴³ Quinn points out that scholars differ in opinion in this regard. Some will argue that these predecessors had “supply-side” problems, meaning that the monitoring bodies did not portray disability as an issue of equality and rights. Others will argue that it was “demand side” problems that were present. PWDs themselves did not turn to these treaties for validation of claims.²⁴⁴ Quinn is of the opinion that there is a deeper reason why these preceding treaties did not yield benefits for persons with disabilities by stating that the wording and the way in which they were interpreted, reflected a cultural negation of persons with disabilities.²⁴⁵

Thus, prior to the CRPD there was much uncertainty on how the right to work ought to be interpreted. Since its enactment this uncertainty has been reduced and States Parties both have positive and negative obligations in respect of disabled persons’ right to work.²⁴⁶ Whenever a state has ratified a Convention it has a duty to uphold the provisions thereof and States Parties must therefore adhere to the obligations as set out in the CRPD.²⁴⁷ This Convention may also serve as a powerful measuring tool to critique state conduct.²⁴⁸ The CRPD moved away from the traditional, medical perspective of disability, by following a rights-based approach. The Convention specifically states as follows:

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental

²⁴² Quinn 2009 *TJCLCR* 38.

²⁴³ Quinn 2009 *TJCLCR* 38.

²⁴⁴ Quinn 2009 *TJCLCR* 38.

²⁴⁵ Quinn 2009 *TJCLCR* 38.

²⁴⁶ Harpur 2012 *Disability and Society* 7.

²⁴⁷ Article 2(b) 11-15 Vienna Convention on the Law of Treaties (1980).

²⁴⁸ Harpur 2012 *Disability and Society* 7.

barriers that hinder their full and effective participation in society on an equal basis with others.²⁴⁹

Quinn suggests that economic development strategies and disability rights must form part of a country's political process. This is also advocated for in the CRPD.²⁵⁰

Quinn²⁵¹ further envisions a deeper reason for the CRPD, which he describes as follows:

A chronic failure of politics in the past...a failure in the political process to frame disability as an issue of justice and rights. Its legacy has been a large volume of unjust and discriminatory laws and practices around the world which have not yet to be undone. The convention is a means amongst others of correcting for that failure – as something that not only helps roll back that legacy but also points to a new practice of disability politics... I do not believe that undoing this legacy is enough. We have to find ways to use the convention to put in place a different dynamic of disability politics – one that will not produce such laws in the first place.

Blanck et al²⁵² state clearly that there is no simple solution to the universal challenges people with disabilities face, such as escaping poverty and advancing their economic self-sufficiency and community participation. The world still displays prejudice, ambivalence and stigma towards people with disabilities. As Kemp²⁵³ previously emphasised:

We should be expecting more. We should be expecting more and getting more from companies, from our governments and from ourselves. We should be expecting more and getting it.

Quinn describes the CRPD as both a moral compass for change as well as a legal yardstick against which to measure change.²⁵⁴ The success of the CRPD will depend largely on how this Convention could trigger a new form of engagement, particularly on disability politics and secondly on the responsiveness to the voices of persons

²⁴⁹ Preamble of the CRPD.

²⁵⁰ Blanck 2009 *TJCLCR* 400. For instance, Article 29(b)(i) of the CRPD provides as follows:” b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: ii. “Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels”.

²⁵¹ Blanck 2009 *TJCLCR* 401.

²⁵² Blanck 2009 *TJCLCR* 402.

²⁵³ Blanck 2009 *TJCLCR* 402.

²⁵⁴ Quinn 2009 *TJCLCR* 34.

with disabilities.²⁵⁵ The CRPD aims to give equal effectiveness to all human rights for persons with disabilities.²⁵⁶ Positive steps are required to effect change.²⁵⁷ The reformative process must take into account the views expressed by PWDs themselves.²⁵⁸ The provisions on workplace re-integration and workers' compensation as set out in the CRPD should find expression in the domestic laws of a country.²⁵⁹ The Convention takes a forceful step by requiring a domestic change, including governmental input as well as the presence of international bodies to monitor and protect these rights.²⁶⁰ The CRPD requires cooperation between government, independent human right agencies and people with disabilities. Such a triangular relationship offers the best hope for a sustainable, global reformative process.²⁶¹ In order for South Africa to meet the obligations of workplace reintegration, domestic laws must change and consultations with PWD's and other human rights role-players need to take place. It will be crucial for different government departments to work together for the reformative process to succeed. Non-compliance should also be addressed as soon as the need arises, either by the Committee or by a submission of communication.

The CRPD must be seen as a tool that can transform the legislation process right from the beginning. It must therefore not only be seen as supplying a set of norms against which bad laws and policies can be weighed.²⁶² The process-based innovations²⁶³ as set out in the CRPD are the key to the success of the Convention. The normal process of change must make provision for disability aspects, failure of which will result in the same process that continues to ignore the just claims of persons with disabilities.²⁶⁴ The Convention does not only impose obligations, it also

²⁵⁵ Quinn 2009 *TJCLCR* 37.

²⁵⁶ Quinn 2009 *TJCLCR* 45.

²⁵⁷ Quinn 2009 *TJCLCR* 37.

²⁵⁸ Quinn 2009 *TJCLCR* 46.

²⁵⁹ Olivier et al *2012 IJSSWC* 15.

²⁶⁰ Quinn 2009 *TJCLCR* 46.

²⁶¹ Quinn 2009 *TJCLCR* 37.

²⁶² Quinn 2009 *TJCLCR* 49.

²⁶³ Article 32 and 33 of the Convention on the Rights of People with Disabilities (2006).

²⁶⁴ Quinn 2009 *TJCLCR* 49.

strives to improve the democratic process by listening to the voices of people who were previously excluded or discounted.²⁶⁵

The importance of the CRPD can be summarised as follows:²⁶⁶

It articulates a theory of justice that every citizen can subscribe to and in which every citizen has a stake. It is not a case of special rights for a particular group, it is about equal rights for all. It is about making the democratic process open to all voices so that blockages can be dissolved and solutions found to deal with the legacy of that past and build a more inclusive society for all.

The CRPD does not create new rights or entitlements, but it covers the already existing rights in such a manner that the needs of PWDs are addressed. The UN urges Member States to amend their laws so as to comply with the obligations as set out in the Convention, so protecting their citizens with disabilities.²⁶⁷

Globally, inadequate laws, policies and programmes governing disability abound. The rights and obligations as set out in the Convention will enable citizens to contest these laws. The Convention has the potential to transform the process that put these laws into place.²⁶⁸

Quinn²⁶⁹ correctly states that “there is no transmission belt to ensure that the fresh air of international law can reach into and revive the domestic reform process”. One will need to find a way to ensure that the norms in the Convention gain traction where it is needed most. The author agrees with Quinn²⁷⁰ when he states that:

Policymakers need to become motivated to see the symmetry between the Convention and their domestic reform agenda. Most importantly, policy makers should see themselves as giving back to the international arena. This is a two-way street.

There needs to be a monitoring system in the pure domain of international law.²⁷¹ Article 33 of the Convention demands the existence of a ‘focal point’ as well as a

²⁶⁵ Quinn 2009 *TJCLCR* 49.

²⁶⁶ Quinn 2009 *TJCLCR* 51.

²⁶⁷ Devi et al 2011 *EJDR* 251.

²⁶⁸ Quinn 2009 *TJCLCR* 47.

²⁶⁹ Quinn 2009 *TJCLCR* 47.

²⁷⁰ Quinn 2009 *TJCLCR* 47.

²⁷¹ Quinn 2009 *TJCLCR* 48.

coordination mechanism with governments. However, there is a need to strengthen reformation with the help of governments who are accountable.²⁷²

Greenberg also urges states to be agents of change by stating as follows:

In order to ensure full compliance with the spirit and the intent of the CRPD, supporting states must align their societal and individual attitudes, policies and practices towards persons with disabilities with the aspirational goals of the CRPD. Moreover, unless there is proactive intervention to change attitudes, employers and employees with existing biases about individuals with disabilities will have a greater likelihood to continue interacting with individuals in the close-minded, biased way.²⁷³

He further highlights that Member States have the opportunity to address a history of systematic discrimination against PWDs. He asserts as follows: "We should no longer watch the preview of life's coming attractions. We should be ready for the main attraction, namely a universal workforce that encourages full participation of PWDs".²⁷⁴

Owing to high unemployment and poverty as well as an increased dependency on benefits, more emphasis should be placed on the role social protection can play in developing skills and competencies through employability programmes.²⁷⁵ Countries need to put mechanisms and strategies in place to adopt the provisions of the CRPD into their national and local contexts to ensure that they are efficient. At company level, policies need to be adopted to ensure that the needs of PWDs are adequately responded to. PWDs need to undergo training to enhance employability skills to assist them to re-enter the labour market.²⁷⁶ It is necessary to prevent disabling conditions and remove barriers to employment by adopting policies that are in line with the changing needs of PWDs, which ultimately promote access to training and encourage accessibility to the workplace. Furthermore, it is important to have policies

²⁷² Quinn 2009 *TJCLCR* 48.

²⁷³ Greenberg 2012 *SJUSL* 594.

²⁷⁴ Greenberg 2012 *SJUSL* 602.

²⁷⁵ Majid 2011 <http://ripph.qc.ca/fr/node/48121>. (reference this on the footnotes).

²⁷⁶ Majid 2011 <http://ripph.qc.ca/fr/node/48121>.

in place relating to adjustments in the workplace, such as modified working hours; flexible recruiting processes and accessibility to the physical infrastructure.²⁷⁷

Valuable lessons can be drawn from the report South Africa submitted in terms of the CRPD, and such analysis may assist in identifying the steps it needs to take to give effect to the rights of PWDs as guaranteed by the CRPD.

2.2.5 Reports submitted in terms of the CRPD by South Africa

South Africa is still in its infancy when it comes to developing and implementing mechanisms, as listed in Article 33 of the CRPD,²⁷⁸ although it acknowledges their importance and that of the Optional Protocol to improve the living conditions of people with disabilities in South Africa.²⁷⁹ However, several authors have argued that South Africa has not yet adequately incorporated the provisions of the CRPD in its domestic legislation since ratifying the Convention in 2007.²⁸⁰ This has reduced the effect of the Convention in South Africa. States Parties are obliged to submit periodic reports to the said Committee, and these reports are due within two years of ratification, and thereafter every four years.²⁸¹

South Africa submitted its first report in terms of the CRPD on the 26 November 2014.²⁸² The relevant sections will now be discussed. With reference to Article 26, which refers to “Rehabilitation and Habilitation”, South Africa highlights its capacity problem relating to qualified rehabilitation practitioners, especially in the public sector. Poverty is also a major barrier in accessibility of rehabilitation services, and specialised services are usually available at major centres only. The poor referral services within the public health sector and between it, the social security system, social development services, the education system and employment and skills-development programmes hamper the quality of service.²⁸³ The author is of the

²⁷⁷ Majid 2011 <http://ripph.qc.ca/fr/node/48121>.

²⁷⁸ Olivier et al 2012 *IJSSWC* 17.

²⁷⁹ Olivier et al 2012 *IJSSWC* 17.

²⁸⁰ Olivier et al 2012 *IJSSWC* 17.

²⁸¹ Article 35 of the CRPD.

²⁸² Submitted 26 November 2014 OHCHR 2018 CRPD/C/ZAF/1
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN.

²⁸³ Paragraph 278 of the report.

opinion that poor communication and lack of services may be obstacles when the RTW programme is rolled out nationally and contingency plans need to be put in place to address these problems. The government further submits that rehabilitation programmes are in place to address problem areas in the primary health care sector. However, the quality and availability of services differ from province to province. Long waiting lists for assistive devices is the norm.²⁸⁴ The National Development Plan of 2012 acknowledged that the burden of care, treatment and rehabilitation cannot be shifted to non-governmental organisations and the communities, and that “well-conceived state and community” interventions are indeed necessary.²⁸⁵ This is in line with my submission that the government, will need to be more sensitive about capacity constraints when developing an RTW programme. Since occupational injury funding operates on a contributory basis, there should be a budget for proper rehabilitative services.

With reference to Article 27, “Work and employment”, the Committee was referred to South African legislation which aims to provide for the fair treatment of PWDs. This is supported by certain guidelines and Codes of Good Practices with the aim of assisting with the practical implementation of the relevant legislation, which, in turn, aim to establish reasonable accommodation mechanisms and targets for empowering PWDs. However, insufficient progress has been made regarding the economic independence of PWDs. This is due to a lack of access to buildings and public transport infrastructure; ongoing attitudinal and communication barriers as well as the inter-relatedness of disability and poverty.²⁸⁶ Reference was made to the employment target of 2 percent set for PWDs in the public sector, as well as a revision of the “Handbook on Reasonable Accommodation for PWDs in the Public Service” to include a funding model for assistive devices. The government also explained its supportive initiatives, including: sheltered work; integrative enterprises; supported employment and lastly the open labour market.²⁸⁷

²⁸⁴ Paragraph 283 of the report.

²⁸⁵ Paragraph 286 of the report.

²⁸⁶ Paragraph 39 of the report.

²⁸⁷ Paragraph 297 of the report.

It is disappointing to see that no mention is made of deliberate targeted plans with deliberate timelines for the re-integration, rehabilitation and RTW of injured workers. The government needs to do more than organise sheltered employment workshops and focus instead on how the abilities of PWDs could be developed or restored to become productive members of society. It is the author's opinion that, while designated employers need to submit employment equity plans, these must also contain detailed RTW plans, and not merely general reasonable accommodation guidelines.

It is interesting to note how much compensation is paid out for disability grants by the Compensation Fund. The report stated that for the period 2010/2011 COIDA paid USD 19,4 million USD for permanent disability and USD13,9 million for temporary disability compensation for occupational-related injuries and diseases.²⁸⁸

With reference to Article 33, "National implementation and monitoring", South Africa reports that several bodies have been established to assist with this task. For instance, all national government departments, provincial administrations as well as district and local municipalities need to appoint a disability representative or unit who will be responsible for coordinating the mainstreaming of disability within each of these divisions. Other bodies such as the South African Human Rights Commission and the Department of Women, Children and PWDs are also mentioned. However, what is lacking from these discussions is how these bodies will ensure that South Africa meets its obligations as set out in the CRPD. For instance, how will it monitor compliance? Brief reference is made to the work of the Human Rights Commission and whether bi-annual meetings are sufficient for allowing role-players the opportunity to share experiences and challenges on the implementation of the CRPD. It is acknowledged that there is a need for "further internal engagement and dialogue".²⁸⁹

To conclude, the South African government admitted that there were flaws in its operational structure, capacity constraints and a lack of coordination in the disability sector which have detracted from a systematic approach to the implementation of

²⁸⁸ Paragraph 320 of the report.

²⁸⁹ Paragraph 412 of the report.

the CRPD.²⁹⁰ The vulnerability of PWDs requires a more coordinated and targeted intervention. South Africa says that it is still committed to providing for the rights of PWDs with interventions, such as strengthening its mainstream legislative and policy framework; and through monitoring mechanisms and transversal policies and legislation. It is also mentioned that its national disability rights mechanisms will need to be strengthened, to create a more enabling environment for PWD organisations. Accountability and monitoring should also form part of the national agenda. Policies and programmes that aim to provide equal access to PWDs, including disability-specific programmes aimed at addressing obstacles in the way of participation, should be accelerated.²⁹¹

A critical assessment of South Africa's report reveals that RTW, rehabilitation and re-integration of PWDs are not directly addressed. An interesting conclusion that can be drawn from the report, is that no reference is made of the new strategic goals of COIDA which are discussed in the following chapter. It is also clear from the report that the private sector was not consulted or asked for contributions. Multi-disciplinary assessment of disability, multi-faceted rehabilitation and early intervention are also not proposed in any part of the report. South Africa's current legislative and policy framework are not optimally enabling PWDs to be re-integrated into the labour market.

2.2.6 The Committee on the Rights of Persons with Disabilities response to report submitted by South Africa

The Committee on the Rights of Persons with Disabilities consists of eighteen independent experts tasked to monitor implementation of the CRPD. All members serve in their individual capacity and not as designated government representatives. All States Parties are obliged to submit regular reports to the Committee on how they have implemented the rights enshrined in the Convention. States need to submit a report two years after ratification and every four years thereafter. The Committee then examines the report whereupon general recommendations are

²⁹⁰ Thus, South Africa will need to have targeted legislation and policies in place, with mandatory disability management processes to allow for the integration of PWDS in all spheres of life.

²⁹¹ Paragraph 415-417 of the report.

forwarded in the form of concluding observations to the relevant State Party.²⁹²The Committee on the Rights of Persons with Disabilities has responded²⁹³ to the report submitted by South Africa and the aspects of relevance to this study will be discussed. With reference to Article 25, the Committee required the government to provide information pertaining to the measures they have adopted to ensure that professionals and support personnel in the health sector undergo the necessary training in a human rights approach to disability. Effective reporting and appeal mechanism in the health sector in instances where the client's rights have been infringed, need to be in place. This will also apply to RTW cases.

Regarding Article 27, the Committee was concerned about the declining rate of PWDs in the public sector and requested that the government inform the Committee on the measures taken to provide employment for PWDs.²⁹⁴ More awareness of the rights of PWDs needs to be created. The Committee further sought information pertaining to the measures the government has taken to create employment for persons with psychosocial and/or intellectual disabilities as well as affirmative action measures and vocational training for PWDs, including reasonable accommodation in the workplace. Information also needs to be provided whether sanctions for non-compliance can be issued against entities for non-compliance or those who deliberately fail to employ PWDs.

Referring to South Africa's specific obligations, the Committee emphasised the need to involve the disabled community in data collection and international cooperation agreements. Information pertaining to the measures South Africa has taken to establish an independent monitoring mechanism, once again with the full and effective participation of PWDs and their representative organisations, was requested.

²⁹² UN 2017 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

²⁹³ The Committee on the Rights of Persons with Disabilities response to report submitted by South Africa: List of issues in relation to the initial report of South Africa: CRPD/C/ZAF/Q/1 dated 14 March 2018.

²⁹⁴ Paragraph 28 of the report.

2.2.7 The influence of the CRPD on a regional level

The CRPD as well as its Optional Protocol has- as its aim to be a ground-breaking instrument in the field of disability rights law, both on an international and domestic level.²⁹⁵ Taking cognisance of the fact that a direct comparison between different jurisdictions might be problematic, it became apparent that disability rights in the African system were progressing at a slower pace than the Inter-American and European counterparts.²⁹⁶ Nevertheless, the CRPD provides new opportunities for African countries, which have signed and ratified it, to re-evaluate their national legal regimes with reference to disability rights.²⁹⁷

The implementation of the CRPD emphasised the shift from the medical model of disability towards the human and social rights models.²⁹⁸ African states were mostly well represented and involved in the process leading up to the formation of the *Ad Hoc* Drafting Committee by the UN General Assembly, as well as in the composition of the text of the Convention process.²⁹⁹ Some would say that the CRPD contains an "African" imprint due to its emphasis on the connections between disability, development and poverty.³⁰⁰

The African Union declared 1999-2009 the African Decade of Disabled Persons (ADDP).³⁰¹ During this period, the African Union urged its members to empower PWDs and encourage their optimal participation as well as their right to equality.³⁰² The ratification and implementation of the CRPD were also advocated for.³⁰³

One of the most significant changes was the replacement of a medical model of disability with that of a social one, which espouses that a person's disability is the result of interaction between the individual's functional status, policy, and cultural and physical environments. The introduction of the CRPD has brought meaningful

²⁹⁵ Combrinck and Van Reenen IJOHR 2011 133.

²⁹⁶ Combrinck and Van Reenen IJOHR 2011 133.

²⁹⁷ Combrinck and Van Reenen IJOHR 2011 133.

²⁹⁸ Chilemba 2015 *ADRY* 294.

²⁹⁹ Combrinck and Van Reenen IJOHR 2011 142.

³⁰⁰ Combrinck and Van Reenen IJOHR 2011 143.

³⁰¹ Lord et al 2010 *SPDP* 15.

³⁰² United Nations Enable 2003/2004
<https://static.un.org/esa/socdev/enable/disafricadecade.htm>.

³⁰³ Forced Migration Review 1987 <http://www.fmreview.org>.

change to the African continent, since it led to the establishment of many Disability Peoples' Organisations as well as constitutional and legislative frameworks recognising the rights of PWDs.³⁰⁴ There was a clear need to create enabling environments open to diversity to address inequalities. It is estimated that approximately 80 million people in Africa have some form of disability.³⁰⁵ PWDs face many challenges, such as limited access to education and employment opportunities, and are often victims of discrimination and stigma.³⁰⁶ Before the introduction of the CRPD to Africa, PWDs were regarded with pity and were recipients of medical benefits and charity, instead of enjoying lawful rights.³⁰⁷ With the introduction of the CRPD, disability is now viewed through a human rights lens, with the emphasis on the human dignity of the individual. The focus is thus extended, to reach beyond the individual, and addressing society's response to the individual and his or her disability. A human rights-based approach is now being followed, where PWDs are viewed as right-bearers.³⁰⁸

2.2.8 Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (CRPD 2008)³⁰⁹ and relevant jurisprudence

Article 1 of the Protocol provides as follows:

1. A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.
2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 1 of the Protocol thus empowers the treaty-monitoring body, the Committee on the Rights of PWDs to receive and review communications pertaining to alleged violations of rights of the CRPD by States Parties. When a communication is

³⁰⁴ Du Plessis and Van Reenen *Aspects of Disability* 54.

³⁰⁵ Du Plessis and Van Reenen *Aspects of Disability* 53.

³⁰⁶ Du Plessis and Van Reenen *Aspects of Disability* 55.

³⁰⁷ Du Plessis and Van Reenen *Aspects of Disability* 54.

³⁰⁸ Du Plessis and Van Reenen *Aspects of Disability* 54.

³⁰⁹ *Protocol to the United Nations Convention on the Rights of Persons with Disabilities* (CRPD 2008 G.A Res 61/106).

received, States Parties have six months to respond. Thereafter the Committee reviews the communication and delivers its decision, to both the State Party as well as the author of the communication.³¹⁰ Even though these decisions are not legally binding, they still set normative standards and make a valuable contribution in relation to the interpretation and application of the CRPD.³¹¹

If member states ratify the Optional Protocol, they agree to accept a complaints mechanism that will permit the United Nations Committee on the Rights of Persons with Disabilities to hear both group and individual complaints.³¹² The Optional Protocol can thus be used as a mechanism to reinforce national protection mechanisms. The Optional Protocol places a mandate on the Committee to question or validate national court decisions. The Committee helps domestic courts, in advising on the further substantive development of rights and obligations under the Convention. It can thus be concluded that international case law can be used to promote national jurisprudence. The inquiry procedure, which is available in terms of the Protocol, also provides countries with the opportunity to solve complex problems with international expertise. For instance, the Committee can visit a country and could be helpful in analysing problems from an impartial and independent perspective and offer solutions.³¹³ The recommendations and views of the Committee could trigger law reform, since procedures outlined in the Protocol could assist in the incorporation of the Convention into national law. Another important feature of the Protocol is the strategic litigation mechanisms it provides. For example, public interest advocates and civil society organisations can use litigation as a tool for change, bearing a standard for others finding themselves in a similar situation.³¹⁴

³¹⁰ Mgijima "The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa" 269.

³¹¹ Mgijima "The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa" 270.

³¹² Quinn 2009 *TJCLCR* 33.

³¹³ United Nations *The Convention On The Rights Of Persons With Disabilities Training Guide* 154.

³¹⁴ United Nations *The Convention On The Rights Of Persons With Disabilities Training Guide* 148/149.

It is important to look at the jurisprudence³¹⁵ of the said Committee since it may assist South Africa to understand the interpretation of the right as set out in the CRPD. Article 27 CRPD was interpreted, *inter alia* in several cases, for instance that of *Marie-Louise Jungelin v Sweden*.³¹⁶ In this case, claims were submitted by Marie-Louise Jungelin, a Swedish national and represented by the Swedish Association of Visually Impaired Youth and the Swedish Association of the Visually Impaired. She was born with a severe eye defect. In spite of this she holds a Bachelor of Laws degree and has experience in a wide range of jobs. She applied for a position as investigator of sickness benefits and sickness compensation applications with the Social Insurance Agency. Following an interview, the applicant was informed that the Agency's computer system could not be adjusted to accommodate her sight. The matter was reported to the Ombudsman who took the case to the Labour Court. They claimed that Ms Jungelin had the necessary qualifications for the position and that the Agency should have tried to accommodate her impairment. It was argued that the agency violated the former Prohibition of Discrimination in Working Life of PWDs Act 132 of 1999, by not taking reasonable support measures to assist Ms Jungelin to fulfil her tasks as expected. The Agency submitted that the adaptation and adjustment of its whole IT system would have been an unreasonable burden. Ms *Jungelin* was not successful. The Labour Court found as follows:

...it had been shown that the support and adaptation measures that the Social Insurance Agency would have had to adopt to put the author in a situation comparable with that of a person without her visual impairment were not reasonable. Thus she did not have the necessary qualifications for the position of investigator/assessor.

No appeal against the decision was available and accordingly the complainant believe that no other domestic remedy was available.

The main issue before the Committee was whether the 2010 judgment of the Labour Court amounted to a violation of Article 5 and Article 27 of the Convention. The complainant alleged that the failure of the Social Insurance Agency to make the necessary adjustments was discriminatory and that such adjustments could further

³¹⁵ OHCHR 2014 <http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD-C-18-DR-22-2014.pdf>.

³¹⁶ OHCHR 2018 <http://juris.ohchr.org/Search/Details/2006>.

benefit future employees with visual impairments. The Committee, in its communication referred to Article 27(a);(e);(g);(i) of the CRPD in which it is stated as follows:

States parties have the responsibility to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; to employ persons with disabilities in the public sector; and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

With reference to the definition of reasonable accommodation, it was submitted as follows:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

It is important to note that the Committee considered the reasonableness and proportionality of the accommodation measures, and this could provide guidance on the standard of reasonableness for a country such as South Africa. The Committee noted that States Parties enjoy a "certain margin of appreciation". The Committee also observed that in most instances it is for the domestic courts of a country to consider the facts and evidence of a case, unless it was proven that the evaluation was "clearly arbitrary or amounted to a denial of justice". The Committee noted that the Labour Court did a proper evaluation of all the elements submitted by both parties before coming to its decision, which did not amount to a violation of Articles 5 and 27 of the Convention. Some Committee members disagreed, and formed their own joint opinion, as an annexure to the decision of the Committee. They stated that all the alternatives placed in front of the court by the Ombudsman had to be considered, in light of Article 5 of the Convention. They were of the opinion that the term "reasonable accommodation", should be analysed on a case-to-case basis and that the context in which the terms reasonableness and proportionality must be

assessed, was as important. In this case, it appeared in a professional context.

They emphasised as follows:

...the measures of accommodation were requested to promote the employment of a person with a disability, with the professional capacity and experience to perform the functions corresponding to the position for which he or she applied; and (ii) the public or private company or entity to which the candidate applied can reasonably be expected to adopt and implement accommodation measures. It was never questioned that the author had the professional capacity and work experience required to perform the duties of the position for which she had applied.

They further observed that one of the objectives of reasonable accommodation was to compensate for the material limitations a person may experience in the workplace, thus preventing PWDs from performing their duties. They further observed that the Labour Court failed to consider the impact of the measures proposed by the Ombudsman. Thus, even though reasonable accommodation was in principle an individual measure, one must also consider the benefit it must have for other employees with disabilities. As one of the main institutions tasked, The Labour Court should have considered the particular role, functions and profile of the Social Insurance Agency more carefully, when implementing the national policy on PWDs. Finally, they observed that the Labour Court did not consider the subsidy and assistance benefits available to them and the candidate as proposed by the ombudsman. Thus, they were of the opinion that the Committee should rather have determined that the judgment by the Labour Court amounted to a wide interpretation of the notion "undue burden", thus severely limiting the possibility of PWDs to be selected for positions where adaptation of the environment must be necessary.³¹⁷

If one considers the implication of the communication for Africa, some authors are of the opinion that the principle of reasonable accommodation, as set out in *HM v Sweden* has not found resonance yet, as it is either not properly defined or there is uncertainty about its application.³¹⁸ I agree with this submission, also with specific reference to South Africa, as will be argued in the following chapter.

³¹⁷ OHCHR 2019 <https://www.ohchr.org/en/hrbodies/crpd/pages/jurisprudence.aspx>.

³¹⁸ Mgijima "The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa" 271.

In *A.F v Italy*³¹⁹ the Committee stated that in line with Article 27(a); (e); (g) and (i) of the Convention, States Parties have the responsibility to prohibit discrimination based on disability, pertaining to all forms of employment, including:

... conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and *returning to employment*³²⁰; to employ persons with disabilities in the public sector; and to ensure that *reasonable accommodation*³²¹ is provided to persons with disabilities in the workplace.

The Committee also stated, in line with the case discussed above, that it is usual practice for the courts of the State Party to assess the facts and evidence of the specific case, unless it can be found that the evaluation was “clearly arbitrary and amounted to a denial of justice”. This is an important consideration that all parties must adhere to when submitting a complaint to the Committee.

In *S.C. v Brazil*³²², a complaint was filed, based on the following facts.³²³ S.C., a Brazilian national, claimed to have been the victim of a violation of, amongst others, Article 27(1)(a) and (b) of the CRPD. She started working for Banco do Estado de Santa Catarina (BESC) in July 2004 and was transferred to Campinas to Florianópolis to work as a bank teller. In June 2006 she was involved in a motorcycle accident and sustained a knee injury. She was able to return to work two months after her sick leave had expired. In September 2007 she was involved in another motorcycle accident and had to undergo surgery in June 2008. Her doctor issued her with a medical certificate ordering her to rest for sixty days. In January 2009, she was involved in a third motorcycle accident and in April 2009, before she took medical leave, the company BESC was purchased by Banco De Brasil. In terms of the bank’s internal policy, she was informed that she had to return to work within three months, to retain her position as teller. The bank’s policy stipulated that after an employee had taken sick leave exceeding three months, it had the discretion to

³¹⁹ *A.F v Italy* CRPD/C/13/D/9/2012 (CRPD Committee 2013).

³²⁰ Own emphasis.

³²¹ Own emphasis.

³²² OHCHR 2018 <http://juris.ohchr.org/Search/Details/2007>.

³²³ The facts leading to the complaint is extensive but is specifically included for purposes of this study, to illustrate the complexity of return to work cases.

decide whether the employee should return after three or six months. Even though the employee wished to return to work within three months, she was not able to do so on medical grounds, as attested by her own doctor as well as that of Banco do Brazil's. Upon her return to work before the end of the six-month period, she was demoted. She remained in the bank's employment, but without a defined job description.

In November 2009 S.C. requested a transfer to the bank's branch in Campinas, which was closer to her home and more convenient for health reasons. The transfer was refused, due to the Campina office being overstaffed. The bank referred her to earlier recommendations made by her doctor that she was able to resume work but should not be required of her to lift materials exceeding five kilograms, to go up or down stairs or to remain seated or stand for long periods. In 2010 the complainant had severe episodes of muscle cramps and had to take prescribed medication. In December 2010 her doctor issued a medical certificate, stating that she was suffering from a chronic illness and a recommendation that she should work closer to home. She also had to take additional sick leave during 2010 because of chronic pain. In February 2011, the bank's lift went out of order and the complainant was advised to do administrative work on the ground floor, using a computer. However, her work station was not suitable, and did not correspond to her needs. She had to leave home at 06:30 am to be at the office from 10:00am-16:00pm. S.C. filed a complaint against Banco De Brasil in February 2011 with the Regional Labour Court. She alleged, *inter alia*, the unconstitutionality of the bank's internal policy, which provided for the demotion of staff who were on medical leave exceeding three months and the discriminatory nature of the policy. The Bank submitted that S.C. had voluntarily accepted the bank's policy which applied to all employees, without exception.

The Regional Labour Court accordingly dismissed her complaint and S.C. appealed, which was also unsuccessful.³²⁴ The applicant believed that all internal remedies were exhausted and that her employment situation had not improved. She further submitted that a forensic physician had diagnosed a permanent infirmity of her left knee with moderate loss of function rendering her permanently unable to occupy her current job, however, she had “no general disability for work purposes”. From July 2011-April 2012 she had to take medical leave again due to a serious shoulder complaint and was accordingly diagnosed with fibromyalgia, a condition causing inflammation and cramps, brought on by stress. The doctor recommended that she could work, but under certain conditions only, for instance: For every hour of repetitive work a ten-minute break had to be taken; she should not work in an air-conditioned space; and her daily schedule should make provision for physical activity. When she resumed work in April 2012, she was assigned a position in the archives, which required significant physical effort. After two weeks, she was offered a position in the administrative records department at Banque Postale, situated in another building. She was tasked with problem-solving and coordinating of the work of a team. During this time, she submitted that she was “unjustly subjected to reprimands” from assistants and her managers. After working there for forty-five days, the bank ordered the complainant to return to her previous office, tasked to resolve “various problems”. She had difficulty performing her functions, since telemarketers were situated close to her workstation. She further submitted that she was harassed by one of her co-employees who had ousted her from her workstation without the bank reprimanding him. In the meantime, she was also ordered to work for operations control and had to do analytical work.

The complainant’s case was based on several grounds, for instance that Banco’s do Brasil’s conduct was tantamount to discrimination on grounds of disability based on its policies as described above. She also claimed that she had not enjoyed the same working conditions and opportunities as her unimpaired colleagues, even though

³²⁴ The complainant appealed to the Superior Labour Court, however for this procedure legal representation is compulsory. She requested legal aid, but they denied her request for lack of merits. She accordingly contacted a private attorney but she refused to represent her. In July 2011, the complainant filed her appeal without representation and the appeal was accordingly rejected.

they had similar skills. The Bank also made submissions, mainly based on the following: Her disability did not correspond with that set out in the Convention and that she had not exhausted all internal remedies.

The Committee evaluated the author's physical impairment and explained the difference between an illness and disability as follows:

...the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A human rights-based model of disability requires the diversity of persons with disabilities to be considered.

The Committee also considered how the Convention defines "disability" as:

...a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.

The Committee concluded that it was not precluded by Article 1 of the Optional Protocol to examine the communication. It then attended to the bank's demotion policy and made the following noteworthy statement:

...discrimination can result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate, but that disproportionately affects persons with disability. The Committee therefore considers that the question before it is whether, by requiring the demotion of persons on medical leave for over 90 days, the Bank's policy had a disproportionately adverse impact on the author and concludes that it is not precluded by article 2, paragraph (e), of the Optional Protocol, from examining the communication.

However, the Committee held that the complainant's claim was inadmissible, since she had failed to exhaust all domestic remedies, because she did not mention that she had not had the option of legal counsel before the Superior Labour Court or to have her case examined on merit.

The decision of the Committee is an example for all African states, including South Africa, that the CRPD adopts a broad categorisation of PDS's and confirms that all individuals with every type of disability should be entitled to the rights and freedoms

enshrined in the Convention. States are also reminded that the definition of disability must be interpreted in the context for the purpose for which it was adopted.³²⁵

This case is an example of how complicated the circumstances surrounding an illness or disability can be. When developing workplace policies about RTW arrangements, individual circumstances must be taken into consideration, but it must be realised that companies cannot be expected to accommodate an illness or disability on an unlimited basis. Also, applicants who wish to submit communication to the Committee need to make sure of the validity of their claims, since it would have been interesting to see how the Committee would have interpreted the merits of the case and the obligations of the parties concerned. Companies must be mindful of policies that might seem non-discriminatory in theory but quite the opposite in practice. It also would be interesting to see how the Committee would have interpreted the extent of the bank's duty to reasonably accommodate the author, considering that she was placed in different positions and since she had been involved in more than one accident.

The Committee's jurisprudence in terms of the Protocol covers a combined assessment of communications and recommendations for an improved implementation of the rights of the CRPD. Even though it is not legally binding, it is of value to African countries in that it helps to clarify the legal obligations of States Parties; gives guidance on the practical implementation of rights; and ensures thorough implementation of the CRPD. Thus, it enables countries to incorporate the rights of the CRPD into their domestic laws, policies and programmes.³²⁶ South Africa could benefit from the way the Committee interprets the rights and the obligations as set out by the CRPD and evaluate whether it has made progress in this regard. For instance, with reference to the duty to "reasonably accommodate", South Africa can review its own definitions of this phrase, as set out in various pieces of legislation to determine how a more conducive environment could be created.

³²⁵ Mgijima "The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa" 280.

³²⁶ Mgijima "The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa" 281.

2.2.9 UN Standard Rules on the Equalization of Opportunities for People with Disabilities (1993)

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have been developed, based on the experience of the United Nations Decade of Disabled Persons (1983-1992). Several International Conventions and Programmes, such as the Universal Declaration of Human Rights, World Programme of Action concerning Disabled Persons informed the political and moral foundations of these Rules.³²⁷

In terms of Rule 7, it is expected of states to actively support the integration of PWDs into employment. This can be achieved by a variety of measures, such as incentive-oriented quota schemes; vocational training and financial assistance to organisations employing PWDs. It is also important for states to motivate employers to make the necessary reasonable adjustments to accommodate PWDs. States must implement action programmes, which *inter alia*, make provision for adaptation of workplaces; supporting the production of assistive devices; and public awareness training to combat negative attitudes and prejudices towards workers with disabilities.

Rule 8 addresses income maintenance and social security. States are responsible for the provision of social security and income maintenance for persons with disabilities. Sub-section 4-6 is of particular importance:

4. Social security systems should include incentives to restore the income-earning capacity of persons with disabilities. Such systems should provide or contribute to the organization, development and financing of vocational training. They should also assist with placement services.

5. Social security programmes should also provide incentives for persons with disabilities to seek employment in order to establish or re-establish their income-earning capacity.

6. Income support should be maintained as long as the disabling conditions remain in a manner that does not discourage persons with disabilities from seeking employment. It should only be reduced or terminated when persons with disabilities achieve adequate and secure income.

³²⁷ UN DESA 2019 <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html>.

Rule 3 advises states to develop national rehabilitation plans for all groups of PWDs. These programmes have to cater for individual needs and must be based on the principles of full participation and equality. States may need assistance from experts as well as PWD organisations when evaluating or formulating rehabilitation programmes. Rule 4 urges states to provide PWDs with the necessary support services, including assistive devices and personal assistance. According to this document/set of rules, social security does not consist of cash transfers only, but also has developmental and restorative functions.³²⁸

In the next part of the chapter, the role of the ILO as well as the relevant ILO instruments are scrutinised. It is clear from the discussion above, that there are several international instruments that gave rise to RTW obligations, which are of utmost importance for South Africa in the development of legislation dealing with RTW obligations. States need to take concrete steps to ensure that PWDs are re-integrated into to the labour market.

2.3 International Labour Organisation³²⁹

2.3.1 Introductory remarks

The ILO was founded in 1919 as part of the Treaty of Versailles, which ended World War I and stands for the principle “that universal and lasting peace can only be achieved if it is built on social justice”. It is the only “tripartite” UN agency that brings together representatives of governments, employers and employees to inform policies and programmes for social justice as well as decent working and living conditions for all women and men. This unique body allows employers and governments an equal say and assures that views of social partners are represented in labour standards as well as in the formulation of programmes and policies. In 1946 the ILO became the first specialised agency of the UN³³⁰ and was awarded the Nobel Peace Prize in 1969.

³²⁸ Guthrie et al 2001 *ICR* 31.

³²⁹ International Labour Organisation, hereafter ILO.

³³⁰ ILO 2017 www.ilo.org.

The ILO is, *inter alia*, responsible for the drafting and overseeing of international labour standards, in the form of Conventions and Recommendations. It therefore exerts influence by incorporating “real world” knowledge in the world of work. It consists of 185 member states, and is responsible for organising an annual general assembly, the International Labour Conference.³³¹

The ILO, collaborates with governments, employers’ and workers’ organisations and PWD representative organisations to promote labour market inclusion of PWDs by way of Increasing employability of PWDs by promoting mainstream skills and entrepreneurship development to ensure that they are trained sufficiently upon entering the labour market; inclusive employment, by working with multinational companies and national networks of employers to raise awareness on the “business case” for the employment of PWDs; and enabling environments, where the ILO works together with governments, social partners and PWD organisations establishing an environment in which legislation and policy are more supportive of disability.³³²

The ILO’s mandate is to advance opportunities for women and men to obtain productive and decent work conditions and to protect fundamental rights such as equality, freedom, security and human dignity.³³³ The Disability Programme of the ILO promotes the procurement of decent work (as stated above) and facilitates the means to overcome obstacles encountered by PWDs in the labour market.³³⁴ Its disability programme further strives to: promote international labour standards regarding PWDs; improve knowledge on disability-related matters regarding employment, vocational rehabilitation and training; and provide guidance and advice on policy to governments, employees and employers’ organisations, and organisations for PWDs on training, vocational rehabilitation, and employment of PWDs and technical cooperation services.³³⁵

³³¹ Anon 2017 <https://www.safety2017singapore.com> 14.

³³² Lord et al 2010 *SPDP* 5.

³³³ Lord et al 2010 *SPDP* 5.

³³⁴ Lord et al 2010 *SPDP* 5.

³³⁵ Lord et al 2010 *SPDP* 8.

The unique tripartite structure means that all parties are represented, and representatives can cast their votes at the annual International Labour Conference where international labour and social security standards are established and adopted. This requires extensive preparatory work by the Organisation, including dialogues between governmental groups, employers, employees, ILO member states and the ILO.

The ILO standards embrace the following:³³⁶ First, they are universal, meaning general minimum standards that are globally applicable; they are inter-linked with political, social and economic standards; they are comprehensive in nature, covering an extensive range of subject matters; and some of the instruments are flexible by nature, since they allow countries to choose between alternative standards.³³⁷

It must be noted that an ILO Convention will only be applicable to a member state if that Convention had been ratified by the member state. Unlike other Conventions, ILO Recommendations are non-binding instruments, but usually address the same subjects as Conventions.³³⁸ The ILO's social security standards provide different types of social security benefits, with the goal of having an extensive range of options and flexibility clauses to provide universal coverage at a gradual pace.

The ILO Conventions can be divided into two main categories, namely those that provide comprehensive standards and those which set standards relating to the different branches of social security. The ILO's Comprehensive Conventions are the Social Security (Minimum Standards) Convention 102 of 1952, Equality of Treatment (Social Security) Convention 118 of 1962, and Maintenance of Social Security Rights Convention 157 of 1982. The Social Security (Minimum Standards) Convention 102 of 1952 is said to be the flagship of all the ILO social security Conventions, since it is the only international instrument which has worldwide- minimum standards for all nine identified branches of social security, including unemployment and invalidity

³³⁶ Mpedi and Nyenti 2015 *CICLASS* 17.

³³⁷ Mpedi and Nyenti 2015 *CICLASS* 18.

³³⁸ Mpedi and Nyenti 2015 *CICLASS* 18.

benefits. The Convention also describes the minimum standards of social security benefits, as well as the conditions for the granting of benefits.³³⁹

The ILO is primarily responsible for developing and setting international standards in the fields of employment relations, labour law and social security, monitoring and technical advice. The influence that the ILO exerts can be observed at a regional level, with reference to SADC instruments, but also on a national level, considering the purpose of the *Labour Relations Act 66 of 1995* for instance, where it is stated that South Africa, as a member state of the ILO, must give effect to its obligations, as these should be relied upon by its courts.³⁴⁰

It is important to see international standards within the context of the developing world. Olivier emphasises as follows:

In essence, what is needed is a conceptual framework and orientation, supported by a normative context *via* appropriate standard-setting provisions, which cover, address and include basic entitlements towards essential forms of social security related support, informal modes of social security provisioning, informal workers and specific risks to which people in the developing world, including in Africa, are invariably exposed to.³⁴¹

The discussion of ILO standards in the paragraphs to follow, must be viewed within the South African context and the unique support its workers need to enable them to return to work.

2.3.2 ILO Instruments

One of the key functions of the ILO is the adoption of Conventions and Recommendations at the tripartite International Labour Conference, which sets international standards. When ratified, Conventions create binding obligations for States to implement their provisions. Recommendations on the other hand, aim to provide guidance on policy, legislation and practice. Since 1919, many Conventions and Recommendations have been made, relating for instance to the elimination of unfair discrimination and social security. All Member States are required to submit

³³⁹ Mpedi and Nyenti 2015 *CICLASS* 18.

³⁴⁰ Olivier "Social Security Framework" 166.

³⁴¹ Olivier "Social Security Framework"181.

the Conventions and Recommendations adopted at the Conference to the relevant authority to decide on what action needs to be taken.³⁴²

There are several ILO Instruments that relate to vocational rehabilitation, disability, injury prevention and benefits. They include the ILO Employment Injury Benefit Convention, 1964 (No.121); ILO Nursing Personnel Convention, 1977 (No.149); ILO Occupational Safety and Health Convention, 1981 (No.155); ILO Occupational Health Services Convention, 1985 (No. 161); ILO Prevention of Major Industrial Accidents Convention, 1993 (No.174); ILO Promotional Framework for Occupational Safety and Health Convention 2006 (No. 187); ILO Protocol to the Occupational Safety and Health Convention, 1981, 2002 (No. P 155); ILO Safety and Health in Agriculture Convention, 2001 (No. 184); ILO Safety and Health in Construction Convention, 1988 (No. 167); ILO Safety and Health in Mines Convention, 1995 (No. 176); ILO Social Security (Minimum Standards) Convention, 1952 (No. 102); ILO Vocational Rehabilitation and Employment (Disabled Persons) 1983 (No.159); ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation 1983 (No. 168) and the ILO Vocational Rehabilitation (Disabled) Recommendation 1955 (No.99).³⁴³

However, South Africa has ratified only two of the above instruments, the Occupational Safety and Health Convention, 1981 (No. 155), and the ILO Safety and Health in Mines Convention, 1995 (No. 176). It is unfortunate that both these Conventions do not make a major contribution towards promoting an RTW agenda. Other standards, which were not ratified by South Africa, give noteworthy insights into vocational rehabilitation standards and measures. However, given the fact that South Africa has signed and ratified the CRPD, it would be more helpful to use the CRPD as starting point to assess its rehabilitation and reintegration obligations.³⁴⁴ It is however important to consider the Vocational Rehabilitation and Employment Convention, which is discussed in the next paragraph.

³⁴² ILO 2018 <http://www.ilo.org/global/about-the-ilo/newsroom/lang--en/index.htm>.

³⁴³ Govindjee, Olivier and Nyenti *The Role of Standard in Labour and Social Security Law* 225.

³⁴⁴ Govindjee, Olivier and Nyenti *The Role of Standard in Labour and Social Security Law* 225.

2.3.2.1 The Vocational Rehabilitation and Employment (Disabled Person) Convention, 1983 and Recommendation No 168 of 1983

The Disabled Persons Convention calls on Member States to adopt policies on vocational rehabilitation and employment promotion based on the equal treatment and equal opportunity for PWDs. Recommendation No. 168 advocates the promotion of employment opportunities for PWDs with salaries and employment standards aligned to those of non-disabled workers.³⁴⁵ After analysis of the Convention, it seems that there is no direct reference to RTW. However, there are some provisions which may assist to lay the foundation for RTW. For example, Article 7 provides as follows:

The competent authorities shall take measures with a view to providing and evaluating vocational guidance, vocational training, placement, employment and other related services to enable disabled persons to secure, retain and advance in employment; existing services for workers generally shall, wherever possible and appropriate, be used with necessary adaptations.

Article 8 provides that Member States need to take measures to promote the formation and development of vocational rehabilitation and employment services for PWDs in rural areas and remote communities. Article 9 highlights the importance of training the stakeholders involved with vocational rehabilitation, placement and employment of PWDs.

From the above, one can deduce the following: It is important to not only to secure employment for PWDs, but they must also be able to retain such employment. The fact that staff, who are tasked with vocational rehabilitation must be trained, is indicative of the demand for quality services. This must also be a priority for South Africa when an RTW programme is rolled out nationally.

It is important to consider the supervisory mechanism procedures of the ILO, even though South Africa has not ratified the above Convention. Parties must be made aware of the difference avenues they may follow. It will be interesting to analyse the reports by South Africa once it has ratified the above convention.

³⁴⁵ ILO 2012 www.ilo.org/skills/pubs/WCMS_194822/lan.

2.3.2.2 Supervisory procedure of the ILO

The ILO has established a supervisory procedure to guarantee the application of ILO Conventions and Standards in both law and practice. It entails an objective evaluation by independent experts on whether obligations are being complied with as well as an evaluation of cases by ILO tripartite bodies. A special procedure exists for complaints to be investigated.³⁴⁶

International standards are thus supported by the ILO's supervisory system in that it ensures that countries implement the conventions they have ratified. The ILO examines the application of standards by Member States on a regular basis and directs them into areas that need to be improved. In case of problems with application of the standards, the ILO assists countries by way of social dialogue and technical assistance.³⁴⁷ The Organisation has developed numerous means of supervising the application of International Conventions and Recommendations (for countries that have adopted and ratified them) in the spheres of both law and practice.³⁴⁸ There are two kinds of supervisory mechanisms in existence: the regular system of supervision and Special Procedures.³⁴⁹

The regular system entails the examination of reports submitted by Member States and observations submitted by employee and employer organisations. The two ILO bodies responsible for this task are the Committee on Experts on the Application of Conventions and Recommendations and the International Labour Conference Tripartite on the Application of Conventions and Recommendations.³⁵⁰ The Committee on Experts was created in 1926 and was tasked to examine the increased number of reports by governments on the Conventions they have ratified. It currently comprises twenty renowned jurists from different cultures, legal systems

³⁴⁶ ILO 2018 <http://www.ilo.org/global/about-the-ilo/newsroom/lang--en/index.htm> pdf doc in folder.

³⁴⁷ ILO 2018 <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

³⁴⁸ ILO 2018 <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

³⁴⁹ ILO 2018 <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

³⁵⁰ ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm>.

and geographic regions who are appointed by the governing body and serve three-year terms. Their primary role is to conduct an impartial and technical evaluation of the application of international standards in an ILO Member States.

South Africa has ratified two ILO Conventions only and does not provide any direct contribution for RTW. Because of this, it falls outside the ambit of the study. Conventions that provide standards for vocational rehabilitation, such as the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) that is essential to analyse and evaluate the reports South Africa is obliged to submit.

2.3.2.3 Committee of Experts on the Application of Conventions and Recommendations

Once a country, such as South Africa has ratified an ILO Convention, it becomes mandatory to report regularly on the measures taken to implement it. Governments must submit reports every three years setting out the steps they have taken in both law and practice. This is applicable to any of the eight fundamental Conventions and the four governance Conventions. The reporting term for all other Conventions is five years, with the exclusion of those Conventions that no longer require supervision on a regular basis. The Committee may request reporting at shorter intervals. The Reports are sent to employee and employer organisations for comment, directly to the Committee. When examining the application of international standards, the Committee can make two types of Comments: Observations and direct requests. Observations are published in the Committee's annual report which in turn contains comments on fundamental questions relevant to the application of a Convention by a state. Direct requests on the other hand, deal with technical questions or requests for further information. Unlike the observations, they are not published but sent directly to the governments involved. The annual report published by the Committee consists of three parts: the general report, which

includes comments by Member states of their constitutional obligations; the observations; and the General Survey.³⁵¹

2.3.2.4 Conference Committee on the Application of Conventions and Recommendations

The Committee examines the annual report of the Committee of Experts, which is usually submitted at the International Labour Conference. The Committee consists of representatives from government, employer and worker delegates and will select a few observations for discussion. Governments mentioned in the comments are invited to respond and provide more information. The Committee draws up conclusions which may contain recommendations on the steps governments need to take to remedy a problem or to invite the ILO for technical assistance.³⁵²

The supervisory system is useful in assisting countries to make progress with the application of international standards and serves to review the reports of other Member States to amend their own legislation, avoid certain practices or to follow good practices. This procedure also acts as a channel for these committees to make direct requests to countries where problems were identified, and to give them an opportunity to address concerns before a report is published. The Committee's interventions could trigger social dialogue, in instances when governments are required to engage with social partners, which could lead to prevention and problem solving.³⁵³

2.3.2.5 The Second supervisory procedure³⁵⁴

This procedure is triggered upon the submission of a representation or a complaint and could take three forms: Procedure for representations on the application of ratified Conventions; Procedure for complaints over the application of ratified

³⁵¹ ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>.

³⁵² ILO 2018 Reports: http://www.ilo.org/global/standards/information-resources-and-publications/WCMS_190528/lang--en/index.htm.

³⁵³ ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/the-impact-of-the-regular-supervisory-system/lang--en/index.htm>.

³⁵⁴ ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm>.

Conventions; and Special procedure for complaints regarding freedom of association through the Freedom of Association Committee. The representation procedure makes it possible for employers' or workers' associations the right to make a representation to the ILO Governing Body against any Member State in instances where it has failed "to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party".³⁵⁵ A three-member tripartite committee of the Governing Body is then established to evaluate the representation as well as the government's response. The report which is submitted to the government sets out the legal and practical aspects of the case, an evaluation of the information submitted as well as a conclusion and recommendations.³⁵⁶

The complaint procedure is regulated by Articles 26 to 34 of the ILO Constitution and provides that a complaint may be filed against any member state for not complying with a ratified Convention. Such complaint may be filed by another Member State that ratified the same Convention or by a delegate to the International Labour Conference or by the Governing body. Upon receipt, the Governing body establishes a Commission of Enquiry, comprising three independent members, tasked to conduct a full investigation of the complaint, gathering all the facts and making recommendations on the measures to be taken to address it. The Commission of Inquiry is the highest ILO investigative procedure and is usually reserved for instances where a Member State committed persistent and serious violations and refused to address them.³⁵⁷ The ILO has had twelve Commissions of Inquiry to date. In instances where a country refuses to act upon the recommendations made by the Commission, the Governing Body can take the necessary actions as prescribed by Article 33 of the ILO Constitution.³⁵⁸

³⁵⁵ ILO 2018 <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>.

³⁵⁶ ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>.

³⁵⁷ ILO 2019 <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm>.

³⁵⁸ Article 33 provides as follows: "This provision states that "[i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."

The Committee on Freedom of Association, deals with matters relating to freedom of association and collective bargaining.³⁵⁹ South Africa has not been subjected to the complaints procedure yet,³⁶⁰ except for freedom of association cases.³⁶¹

Besides those described above, the ILO has other mechanisms in place to assist with compliance with international standards. The ILO deems it important to keep up to date with developments in countries, irrespective of whether a country has ratified a Convention, and hence General Surveys are published from time to time by the Committee of Experts, on aspects chosen by the Governing Body relating to Member States' national laws and practice. Furthermore, the ILO aids with the drafting of national legislation and also assists countries to address obstacles they may experience with legislation and practicalities in complying with international standards.³⁶²

The ILO often acts in a supervisory capacity to assist countries, such as South Africa, to monitor its own progress on its compliance with international standards and to extract best practices from the reports of other countries. It can also provide technical guidance in the drafting of national legislation. South Africa may need to appoint a task team when planning a national roll-out of RTW (across sectors), and analyses of countries' reports and observations made by the relevant committees could be valuable. In the section that follows, A Code of Good Practice is discussed³⁶³, which may set valuable standards for South Africa when planning for RTW.

³⁵⁹ ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>.

³⁶⁰ ILO 2018 <http://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:::>

³⁶¹ ILO 2018
http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888.

³⁶² ILO 2018 <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

³⁶³ Paragraph 2.3.2.6

2.3.2.6 Principles and standards relating to RTW and DM

Besides the ILO Conventions, the ILO has issued a *Code of Practice on Disability in the Workplace*³⁶⁴.

The Code adds to the set of standards of the ILO to promote the employment of PWDs. Its non-binding rules aim to improve the RTW prospects, job-retention, promotion and recruitment, all based on equality of opportunity.³⁶⁵ Even though the Code is non-binding it advocates for equality in treatment by making provision for, *inter alia* recruitment, job retention, promotion and RTW prospects for persons with disabilities.³⁶⁶

The main objective of the Code is to offer practical guidance on the management of disability-related aspects in the workplace with a view to:

- (a) ensuring that people with disabilities have equal opportunities in the workplace;
- (b) improving employment prospects for persons with disabilities by facilitating recruitment, return to work, job retention and opportunities for advancement;
- (c) promoting a safe, accessible and healthy workplace;
- (d) assuring that employer costs associated with disability among employees are minimized – including health care and insurance payments, in some instances;
- (e) maximizing the contribution which workers with disabilities can make to the enterprise.

The Code defines certain concepts, which are relevant to this thesis. Disability management is defined as follows:

...a process in the workplace designed to facilitate the employment of PWDs through a coordinated effort and taking into account individual needs, work environment, enterprise needs and legal responsibilities.

Disability management thus requires a synchronised effort by relevant parties, by balancing the needs of the individual and those of the organisation, taking the work environment into consideration.

³⁶⁴ *Code of Practice on Managing Disability in the Workplace* (Tripartite Meeting of Experts on the Management of Disability at the Workplace Geneva, October 2001).

³⁶⁵ Lord et al 2010 *SPDP* 9.

³⁶⁶ Lord et al 2010 *SPDP* 5.

A disabled person is defined as follows:

An individual whose prospects of securing, returning to, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual or mental impairment.³⁶⁷

The Code contains several themes and obligations that are discussed briefly, since they illustrate the different rights and obligations throughout the RTW process. They are also important for South Africa, since these obligations will need to be clearly regulated by legislation if the country is to succeed in returning disabled workers to work.

2.3.2.6.1 Benefit of retention

The first subject centres on the retention of PWDs. Part 6 of the Code emphasises that when an employee incurs a disability while on duty and is retained, employers should bear in mind that they may continue to benefit from the experience and expertise of such an employee. When employers develop their strategy for DM, they should include job retention measures, for instance, they need to consider the importance of early intervention and referral of the employee to appropriate services. They need to include measures that will allow for gradual resumption of work. Possibilities for test work or alternative jobs must be in place should a disabled employee be unable to resume previous employment. Employers should encourage the use of support and technical services to identify possible adjustments which might be required.

2.3.2.6.2 RTW requires a facilitative process

Another theme is the facilitation of RTW. Employers need to be aware of the different options of returning to work. For example, in some instances employees will be able to resume employment, without changes being necessary. For others, adjustments may be required either to the job itself, or the workstation, or a transfer to an alternative position in the organisation may be necessary. Thus, the organisation needs to make sure that their DM strategy encompasses all these

³⁶⁷ *Code of Practice on Managing Disability in the Workplace* (Tripartite Meeting of Experts on the Management of Disability at the Workplace Geneva, October 2001).

different forms of adjustment. It may also be necessary to provide training or re-training for the employee and to inform colleagues and supervisors.³⁶⁸

2.3.2.6.3 Importance of consultation

Consultation is of vital importance to any RTW process. In the re-deployment of a disabled employee, employers must keep occupational preferences of the employee in mind, and if necessary also engage in discussions with employee representatives. If an employee becomes disabled, employers need to take a holistic view to ensure that the residual skills and potential of the employee are considered, before any other steps are taken. Experts should assist employers (or employer organisations, or groups of employers) by providing them with the necessary guidance, services and incentives to avail themselves of the opportunities for PWDs in retaining their employment and resume work after an event causing disablement. Measures should be in place to make provision for a range of services, including individual counselling, job retention programmes, individualised rehabilitation programmes, promotion of talent and experience of employees to either promote opportunities in their current employment or in another occupation, and to do so without loss of income. These measures should be developed in conjunction with employer and employee organisations, of PWD organisations and relevant professionals.³⁶⁹

2.3.2.6.4 The role of relevant authorities

The roles of relevant authorities are also highlighted.³⁷⁰ The competent authorities, by instruction of the employer, should guide employers on how to go about assessing the work experience and abilities of employees who have incurred a disability or a reduced capacity to work. The employee's main purpose is to remain in the same job with possible modification of current job tasks, work schedule, working environment or re-training. Relevant authorities should create opportunities for those who become disabled, experience employment injuries, or contract an occupational disease, to remain economically active, through the following:

³⁶⁸ ILO 2002 Managing Disability in the Workplace Catalogue 29.

³⁶⁹ ILO 2002 Managing Disability in the Workplace Catalogue 30.

³⁷⁰ Paragraph 2.2 of the Code.

- Vocational re-training opportunities in a wide range of sectors in the open labour market;
- authorities need to support and promote advisory and information services relating to RTW and job retention;
- an electronic database need to be created with best practice examples;
- active programmes need to be in place to coordinate the integration or re-integration of PWDs into the labour market;
- the compatibility of social security systems to support employees to RTW or retain employment, needs to be monitored;
- and services provided to PWDs need to be of a high standard, properly coordinated, and available without delay.

Another important recommendation that employees need to be made aware of, is the range of benefits available within their respective social security schemes, which should make provision for preventative, compensatory or rehabilitative functions. Model practices and procedures for job retention in the public sector should be established. Employees' representatives should establish job retention policies, which must form part of their proposals for collective bargaining.³⁷¹

2.3.2.6.5 Making adjustments to assist with RTW

Part 7 of the Code deals with adjustments, which are relevant for any RTW programme. It may become necessary for employers to make adjustment(s) to its recruitment policies or policies aimed at retaining disabled employees and allow them to perform their jobs effectively. The Code divides such adjustments into four categories: Accessibility, adaptations, incentives and support services. Accessibility means making the premises more accessible to retain disabled employees. It also includes additional support, for example, manuals and electronic information must be reviewed often and in collaboration with the disabled employee and specialist

³⁷¹ Paragraph 6.2 of the Code.

technical advisory services. Adaptations may be required to allow disabled employees to perform their jobs efficiently. For example, tools or equipment will need to be adapted, in consultation with disabled employees and/or their representatives. It may be necessary to review work schedules or job descriptions and review performance requirements through a consultative process as discussed above.³⁷² Incentive and support services should be made available by competent authorities to employers, as well as technical advisory services to provide information and advice on workplace or task adjustments.³⁷³

In the section below, the relevant regional instruments which are of importance to South Africa will be analysed.

2.4 Regional instruments and standards relevant to the RTW, Reintegration and Rehabilitation of disabled workers

International and regional standards provide certain crucial benchmarks for developing an appropriate RTW system for South African law. The main principles and key components that inform and underpin such a programme need to be identified. Olivier et al suggest that regional and international standards, when combined with the South African Constitution as well as comparative best practice experience, will provide a comprehensive foundation to allow for the introduction of an RTW programme in South Africa, enabling it to introduce a standardised, comprehensive and clear policy framework, allowing for rehabilitation, reintegration and early RTW in South Africa.³⁷⁴

There are several regional standards which are of relevance to the RTW of disabled employees. In the section that follows, the role of the African Union and the relevant supervisory bodies are discussed. Relevant legal instruments will also be discussed, also drawing attention to reports South Africa has submitted as mandated by the African Charter. Thereafter, concluding observations will be drawn, followed by a discussion on the SADC as well as the relevant SADC instruments.

³⁷² ILO 2002 Managing Disability in the Workplace Catalogue 34.

³⁷³ ILO 2002 Managing Disability in the Workplace Catalogue 35.

³⁷⁴ Govindjee, Olivier and Nyenti *The Role of Standards in Labour and Social Security Law* 217.

2.4.1 *The Continental Position: The Organisation of Africa Unity and the African Union*

The Organisation of African Unity³⁷⁵ was established in 1963 and its main objectives were contained in the Organisation of African Unity Charter. It included for instance, cooperation with the UN framework to strengthen efforts to achieve a better life for all in Africa. It was composed of different organs, such as the Assembly of Heads of State and Government, Council of Ministers, General Secretariat and Commission of Mediation, Conciliation and Arbitration, which were later replaced by the Mechanism for Conflict Prevention, Management and Resolution in 1993. During the 1990s, it was time to amend the structures of the OAU in line with the values of a changing world. Three summits³⁷⁶ were held prior to the official launch of the AU. Several of the OAU structures were carried over to the AU as well as many of its core commitments, strategy frameworks and decisions. However, the AU Constitutive Act and its protocols have led to the establishment of new structures and committees, which are still evolving.³⁷⁷

On 9 September 1999, the Heads of State and Government of the Organisation of African Unity issued the so-called Sirte Declaration calling for the establishment of the AU.³⁷⁸ In July 2002, the AU was formally launched, and the first Assembly of the Heads of State of the AU was convened.³⁷⁹

2.4.1.1 The role and structure of the AU

It is important to consider the Constitutive Act, since it sheds light on the role and structure of the AU. Article 3 of the Constitutive Act sets out the obligations of the AU, and its objectives are for example, to “achieve greater unity and solidarity between the African countries and the peoples of Africa” and to “promote and

³⁷⁵ Organisation of African Unity, hereafter OAU.

³⁷⁶ The Lomé Summit in 2000, where the AU Constitutive Act was adopted. The Lusaka Summit in 2001) which focused on the road map for implementation of the AU and lastly the Durban Summit of 2002, where the AU was launched and convened its first Assembly of Heads of State and Government.

³⁷⁷ African Union Commission and New Zealand Crown *The African Union Handbook 10*.

³⁷⁸ The African Union Commission date unknown <https://au.int/en/au-nutshell>.

³⁷⁹ Staff 2012 <http://eacj.org/general/24-general-east-africa/103-the-au-mission-goals-organs-and-objectives.html>.

defend African common positions on issues of interest to the continent and its peoples”.

Article 5³⁸⁰ states that the AU consists of different organs such as the Assembly; the Executive Council; the Permanent Representatives' Committee; the Court of Justice; Peace and Security Council (PSC); the Pan-African Parliament; and The Economic, Social and Cultural Council. The AU Commission plays a central role in the day-to-day management of the AU, and its responsibilities include the preparation of strategic plans and studies, representing the Union and defending its interests. The AU also has certain Specialised Technical Committees tasked to address issues at ministerial level, such as the Committee on Rural Economy and Agricultural Matters and the Committee on Health, Labour and Social Affairs.³⁸¹

The AU has also adopted the so-called 2063 Agenda which is a strategic framework for socio-economic transformation for Africa over the next fifty years.³⁸² Its guiding principle is: “An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena”. Also, worth mentioning for purposes of this study is the ten-year implementation plan spanning from 2014 to 2023. Even though RTW is not specifically listed as a goal, the Agenda does make provision for sustainable development goals, and one of these is a high standard of living, quality of life and well-being for all citizens. It is also linked to the UN Sustainable Development Goals, which *inter alia* entail the promotion of “sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.”³⁸³ In the paragraphs to follow, a discussion on whether the African Charter on Human and Peoples Rights provides implicit support for disabled workers to return to work, will follow.

³⁸⁰ Article 5: The organs of the Union shall be: (a) The Assembly of the Union; (b) The Executive Council; (c) The Pan-African Parliament; (d) The Court of Justice; (e) The Commission; (f) The Permanent Representatives Committee; (g) The Specialized Technical Committees; (h) The Economic, Social and Cultural Council; (i) The Financial Institutions; 2. Other organs that the Assembly may decide to establish.

³⁸¹ Staff 2012 <http://eacj.org/general/24-general-east-africa/103-the-au-mission-goals-organs-and-objectives.html>.

³⁸² AU Commission date unknown <https://au.int/en/agenda2063>.

³⁸³ UN date unknown <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

2.4.2 African Charter on Human and Peoples Rights

The *African Charter on Human and Peoples Rights*³⁸⁴ can be classified as the “foundational normative instrument” that makes provision for the promotion and protection of human rights on the African continent. The Charter contains not only civil, political, economic, social and cultural rights, but also makes provision for “peoples’ rights” and collective rights. Such an approach adds to the universality and indivisibility of the Charter and is also an indication that it aims to attach interdependence to all human rights.³⁸⁵

Historically, the state of disability rights in the African regional systems could be described as “underutilised potential”.³⁸⁶ The Charter acknowledges people’s duties and rights, individual rights and certain socio-economic rights. The Charter also initially created a supervisory mechanism, the African Commission on Human and Peoples’ Rights, which was later enhanced with the introduction of the African Court on Human and Peoples’ Rights. The Charter recognises that “fundamental human rights stem from the attributes of human beings” which in turn justify its international protection and furthermore that “the reality and respect of peoples’ rights should guarantee human rights”.³⁸⁷ The Charter does not only recognise the enjoyment of freedoms and rights, but also implies that individuals have certain duties to perform towards their families, society, the state and other legally recognised communities as well as the international community. The African Charter, like the CRPD³⁸⁸, recognises that civil and political rights cannot be separated from cultural, social and economic rights.³⁸⁹ Thus, if economic, social and cultural rights are fulfilled, the enjoyment of civil and political rights will be guaranteed, which is in line with the CRPD. The Charter also highlights the importance of the right to development.³⁹⁰

³⁸⁴ *African Charter on Human and Peoples’ Rights* 1981 (hereinafter referred to as *The Charter*).

³⁸⁵ Keetharuth “Major African legal instruments” 163.

³⁸⁶ Combrinck and Mute 2014 *ADRY* 309.

³⁸⁷ Preamble to the African Charter.

³⁸⁸ Convention on the Rights of Persons with Disabilities, hereafter CRPD.

³⁸⁹ Combrinck and Van Reenen *IJOHR* 2011 139.

³⁹⁰ Combrinck and Mute 2014 *ADRY* 363.

The Charter allows for multi-actor responsibility to give effect to socio-economic rights.³⁹¹ It must further be noted that the African Charter does not directly guarantee a right to social security; however social protection is still afforded.³⁹²

The Charter, in its Preamble, makes specific reference to the values of African civilisation and the historical tradition that informs the concept of human and peoples' rights. The Preamble to the Charter further recognises the existence of an obligation on the state for all rights and freedoms by legally recognised communities and the international community.³⁹³

South Africa signed and ratified the African Charter on Human and Peoples Rights on 9 July 1996.³⁹⁴ In the Preamble, Member States declare, *inter alia*, to recognise that "fundamental human rights stem from the attributes of human beings", which in turn justify national as well as international protection. Furthermore, Member States declare that they have a duty to protect and promote human and peoples' rights and freedoms. Of particular importance is Article 18(4) of the Charter which reads as follows:

The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 18(4) has been subject to criticism, for being unclear and vague, and for "conflating the rights of PWDs and the rights of the aged".³⁹⁵

Article 2 of the Charter provides that all individuals shall be entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter, without being discriminated against on grounds such as religion, colour, race *et cetera*. Even though Article 2 of the Charter does not specifically include disability as one of the listed grounds, the phrase "or other status" implies that the list as contained in Article 2, is an open-ended list.³⁹⁶ Thus, even though disability is not specifically

³⁹¹ (The state as well as other non-state actors, for example individuals and communities have a role to play in the realisation of these rights).

³⁹² Mpedi and Nyenti 2015 *CICLASS* 57.

³⁹³ Combrinck and Mute 2014 *ADRY* 363.

³⁹⁴ African Commission on Human Rights 2017 <http://www.achpr.org>.

³⁹⁵ Combrinck and Mute 2014 *ADRY* 363.

³⁹⁶ Combrinck and Mute 2014 *ADRY* 363.

mentioned in Article 2, one can argue that the inclusive nature of the Article's wording, which contains phrases like "such as" and "other status," proposes an objective standard rather than a subjective one, and that disability is thus included. This promotes a substantive approach to equality for PWDs. States are therefore mandated to take positive steps to guarantee that PWDs have the necessary capacity to enjoy the rights as stipulated in the African Charter.³⁹⁷

In terms of Article 15 of the Charter, all individuals have the right to work "under equitable and satisfactory conditions". Article 16 states that individuals have the right to enjoy the best possible state of mental and physical health. Member States also declare to take necessary measures to, *inter alia*, protect the health of their people. Article 19 guarantees that all people are equal and have the right to enjoy the same respect and rights and "nothing shall justify the domination of a people by another". Article 3 of the Charter provides that every individual is equal before the law and entitled to equal protection thereof. Articles 4 and 5 recognise the sacred nature of all human beings and confirm the right to human dignity.

Article 61 states that the Commission must consider African customs and practices insofar as they embody binding legal rules, when drafting legislation. Article 62 stipulates the reporting cycle of States, and provides that every two years, from date of enforcement, each party is required to submit reports on the legislative and other measures they have taken to give effect to the rights and freedoms as recognised and guaranteed in the Charter.³⁹⁸

When one looks at the obligations imposed by the African Charter it is important to consider the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights³⁹⁹. This document was adopted in

³⁹⁷ Oyaro 2015 *AJILR* 353.

³⁹⁸ This procedure is thus similar to the requirement of submission in terms the ICESCR, as discussed earlier in the Chapter.

³⁹⁹ ACHPR 2019 <http://www.achpr.org/instruments/economic-social-cultural/>.

November 2010 by the African Commission on Human and People Rights during their 48th session.⁴⁰⁰

The first important aspect in this regard is the principle of progressive realisation. It is acknowledged that even though the African Charter does not expressly refer to this principle, it has been implied by Articles 61 and 62 of the Charter, as discussed above. It is thus expected of States Parties to continuously “move as expeditiously and effectively as possible towards the full realisation” of the economic, social and cultural rights.⁴⁰¹ The guidelines explain that this principle should be interpreted to mean that States need to implement a quantifiable and reasonable plan, which makes provision for attainable benchmarks and timeframes, to ensure that economic, social and cultural rights can be enjoyed with the resources available. States are obliged to take targeted and tangible steps to realise economic, social and cultural rights. It is important to note that it is also stated that the essential needs of members of vulnerable and disadvantaged groups must be prioritised in resource allocation processes.⁴⁰² The guidelines say that states need enough resources to progressively realise rights and that resources could be generated through a variety of means.⁴⁰³

The right to work, as described in Article 15, is examined in the Guidelines and is described as essential for the fulfilment of the other economic, social and cultural rights. Being able to work is essential to an individual’s role in society and forms an inherent part of human dignity. The right to work should not be interpreted as an “absolute” and an “unconditional” right to obtain employment. Instead, it should be interpreted that the State has the obligation to facilitate employment by creating a conducive environment to the full employment of individuals in society under conditions which will ensure the realisation of the dignity of individuals.

The right to work implies certain state obligations of relevance to this study, namely the obligation to promote employment and promotion opportunities for PWDs in the

⁴⁰⁰ ESCR-Net Date unknown <https://www.escr-net.org/resources/principles-and-guidelines-implementation-economic-social-cultural-rights-african-charter>.

⁴⁰¹ Para 13 of the Guidelines.

⁴⁰² Para 13 of the Guidelines.

⁴⁰³ Para 15 of the Guidelines.

labour market and assistance in finding, maintaining and returning to employment. PWDs must also have effective access to general technical and vocational opportunities.

With reference to the right to health, it is explained that the right to health care requires an effective and integrated health system, accessible to all and responsive to national and local needs.⁴⁰⁴ It entails a minimum core obligation to ensure that access is provided on a non-discriminatory basis, especially for vulnerable or marginalised groups, for instance PWDs.⁴⁰⁵ It is significant to note that health care systems are required to operate in a holistic manner by addressing all aspects which may relate to a person's physical condition.

Social security is of central importance in ensuring that human dignity is maintained when individuals are deprived of their capacity to fully realise their rights.⁴⁰⁶ With reference to disability, the following is stated:

...the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost, or received a reduction in, their income, have been denied employment opportunities or have a permanent disability.

It may therefore be concluded that no provision is made for comprehensive coverage, but this shortcoming is addressed by the Disability Protocol, as will be discussed later in the chapter.

The African Charter does not make any direct relevance to RTW, but one could argue that it still provides implicit support for PWDs to be re-integrated and returned to work. The right to work as described above, may be essential to either guarantee or restore human dignity in instances where a person's abilities to earn a living are impaired. In order to realise the right to work, Member States need to consider what must be done to realise this right, especially in instances where a person's earning capacity is impaired. Mandatory RTW programmes could assist in this regard, supported by a solid legislative and policy framework.

⁴⁰⁴ Para 63 of the Guidelines.

⁴⁰⁵ Para 67 of the Guidelines.

⁴⁰⁶ Para 80 of the Guidelines.

By virtue of Article 16, which states that all individuals have the right to the best attainable state of health, one could again argue that vocational rehabilitative processes are inherent in guaranteeing these rights, to ensure that PWDs are capacitated to ultimately return to work and to be re-integrated into society.

2.4.3 African Human Rights Institutions

African Human Rights Institutions are divided into two main categories, first, those that are aligned within the framework of the AU and second, those institutions established by treaties. With reference to the first category, the Constitutive Act of the AU makes provision for the legitimacy of AU organs (such as the Assembly of Heads of State; Executive Council; Pan African Parliament as well as specialised committees) to promote human rights and to meet human rights objectives.⁴⁰⁷ Noteworthy examples of such initiatives are: the First and Second Decade for PWDs; Continental Plan of Action for PWDs; Ministerial Conference recommendation for the development of the African Disability Protocol; and the establishment of the Secretariat of the African Decade for PWDs.⁴⁰⁸

Human rights institutions formed by virtue of treaties are the African Commission, African Court on Human and People Rights as well as the Committee of Experts on the Rights and Welfare of the Child. All these bodies, although they are financed by, and report to the AU, still operate independently of the AU. The African Commission and Committee on the Child are *quasi*-judicial bodies; however, they function as full judicial organs. It must be noted that between all these judicial mechanisms, the African Commission is the only one to have heard a disability-related matter, the case of *Purohit & Moore v Gambia*⁴⁰⁹. This case is not directly relevant for purposes of the study at hand, since it dealt with the legislative regime on the detention,

⁴⁰⁷ *Oyaro American University International Law Review* 356.

⁴⁰⁸ *Oyaro American University International Law Review* 356.

⁴⁰⁹ *Purohit & Moore v. Gambia*, African Commission on Human and People's Rights, Comm. No. 241/2001 (2003), AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS.

arrest and forced treatments of people of unsound mind⁴¹⁰, and not with the employment context *per se*.

2.4.3.1 African Commission on Human and Peoples' Rights

The role of the African Commission on Human and Peoples' Rights deserves attention. This Commission was established in 1987 with the role of overseeing and interpreting the African Charter on Human and Peoples' Rights.⁴¹¹ Article 45 of the Charter describes the functions of the Commission, which *inter alia* promote and protect human and peoples' rights, interpret the provisions of the Charter and perform any other tasks required by the Assembly of Heads of State and Government. Articles 47-52 of the Charter make provision for a communication procedure in instances where it is alleged that a State Party has violated provision(s) of the Charter. The Commission, after receiving representations by relevant parties, can then make recommendations to the State Party as well as to the AU Assembly. However, these recommendations are not legally binding.⁴¹²

Even though the African Commission has been in existence for over twenty years and has played a relatively significant role in terms of regional human rights, it has only recently introduced disability as part of its agenda⁴¹³ and is yet to make a general comment on disability. The Commission has also been silent on enforcing the reporting duties Member States have in terms of Article 18 of the African Charter.⁴¹⁴ A combination of factors such as a lack of coordination, limited funding and human resource incapacity have weakened the institutional framework of the AU. The fact that only one disability-related case was heard is indicative of the low awareness of the current institutions and the potential they possess to advance disability human rights.⁴¹⁵

⁴¹⁰ ACHPR date unknown
http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf.

⁴¹¹ African Union Commission and New Zealand Crown *The African Union Handbook* 74.

⁴¹² African Union Commission and New Zealand Crown *The African Union Handbook* 74.

⁴¹³ *Oyaro American University International Law Review* 358.

⁴¹⁴ *Oyaro American University International Law Review* 358.

⁴¹⁵ *Oyaro American University International Law Review* 360.

2.4.3.2 The Reporting duties by States

Article 62 of the Charter provides as follows:

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

The purpose of the state reporting procedure is to create a forum for constructive dialogue. It also assists the Commission to monitor how the provisions of the Charter are being implemented and to identify the challenges hindering the realisation of the aims of the Charter. States are obliged to submit two types of reports, an initial and periodic reports. Initial reports are submitted within two years after ratification and periodic reports must be submitted every two years thereafter.⁴¹⁶

The Rules and Procedure of the African Commission on Human and Peoples' Rights were approved by the Commission during their 47th ordinary session in Banjul during May 2010. Rule 77 determines that the Commission, after considering a report submitted by the relevant State Party, formulate Concluding Observations that need to be in line with the Guidelines of the Commission on Concluding Observations. These must be submitted to the relevant State Party within thirty days after the session during which the Observations were adopted. Such observations are deemed part of the Commission's activity report. Rule 78 makes provision that the Commission may specify the issues that need urgent attention. The Commission must follow up further on the recommendations made in their Concluding Observations, within the framework of promotion activities of the States Parties concerned.

In terms of Article 62 of the Charter, South Africa presented its first report in 1999 at Bujumbura, Burundi at the 25th Ordinary Session of the African Commission on Human and Peoples' Rights. In 2005 South Africa presented its first periodic report during the Commission's 38th Ordinary Session held in Banjul, Gambia and its second periodic report in August 2015, which is a combination of its third, fourth, fifth and

⁴¹⁶ ACHPR 2018 <http://www.achpr.org/states/>.

sixth reports. It is a summary of developments on how South Africa has realised the rights guaranteed in the Charter for the period 2002–2013.⁴¹⁷ With reference to the study at hand, it is of relevance to analyse the latest report as well as its relevant Concluding Observations.

In relation to the situation of PWDs, South Africa reported that during the 2011 Census, it still defined disability as “difficulties encountered in functioning due to body impairments or activity limitation, with or without the use of assistive devices”.⁴¹⁸ Since 2009, disability has been measured differently, in order to conform with international data and standards. For the period 2009–2013, the number of PWDs increased from 5,6 percent in 2009 to 6,2 percent in 2010 before declining to 5,4 percent in 2013. In 1997 South Africa has implemented a variety of measures to guarantee PWD’s fundamental rights and freedoms by adopting the *Integrated National Disability Strategy White Paper (INDS)* whereas Government departments have to ensure that their policies, procedures, practices and programmes are integrated and inclusive of PWDs. It is also aimed at a radical transformation in behaviour, perceptions and attitudes towards those who are disabled and prescribes a working environment where disability-related matters as well as the needs of PWDs are fully integrated. Provincial versions of the UNDS have also recently been established. These versions aim to assist with the provincial implementation of the INDS. Provincial legislatures are tasked with the responsibility to ensure that adequate resources exist for the strategies to be implemented. The INDS has also been implemented at district level, and the Disability Framework for Local Government 2009–2014 was adopted to serve as an outline to support and facilitate the mainstreaming of disability-related aspects into all activities, programmes, plans and policies of the local government. Owing to South Africa’s ratification of the CRPD on 30 November 2007, it is expected of all government departments to make greater efforts to mainstream disability. The Cabinet adopted the *Job Access*

⁴¹⁷ Republic of South Africa Combined Second periodic report under the African Charter on Human and People`s Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa August 2015.

⁴¹⁸ Republic of South Africa Combined Second periodic report under the African Charter on Human and People`s Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa August 2015, paragraph 4.3.7.

Strategy 2006-2010 in 2007 to expand and refine the operational definition of disability in the country.⁴¹⁹ The main aim of the strategy is to transform the public sector to be more inclusive towards PWDs. In terms of the strategy, disability is defined as follows:⁴²⁰

...the loss or elimination of opportunities to take part in the life of the community equitably with others that is encountered by persons having physical, sensory, psychological, developmental, learning, neurological, or other impairments, which may be permanent, temporary, or episodic in nature, thereby causing activity limitations and participation restriction with the mainstream society. These barriers may be due to economic, physical, social, attitudinal and/or cultural factors.

The Department of Public Service and Administration published the *Handbook on Reasonable Accommodation for Persons with Disabilities in the Public Service*, which serves as an educational aid in the study of recruitment, to advance job access strategy and the employment and retention of PWDs in the public sector. It also serves as a guide for government departments to create conducive environments for PWDs, in their capacity as both clients of government services as well as employees of state departments.⁴²¹

Looking at the submissions in the report, it becomes clear that no mention is made of any specific legislation, policies or programmes that regulate RTW of disabled workers. No mention is made of rehabilitative processes essential to the realisation of the right to work. South Africa needs more than best practices or provincial strategies to truly re-integrate PWDs into employment and society.

⁴¹⁹ Republic of South Africa Combined Second periodic report under the African Charter on Human and People`s Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa August 2015, paragraph 4.4.3.

⁴²⁰ Republic of South Africa Combined Second periodic report under the African Charter on Human and People`s Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa August 2015.

⁴²¹ Republic of South Africa Combined Second periodic report under the African Charter on Human and People`s Rights and Initial report under the Protocol to the African Charter on the Rights of Women in Africa August 2015.

2.4.3.3 Concluding observations by the African Committee on Human and People Rights on South Africa's Second Period Report⁴²²

The Committee commended South Africa for involving different stakeholders in the preparatory process of the report and for ratifying international and regional human rights instruments, such as the Optional Protocol to the CRPD discussed earlier in the chapter. The enactment of social security legislation was also recognised. With particular reference to PWDs, the Committee lauded South Africa for social assistance in the form of grants provided in terms of the *Social Assistance Act 13 of 2004* and commended the government for adopting a Disability Framework for Local government to assist with the mainstreaming of disability issues in all plans, policies, programmes and activities of local government. Reference was also made to the *Handbook on Reasonable Accommodation for Persons with Disabilities in the Public Service*.⁴²³

The Commission reminded South Africa that it had not yet made a Declaration in terms of Article 34(6) of the Protocol to the African Court on Human and People Rights, in terms of which jurisdiction of the court is accepted.⁴²⁴ The Commission also expressed its concern about the lack of adequate data, age, gender, type of disability as well as other relevant elements important to the formulation of policies applicable to PWDs.⁴²⁵ In conclusion, the Commission makes specific recommendations relating to older persons as well as PWDs, and stated, *inter alia*, that the government needed to take appropriate measures to address inequality and

⁴²² The concluding observations was Adopted by the African Commission on Human and Peoples' Rights at its 20th Extra-Ordinary Session held from 9 to 18 June 2016, in Banjul, Islamic Republic of The Gambia.

⁴²³ African Union Concluding Observations and Recommendations on the Combined on Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa 14.

⁴²⁴ African Union Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa 17.

⁴²⁵ African Union Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa 21.

unemployment.⁴²⁶ No specific recommendations relating to return-to-work were made.

2.4.3.4 Special Mechanisms of the AU: Working group on Older Persons and PWDs

The activities of the Working Group, as mentioned above, deserve brief attention. The African Commission may create, in terms of Article 14 of the Constitutive Act, subsidiary mechanisms, such as committees, special rapporteurs and working groups. The African Commission also determines their mandate and all subsidiary mechanisms needed to report on its work at each ordinary session.⁴²⁷ The Working Group on Older Persons and PWDs was established with the adoption of Resolution 118 at the 42nd Ordinary session in 2007. Its mandate, comprises, *inter alia*, the identification of good practices; comprehensive brainstorming to determine the rights of older persons and PWD; collection of data; and ensurance of the proper mainstreaming of disability rights in policies and programmes of Member States.⁴²⁸ It has further assisted with the drafting of the African Disability Protocol, to be discussed later in the chapter.

2.4.3.5 Resolutions adopted by the African Commission

Article 45 of the Banjul Charter authorises the Commission to “formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights”. In accordance with this provision, the Commission adopts resolutions to address various human rights issues. It can either issue a thematic resolution which is similar to general comments of the UN treaty bodies or an administrative resolution, which mainly concerns the internal mechanisms and procedures, that allow for the establishment of, *inter alia*, working groups as earlier discussed. It is possible for the AU to issue country-specific resolutions, to address

⁴²⁶ African Union Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples’ Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa 24.

⁴²⁷ ACHPR 2018 <http://www.achpr.org/mechanisms/older-disabled/>.

⁴²⁸ ACHPR 2018 <http://www.achpr.org/mechanisms/older-disabled/>.

human rights concerns.⁴²⁹ There are no resolutions that deal specifically with the RTW, reintegration or rehabilitation of PWDs. There is, however, a resolution relating to accessibility of PWDs.⁴³⁰ This resolution recognises the importance of enabling PWDs to live independently and to participate fully in all aspects of life. One can thus argue that mandatory RTW arrangements may also make this possible. The other resolutions relating to PWDs are mainly administrative in nature, for instance Resolution 312 on the Renewal of Mandate and Reconstitution of the Working Group on the Rights of Older Persons and People with Disabilities in Africa. It will be of interest whether the AU will issue a Resolution soon about the enforceability of the Disability Protocol adopted last year. It should be noted that the activity reports⁴³¹ of the African Commission did not contain any matter directly related to RTW, reintegration or rehabilitation of PWDs in Africa.

2.4.3.6 Developments after the adoption of the African Charter on Human and People Rights and the plea for the Protocol on the Rights of PWDs

After the adoption of the African Charter, disability rights slowly entered the regional system. In 1985, the OAU for example, adopted the Agreement for the Establishment of the African Rehabilitation Institute (ARI), which emphasised, *inter alia*, rehabilitation and manpower development.⁴³² Drawing on the technical assistance of the ILO, the aims of this Institute (which is located in Harare, Zimbabwe) are to assist the members of the OAU to achieve a number of objectives with a strong emphasis on rehabilitation.⁴³³

The end of the UN Decade of Persons with Disabilities (1983–1992) saw the advent of democracy to Africa. In July 1999, the OAU Heads of State and Government adopted a resolution whereby the period of 1999–2009 was declared the African

⁴²⁹ ACHPR 2018 <http://www.achpr.org/resolutions/about/>. For example, the ACHPR/Res.165 (XLVII)10 Resolution on the Prevention of Women and Child trafficking in South Africa during the 2010 World Cup Tournament.

⁴³⁰ ACHPR/Res.305 (EXT.OS/XVIII) 2015: Resolution on Accessibility for Persons with Disabilities Adopted on 7 August 2015 during the 18th Extraordinary Session held in Nairobi, Republic of Kenya.

⁴³¹ ACHPR 2018 <http://www.achpr.org/activity-reports/>.

⁴³² Combrinck and Mute 2014 *ADRY* 363.

⁴³³ Combrinck and Mute 2014 *ADRY* 363.

Decade of Persons with Disabilities. In the year 2000, one could say that the human rights mandate for the region was formalised by the adoption of the Constitutive Act of the African Union as well as the transition from the OAU to the AU.⁴³⁴

The African Decade of Persons with Disabilities took inspiration from the UN Decade of PWDs (1983-1992). This decade's main aim was the "full participation, equality and empowerment" of PWDs. In order to meet this goal, it became necessary for the AU to adopt a Continental Plan of Action in the year of 2002.

The Continental Plan of Action on the African Decade of Persons with Disabilities (2010–2019) is aimed at realising priority activities relating to disability during the African Decade of Persons with Disabilities (1999–2009), as discussed above. The formal Declaration to support the Decade was adopted by the 36th Session of the Assembly of Heads of State and Government in Lomé, Togo in July 2000.⁴³⁵ The Plan of Action was the outcome of the Pan-African Conference on the African Decade of Persons with Disabilities, which was held in Addis Ababa, Ethiopia from 4–7 February 2002. The Plan of Action serves as a guideline for Member States on the formulation of their national programmes on disability-related aspects as well as putting in place mechanisms for the implementation of the Decade's objectives. The objective of this Plan is the "the full participation, equality, inclusion and empowerment" of PWDs in Africa.⁴³⁶

Objective 6 of the Plan of Action requires that Member States need to ensure and improve access to rehabilitation, and members need to develop and implement rehabilitation programmes. Employment is addressed in the same objective, and Member States are urged to develop and implement strategies to promote the employment of PWDs, through incentives and tax rebates.⁴³⁷

In 2004, a Secretariat for the African Decade was established in Cape Town, South Africa. Services rendered in line with the Continental Plan happened at a snail's

⁴³⁴ Combrinck and Mute 2014 *ADRY* 364.

⁴³⁵ Anon 2002 www.mhss.gov.na.

⁴³⁶ Kesamang 2014 L www.un.org.

⁴³⁷ Kesamang L 2014 www.un.org.

pace, mainly due to a lack of resources.⁴³⁸ The Decade was extended for a second period, from 2009-2019.⁴³⁹ The AU Labour and Social Affairs Commission recommended this period be marked as such and again the notion was based on the UN Decade for Disabled Persons of 1983–1992. The UN Decade was more prominent in the northern hemisphere than elsewhere in the world, thus creating a need for a uniquely African decade. The Decade had several aims, including *inter alia*, the following: The implementation of the UN Standard Rules on the Equalization of Opportunities for PWDs; to cultivate behavioural change in favour of PWDs; to enable the optimal participation of PWDs; to support “community-based service delivery” for PWDs; and to reduce poverty among PWDs. The African Rehabilitation Institute (“ARI”) in Harare, Zimbabwe was founded to coordinate, amongst states, the implementation of the objectives of the African Decade. During May 2013, after the adoption of the Continental Plan of Action, a Secretariat of the African Decade for PWDs was established to function as a technical disability body to give effect to the Continental Plan of Action as well as to assist the ARI in meeting the objectives of the African Decade.⁴⁴⁰

The African Decade stated rehabilitation services as one of its objectives. PWDs should have access to comprehensive rehabilitation and habilitation services to enable them to attain optimal independence as well as full participation in all spheres of life. For example, member states need to make assistive devices more accessible and need to develop policies and programmes which can strengthen rehabilitation and habilitation services. Employers also need to be motivated, through the use of incentives, to offer employment opportunities for PWDs. This can be achieved through so-called “tax rebates”. Investors and employers need to be encouraged to create employment opportunities for PWDs. Vocational rehabilitation must be promoted, and people who incur a disability in the course of their working lives, must be provided with re-training opportunities, where possible.⁴⁴¹

⁴³⁸ Combrinck and Van Reenen IJOHR 2011 138.

⁴³⁹ Combrinck and Van Reenen IJOHR 2011 139.

⁴⁴⁰ Oyaro 2015 *AUJLR* 369.

⁴⁴¹ African Union Commission Department of Social Affairs: Continental Plan of Action for the African Decade of Persons with Disabilities 2010 – 2019 <http://sa.au>.

Although the African Decade was a landmark initiative, it failed to realise the core objectives it set out to meet, owing to a lack of human resources, financial constraints and coordination problems. For example, African states failed to get the cooperation of donors and international aid agencies to generate external support. The ARI could also not monitor the implementation of the entire region. During 2010, the ARI was shut down because irregularities in the human resource and financial sectors came to light.⁴⁴²

The second African Decade for PWDs is being monitored and coordinated by the Secretariat for the African Decade for PWDs.⁴⁴³ Once again, the Secretariat is facing the same problems mentioned above. However, several initiatives were launched to assist with better coordination and meeting the goals of the second decade.⁴⁴⁴

The second African decade's main objective was to raise awareness and encourage full commitment to the empowerment, equality and complete participation of PWDs. During the Pan-African Conference on the African Decade of PWDs held from 4–7 February 2002, the Plan of Action for the Decade was laid on the table. The main objective of the Plan is to assist member states, governments as well as the AU to meet the goals of empowerment, full participation and equality of PWDs in Africa. Member States and governments are recommended to, *inter alia*:⁴⁴⁵

- Formulate or reformulate policies and national programmes that encourage the full participation of persons with disabilities in social and economic development;
- Create or reinforce national disability coordination committees, and ensure effective representation of disabled persons and their organisations;
- Support community-based service delivery, in collaboration with international development agencies and organisations;

⁴⁴² Oyaró 2015 *AJILR* 370.

⁴⁴³ Sarr and Dube date unknown
<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/disability/FMR35/07.pdf>.

⁴⁴⁴ Oyaró 2015 *AJILR* 371.

⁴⁴⁵ United Nations 2004 <http://www.un.org>.

- Promote more efforts that encourage positive attitudes towards children, youth, women and adults with disabilities, and the implementation of measures to ensure their access to rehabilitation, education, training and employment, as well as cultural and sports activities and physical access to the environment;
- Develop programmes that alleviate poverty amongst disabled people and their families;
- Put in place programmes that create greater awareness in communities and for Governments relating to disability;
- Prevent disability by promoting peace and paying attention to other causes of disability;
- Mainstream disability in the social economic and political agendas of African governments;
- Spearhead the implementation of the UN Standard Rules on the Equalisation of Opportunities for People with Disabilities, and ensure the use of the Standard Rules as a basis for policy and legislation to protect the interests of disabled people in Africa; and
- Apply all UN and OAU human rights instruments to promote and monitor the rights of persons with disabilities.⁴⁴⁶

The African Decade provided African states with the opportunity to bring an improvement in the lives of PWDs on the African continent and to emphasise the success they have had in integrating disability at a national level. The African Decade, similar to the United Nations Day of Disabled Persons, acts as a reminder that PWDs are a part of the mainstream population. This also brought about acceleration in the endorsement of disability rights in Africa. It must be noted that all the main African instruments that were adopted after 2000 (with particular reference to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Youth Charter, the African Charter on Democracy, and

⁴⁴⁶ United Nations 2003-2004 <http://www.un.org>.

Elections and Governance and AU Convention for the Protection and Assistance of Internally Displaced Persons) contain disability-related provisions.⁴⁴⁷

These provisions were criticised due to their limited scope of application and sometimes cumbersome formulation. They did, however, pave the way for the standards to be achieved by the respective states in the protection and promotion of disability rights in Africa.⁴⁴⁸ It is almost certain that the Africa Commission's dedicated efforts to the promotion of disability rights followed after its adoption of the CRPD in 2008. During November 2012, the AU Conference of Ministers of Social Development adopted the theme "promoting the rights and welfare of persons with disabilities". Delegates scrutinised several disability-related reports, *inter alia* the proposed Protocol on the Rights of Persons with Disabilities; the Reviewed Continental Plan of Action on the African Decade of Persons with Disabilities (2010-2019) and a report on the restructuring of the African Rehabilitation Institute (ARI).⁴⁴⁹ The Decade was also extended for a second period, from 2009–2019.⁴⁵⁰ In Africa, disability rights gradually received more attention, for a number of different reasons. As disability was gradually receiving more attention as a human right in the international arena, the Organisation of African Unity (OAU) also adopted a more human rights approach.⁴⁵¹

The African Union, in its Social Policy Framework for Africa, states as follows:

Social protection includes responses by the state and society to protect citizens from risks, vulnerabilities and deprivations. It also includes strategies and programmes aimed at ensuring a minimum standard of livelihood for all people in a given country. This entails measures to secure education and health care, social welfare, livelihood, access to stable income, as well as employment. In effect, social protection measures are comprehensive, and are not limited to traditional measures of social security.⁴⁵²

⁴⁴⁷ Combrinck and Mute 2014 *ADRY* 364.

⁴⁴⁸ Combrinck and Mute 2014 *ADRY* 365.

⁴⁴⁹ Combrinck 2013 *ADRY* 366.

⁴⁵⁰ Combrinck and Mute 2014 *ADRY* 365.

⁴⁵¹ Combrinck 2013 *ADRY* 366.

⁴⁵² Author and date unknown <http://sa.au.int/en/content/social-policy-framework-africa>.

In its quest to adopt a more comprehensive approach to social security, the Protocol on the Rights of Persons with Disabilities was adopted. This Protocol is discussed in the paragraph to follow.

2.4.3.7 Protocol on the Rights of Persons with Disabilities

The African Commission on Human and Peoples' Rights established the Working Group on Older Persons and People with Disabilities in terms of Resolution 143/45 of 2009.⁴⁵³ The terms of reference of this working group relate to, *inter alia*, research and the articulation of the rights of PWDs as well as advising the Commission on the possible adoption of the Protocol on the Rights of Persons with Disabilities.⁴⁵⁴ It is their submission that Africa's human rights system will remain incomplete and skewed without a dedicated human rights instrument specifically confirming and reconfirming the rights of PWDs. It is unfortunate that even though the current African rights instruments do make mention of the rights of PWDs, they are, however, mostly informed by the medical model instead of the social model of disability. Another concern is the qualification stated in many of these instruments, meaning that disability rights (unlike some of the other rights) are made subject to progressive realisation as well as the availability of resources. Bearing in mind that at least forty-five African states have ratified the CRPD, and thirty-three its Optional Protocol, Combrinck and Mute argues that Africa needed an own instrument for driving the disability agenda on the African continent.⁴⁵⁵ It was also important to set out the rights of PWDs correctly in line with the letter and spirit of the CRPD. Such a Protocol can be used to raise the bar for the rights of PWDs. The Protocol contained provisions relating to, for example, community-based rehabilitation, and the fact that PWDs also have a responsibility towards others, such as their families and the community. This Protocol should not be classified as a Charter, because of the fact that the rights of PWDs should be firmly anchored in the "flagship human rights instrument", the African Charter, more specifically Article 18(4), as discussed above. It must also be noted that there should not be an "artificial wall" between the

⁴⁵³ ACHPR 2018 <http://www.achpr.org/mechanisms/older-disabled/>.

⁴⁵⁴ Combrinck and Mute 2014 *ADRY* 313.

⁴⁵⁵ Combrinck and Mute 2014 *ADRY* 315.

African Charter and the new disability rights instrument. This Protocol will be managed by the African Commission on Human and Peoples' Rights.⁴⁵⁶

The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa was adopted at the 19th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, which was held in the Islamic Republic of the Gambia from 16–25 February 2016. This Protocol aims to complement the African Charter on Human and Peoples' Rights and to address ongoing problems PWDs are experiencing. This Protocol is the end result of the African Union's efforts, which commenced in 1999 with the African Decade for PWDs as well as the contributions of the Working Group tasked to draft this new Protocol. The reasoning behind the drafting was to sketch the rights of PWDs in a continental context, by also drawing from the provisions of the CRPD and to address supplementary aspects specifically related to the African context. The difficulties PWDs face, such as discrimination, abuse, poverty *et cetera* are addressed in the Protocol. Member States must utilise this Protocol as a framework from which national legislation may be drafted or amended. Since the African Commission adopted the Draft Protocol, it will now form part of the treaty-making process, whereupon it will be made a legally binding instrument open to ratification by Member States.⁴⁵⁷

A reading of the Preamble to the Protocol reveals that States Parties acknowledge the fact that PWDs have inherent dignity, individual autonomy as well as the right to fully and effectively participate and be included in society. Their diversity must be recognised, as well as the ongoing struggles that PWDs experience in society. States Parties must be determined to promote, protect and ensure the rights and dignity of PWDs to enable them to enjoy human rights and fundamental freedoms optimally and on equal basis. In terms of Article 2 of the Protocol, Member States are obliged to mainstream disability in their activities, programmes, development plans, legislation and policies as well as in other spheres of life. Article 10 recognises the rights of PWDs to community-based rehabilitation services that are provided in a

⁴⁵⁶ Combrinck and Mute 2014 *ADRY* 312.

⁴⁵⁷ International Justice Resource Centre 2016 <http://www.ijrcenter.org>.

manner that enhances the participation and inclusion of PWDs in the community. Community living centres should also provide PWDs with services such as peer support and personal assistance services.

Article 14 of the Protocol deals specifically with rehabilitation and habilitation and reads as follows:

States Parties shall take effective and appropriate measures, including 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, including by:

- a. Organising, strengthening and extending comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services;
- b. Promoting the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services;
- c. Promoting the availability, knowledge and use of appropriate, suitable and affordable assistive devices and technologies;
- d. Supporting the design, development, production, distribution and servicing of assistive devices and equipment for persons with disabilities, adapted to local conditions;
- e. Developing, adopting and implementing standards, including regulations on accessibility and universal design, suitable to local conditions.

Article 14, drawing from Article 27 of the *CRPD*, thus calls on all States Parties to ensure that PWDs, *inter alia*, are reasonably accommodated in the workplace. Should PWDs become disabled in the course of their employment, States Parties need to ensure that they are not dismissed on the basis of their disability. The Protocol further calls on Member States to take the necessary steps to provide reasonable accommodation for PWDs and to promote equality.⁴⁵⁸

Article 15 of the Protocol provides, *inter alia*, that PWDs have a right to decent and productive employment and to work on an equal basis with others, in fair and favourable working conditions. The employment of PWDs in the public sector must be promoted, through the institution of minimum job-quotas. Employment in the private sector must also be promoted, through measures such as tax incentives,

⁴⁵⁸ International Justice Resource Centre 2016 <http://www.ijrcenter.org>.

reasonable accommodation in the workplace and no dismissal on the grounds of disability. The Protocol was adopted earlier this year by Heads of State on 31 January 2018.⁴⁵⁹

2.4.3.8 Other AU Treaties, Conventions or Protocols relevant to RTW?

Three other AU treaties were considered to determine whether they support the RTW, reintegration and rehabilitation of PWDs.

2.4.3.8.1 African Youth Charter⁴⁶⁰

The African Youth Charter was signed by South Africa on 7 May 2009 and ratified on 28 May 2009.⁴⁶¹ In the Preamble to the Charter, one would have expected to see that provision is made for the challenges young PWDs are facing. In terms of the Charter, Article 1, the terms “youth” or “young people” are defined as those who are between the ages of fifteen and thirty-five years of age. Article 2 of the Charter deals with non-discrimination, and once again discrimination on the basis of disability is not specifically mentioned, but one could argue that it is included in the grounds “other status” as set out in Article 2.⁴⁶²

Article 15 of the Charter deals with youth employment and sustainable livelihoods. Worth noting here is the first part of the statement in subsection 1 that every young person shall have the right to gainful employment. This is taken further in subsection 4, where it is declared that States Parties need to take all appropriate measures, with a view of achieving the right to gainful employment and must in particular:

⁴⁵⁹ Blind SA 2017 <http://blindsa.org.za/2018/02/13/protocol-african-charter-human-peoples-rights-rights-persons-disabilities-africa/>.

⁴⁶⁰ The African Youth Charter was adopted by the Summit of Heads of State and Government at their Summit in Banjul in July 2006 (https://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf).

⁴⁶¹ AU 2017 https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf.

⁴⁶² Article 2 reads as follows: Article 2: Non-discrimination 1. Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status. 2. States Parties shall take appropriate measures to ensure that youth are protected against all forms of discrimination on the basis of status, activities, expressed opinions or beliefs.

...ensure equal access to employment and equal pay for equal work or equal value of work and offer protection against discrimination regardless of ethnicity, race, gender, disability, religion, political, social, cultural or economic background.

Thus, there are no provisions in the Charter that stipulate RTW obligations for the youth on a regional level. One can argue that RTW arrangements may form part of “all appropriate measures” to assist the youth to achieve gainful employment.

2.4.3.8.2 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Two other AU documents worth noting is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The latter was signed by South Africa on 16 March 2004 and ratified on 17 December 2004. This Protocol, by virtue of Article 13, acknowledges the economic and social welfare rights of women and States Parties need to adopt and enforce legislative and other measures to ensure that women have equal opportunities and career advancements as well as other economic opportunities. To accomplish this, States Parties must promote, for instance, equality of access to employment and the protection of women from exploitation by their employers. Thus, in terms of this specific Protocol, there are no direct obligations to ensure that women who are or become disabled, are returned to work.

The last Protocol to consider here is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons. This Protocol has not been signed or ratified by South Africa and stipulates that older persons are defined as individuals over sixty years of age. Article 6 deals with protection against discrimination and employment and states that States Parties need to eliminate workplace discrimination with reference to access to employment, keeping occupational requirements in mind. Further, it is important to ensure appropriate working opportunities for older persons, taking into consideration their physical and medical abilities as well as their skills and experience. One could argue whether older workers who have not reached retirement age yet, should be allowed

appropriate working opportunities, and this is where mandatory RTW obligations could be used as a means to achieve the objective.

2.4.3.9 African Court on Human and People Rights⁴⁶³

It is important to reflect briefly on the African Court on Human and People Rights to determine whether there has been any relevant jurisprudence on RTW. The African Court was established by African countries with the aim of protecting human and peoples' rights in Africa. The court was established in terms of Article 1 of the Protocol to the African Charter. Only a few countries, excluding South Africa, has made a declaration recognising the competence of the African Court to hear cases from NGOs and individuals. The African Court has jurisdiction over all disputes and cases submitted to the Court regarding the interpretation and application of the African Charter, as well as the Protocol and other relevant human rights instruments ratified by the relevant States Parties.⁴⁶⁴ The African Court can make binding decisions and order reparation or compensation, unlike the African Commission, that can make recommendations only.⁴⁶⁵ In terms of Article 5 of the Protocol, the African Commission, States Parties to the Protocol as well as African inter-governmental organisations are in a position to submit cases to the African Court. Non-governmental organisations with observer status before the Commission as well as individuals from States Parties who have made the declaration in terms of which they accept the jurisdiction of the African Court may institute cases in terms of Article 34(6) of the Protocol. There have been no cases directly related to the topic at hand, but it would be interesting to see if this will remain the status quo after the Protocol on the Rights of PWDs has taken root on the Continent.

2.4.4 Concluding remarks: Continental position on RTW

To propose an RTW framework for South Africa, it is necessary to identify regional standards which will inform the basis of such a framework. Regional standards on RTW can thus inform and be part of a comprehensive foundation to support RTW.

⁴⁶³ African Court on Human and People Rights, hereafter African Court.

⁴⁶⁴ ACHPR date unknown <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court>.

⁴⁶⁵ African Union Commission and New Zealand Crown *The African Union Handbook* 78.

Before the author continues with the standards applicable in the SADC community, it is important to reflect on the continental standards, as discussed in the foregoing paragraphs.

First, the main continental charter, the African Charter on Human and Peoples Rights was examined. Although the Charter draws no direct relevance to RTW, a case was made about the reason why the Charter does provide implicit support for PWDs to be rehabilitated and returned to work. It was also highlighted that Member States need to, on a continuous basis, have measurable and reasonable plans in place, with timeframes and benchmarks, to ensure that economic, social and cultural rights are enjoyed within available resources. It was highlighted that the right to work is essential to realise other social, economic and cultural rights. These rights impose obligations, on states partners, which include opportunities to assist PWDs to find, maintain and return to employment. People also have the right to the best state of attainable health, which implicates the right to be rehabilitated. Health systems should deal with people's health in a more holistic manner. The role of the African Commission on Human and Peoples' Rights in overseeing and interpreting the African Charter on Human and Peoples' Rights was also explained, even though they are yet to make a General Comment on Disability.

The reporting duties of South Africa under the Charter were discussed, and it was noted that South Africa has realised the rights guaranteed in the Charter. The Concluding Observations by the Committee offered no recommendations relating to RTW specifically, but the South African government was urged to take appropriate measures to address unemployment and inequality.

Initiatives such as the African Decades on Disability helped raise awareness on disability-related matters on the African Continent. Other relevant AU treaties were also considered. For instance, the African Youth Charter was briefly unpacked and even though it creates no direct RTW obligations, it was argued that measures aiming at rehabilitation and reintegration of workers, may form part of "all appropriate measures" to achieve the right to gainful employment. The Protocol to the African Charter on Human and Peoples Rights on the Rights of Older Persons

and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa were also noted. It was pointed out that the latter does not contain any obligations to ensure that women who become disabled are returned to work but was ratified by South Africa. The Charter on the Rights of Older persons, not ratified by South Africa, makes provision that people who have not yet reached retirement age, are entitled to appropriate working opportunities.

The Protocol on the Rights of PWDs was adopted in January 2018, to great acclaim. It is a dedicated human rights instrument confirming and reaffirming the rights of PWDs. Already in its Preamble, the mainstreaming of disability in all spheres of life is advocated for. The relevant sections of importance to this thesis, were examined, with the following main themes emerging: PWDs should attain and maintain independence and be able to participate in all aspects of life, including comprehensive rehabilitation; the use of assistive devices and proper training of staff involved with rehabilitation; reasonable accommodation measures should be available and free from discrimination; and the use of job quotas in the public sector and the use of incentives in the private sector are also encouraged, which are a vital part of any RTW framework.

In the paragraph to follow, a background on the Southern Africa Development Community is provided, followed by a discussion of the relevant Protocols and standards that are important as part of the survey to determine relevant regional standards in respect of RTW programmes and initiatives.

2.4.5 The Southern African Development Community

The Southern African Development Community⁴⁶⁶ was established on 1 April 1980 after the adoption of the Lusaka Declaration, Southern Africa: Towards Economic Liberation, by Angola, Botswana, Lesotho, Malawi, Mozambique, eSwatini (previously Swaziland), United Republic of Tanzania, Zambia and Zimbabwe to set up the Southern African Development Coordination Conference (SADCC). The SADCC had four main objectives: To coordinate developmental projects to assist member states to attain more independence; to implement projects and programmes with a

⁴⁶⁶ The Southern African Development Community, hereafter SADC.

regional and national impact; to organise the resources of Member States⁴⁶⁷ with the goal of collective self-reliance; and to secure international support. On 17 August 1992 the SADCC was transformed into the SADC in Namibia, with the signing of the Declaration and Treaty at the Summit of Heads of State and Government.⁴⁶⁸

2.4.5.1 The SADC Treaty

Article 2 of the SADC Treaty provides the legal foundation and framework for the SADC to achieve its objectives, as set out in Article 5, which entails *inter alia*, to “promote sustainable and equitable economic growth and socio-economic development” to alleviate poverty and improve the quality of life; to promote and maximise productive employment; and to optimise the use of resources. The SADC Treaty, as well as its Protocols, are legally binding documents. For the SADC to achieve its objectives, it promotes the development of human resources and improvement of economic management and performance by way of regional cooperation.

2.4.5.2 The implementation and enforcement of SADC Treaties

For SADC to achieve its goals of regional integration and eradicate poverty, Member States need to cooperate to resolve disputes. To foster such relationships, several legal and institutional instruments have been put in place to monitor and standardise the work of SADC’s Member States. Some of these instruments are the SADC Protocols, which contain certain Codes of Practice, as agreed upon between Member States. Since SADC Protocols are legally binding documents, as stated above, Member States are committed to their objectives and procedures. Where a dispute could arise regarding the application or interpretation of a Protocol, grievances may be lodged with the SADC Tribunal, should diplomatic channels fail.⁴⁶⁹

The principal institutions and organs of the SADC are described in Article 9 of the SADC Treaty. They are as follows: The Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers;

⁴⁶⁷ Olivier “Social Security Framework” 208.

⁴⁶⁸ Olivier “Social Security Framework” 208.

⁴⁶⁹ SADC 2012 <http://www.sadc.int/about-sadc/overview/sa-protocols/>.

the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the SADC Tribunal; and the SADC National Committees. There are twenty-one coordinating units with four main directorates, namely trade, industry, finance and investment; infrastructure and services; food, agriculture and natural resources; and social and human development and special programmes. Social security falls under the auspices of the last-mentioned directorate. Currently, there is no Protocol explicitly regulating social security, but the Protocol on Employment and Labour, to be discussed later in the chapter, does provide some social security standards. Because the SADC functions as a custom union and common market and protocols need to be approved by summit (based on a decision of consensus) the scope of adopting and implementing social security norms on a regional level is limited. It is debatable whether all SADC instruments can truly be described as binding instruments, notwithstanding that they still play an important role in guidelines, standards and principles as part of the agenda of social reform in the region.⁴⁷⁰

With reference to the enforcement of treaties, as pointed out above, the SADC Tribunal has proven to be an unsuccessful institution, despite the powers bestowed on it in terms of Article 16 of the SADC Treaty, such as overseeing adherence to and interpretation of the provisions of the SADC treaty. Even though Article 16(5) prescribes its decisions to be final and binding, they have received much criticism following the Zimbabwe debacle, as will be discussed below. It is also important, when considering the enforcement of SADC treaties, to take the dispute resolution mechanisms of a treaty or protocol into consideration. For instance, the Code on Social Security in SADC provides for the establishment of an Independent Committee of Experts who are tasked to monitor compliance with the Code, however such a committee has not yet been established.⁴⁷¹

It is essential to realise that the SADC context, in which social security standard setting, implementation and enforcement need to concur, is a complex matter. Olivier explains it as follows:

⁴⁷⁰ Olivier "Social Security Framework" 210.

⁴⁷¹ Olivier "Social Security Framework" 210.

Adopting a binding Protocol containing appropriate social security standards may be obstructed by the nature of the decision-making process within SADC, implementation of such an instrument, as is the case with existing non-binding instruments, may be hampered by the failure to transpose the norms embedded in this instrument into the national law of the member states, and enforcement may be severely curtailed by the current lack of respect for and failure to give effect to the judgments of the Tribunal.⁴⁷²

With reference to the enforcement of the Code, Olivier voices his concern as follows:

In the SADC, the promotional role of a still to be established committee of experts as far as implementation of and compliance with the provisions of the Code on Social Security in the SADC is concerned, and the introduction of the flexible notion of "variable geometry", are crucial to the development of social security systems in a region where comprehensive social security reforms are needed and are indeed taking place.⁴⁷³

2.4.5.3 SADC Tribunal

The SADC Tribunal's original mandate was to ensure proper interpretation as well as adherence to the SADC Treaty and other subsidiary instruments. It also adjudicated disputes referred to it. It was originally established on 18 August 2005 in Botswana. After several judgments ruling against the government of Zimbabwe, the Tribunal was de facto suspended during the 2010 SADC Summit when it was resolved that a new Tribunal must be negotiated with a mandate confined to the interpretation of the SADC Treaty and Protocols, relating to disputes amongst Member States.⁴⁷⁴ The adoption of the SADC Protocol has been labelled by many as unconstitutional. For instance, jurisdiction for citizens of SADC members are excluded.⁴⁷⁵ It will take some time for the SADC Tribunal to function as an active judicial organ again.⁴⁷⁶

2.4.5.4 SADC Protocols

There are several SADC protocols that provide implementation strategies and plans of action to assist SADC Member States to not merely cooperate with one another,

⁴⁷² Olivier "Social Security Framework" 211.

⁴⁷³ Olivier "Social Security Framework" 177.

⁴⁷⁴ SADC 2012 <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

⁴⁷⁵ The Patriot Namibia 2018 <http://thepatriot.com.na/index.php/2018/02/23/the-resurrection-of-the-sadc-tribunal/>.

⁴⁷⁶ Erasmus 2015 <https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html>.

but to have more real regional integration with timeframes. The only applicable Protocol for this study is the SADC Protocol on Employment and Labour.

2.4.5.4.1 SADC Protocol on Employment and Labour

The *SADC Protocol on Employment and Labour*⁴⁷⁷ was approved by the Council of Ministers and signed off by the Summit of Heads of State and Government on 5 August 2014.⁴⁷⁸ The *Protocol* has as its aim to provide Member States with strategic guidelines and direction to *inter alia*: Harmonise social security legislation and policies; to encourage collaboration between member states; to promote the development of employment and labour; and to achieve sustainable productivity as well as decent work⁴⁷⁹ in member states. There are certain principles that guide member states in the implementation of the Protocol.⁴⁸⁰ For instance, Article 2(2)(d) provides that multi-actor responsibility will be one of the specific principles to guide the interpretation and implementation of the Protocol.

Member States for example, need to have respect for basic human rights as guaranteed by international, regional and national instruments; the promotion of decent employment and the improvement of the standard of life in the SADC region. The *Protocol* guarantees social protection and other relevant rights. For example, Member States need to take appropriate preventative and re-integrative measures, to allow workers to be integrated and reintegrated into the labour force.⁴⁸¹

The SADC Protocol on Employment and Labour has, *inter alia*, the following specific aims: To set certain minimum standards on social security, employment and other workplace-related aspects; to promote employment opportunities of vulnerable groups in the SADC region; and to provide a framework in which legislation and policies relating to social security, employment and other health and safety matters may be harmonised.

⁴⁷⁷ *Draft Protocol on Employment and Labour* 2013 (hereinafter referred to as the *Draft Protocol*).

⁴⁷⁸ SADC 2012 <http://www.satucc.org/.../SADC-EMPLOYMENT-AND-LABOUR-PR...>

⁴⁷⁹ *Decent work is defined in the glossary of the Code as follows: 'productive work in which rights are protected, which generates an adequate income, with adequate social protection'.*

⁴⁸⁰ Mpedi and Nyenti 2015 *CICLASS* 107.

⁴⁸¹ Mpedi and Nyenti 2015 *CICLASS* 107.

In terms of the above-mentioned *Protocol*, PWDs are seen as part of a vulnerable group. Article 2(c) provides that Member States agree that labour is not a commodity and that decent work and social security can contribute to, *inter alia*, economic development and the eradication of poverty, leading to an improvement in the standard of life.

Member States commit themselves to general⁴⁸² and more specific⁴⁸³ objectives. Article 3(h) provides for the facilitation of labour market integration. Article 4(b) provides for a framework for harmonisation of policies and legislation as one of the specific objectives. Article 4(f) provides for the promotion of employment as well as income-generating opportunities for all, particularly vulnerable groups. States Parties are obliged to create an environment conducive to these objectives.

Article 5 of the *Protocol* emphasises that relevant stakeholders recognise the basic human rights as set out in the various international instruments and encourages them to incorporate into domestic law the respective international obligations imposed by international instruments. The *Protocol* further demands equal treatment and Member States must adopt laws and policies to ensure that they promote employment opportunities equity and eliminate discrimination on grounds of, *inter alia*, disability.⁴⁸⁴

Article 11 deals with social protection and stipulates that Member States, with due regard to means available, must aim at developing an integrated and comprehensive social protection system which, *inter alia*, includes measures aimed at integrating and re-integrating workers into the labour force⁴⁸⁵.

Article 12 contains various occupational safety and health provisions. Article 12(3) provides as follows:

⁴⁸² Article 3 of Southern African Development Community Protocol on Employment and Labour (2014).

⁴⁸³ Article 4 of Southern African Development Community Protocol on Employment and Labour (2014).

⁴⁸⁴ Article 7 of Southern African Development Community Protocol on Employment and Labour (2014).

⁴⁸⁵ Article 11(c) of Southern African Development Community Protocol on Employment and Labour (2014).

States Parties shall adopt measures to ensure that workers have the right to services that provide for the prevention, recognition, detection and compensation of work-related illness or injury including emergency cases, with rehabilitation and job security after injury and adequate compensation appropriately adjusted from time to time.

Article 12(3) thus builds on the right to a safe and healthy environment.⁴⁸⁶ Article 12(4) contains a very important provision in that Member States should ensure that all modalities of disablement are covered, regardless of whether the disablement occurs in the formal or informal sector. Article 12(4) also advocates for the promotion of a safe and healthy culture. Article 15 urges Member States to adopt pro-active policies and measures towards inclusive economic and social development so as to absorb the majority of the labour force into productive employment or other income-generating activities⁴⁸⁷ and to afford preferential employment opportunities for the youth, women and persons with disability.⁴⁸⁸

Article 17 is (designated) to PWDs and reads as follows:

(1) States Parties shall ensure that persons with disabilities are afforded the rights protected in the United Nations Convention on the Rights of Persons with Disabilities of 2006, in particular employment and social protection rights.

(2) States Parties shall ensure that persons with disabilities, whatever the nature and origin of such disability, are entitled to additional concrete measures aimed at improving their social and professional integration, including through measures such as rehabilitation, vocational training, accessibility and mobility, provision of assistive devices, means of transport, access to appropriately designed housing, and the appropriate organisation of work and the working environment.

(3) States Parties shall undertake measures to curb discriminatory practices against persons with disabilities, and foster social acceptance and integration of persons with disabilities.

(4) Social protection measures for persons with disabilities shall include persons with disabilities living with HIV and AIDS, and afford such persons employment protection and access to employment benefits.

⁴⁸⁶ Olivier et al 2015 *ISLP* 45-47.

⁴⁸⁷ Article 15(a) of Southern African Development Community Protocol on Employment and Labour (2014).

⁴⁸⁸ Article 15(c) of Southern African Development Community Protocol on Employment and Labour (2014).

Article 25 of the *Protocol* obliges Member States to implement and apply the *Protocol* at national level. They must further submit bi-annual reports showing achievements in the implementation of the provisions of the Protocol.⁴⁸⁹

This *Protocol* thus contains provisions of importance for South Africa's development and introduction of RTW, such as a comprehensive social protection system, which also makes provision for preventative and re-integrative measures.

2.4.5.4.2 SADC Charter of Fundamental Social Rights in SADC 2003

Regional instruments promote the inclusion of international standards of earning capacity. For example, Article 3(1) of the SADC *Charter of Fundamental Social Rights in SADC*⁴⁹⁰ sets the standard, by stating that "This Charter embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights proclaimed in instruments such as the *United Nations Universal Declaration on Human Rights*, the *African Charter on Human and People Rights*, the *Constitution of the ILO*, the *Philadelphia Declaration* as well as other relevant international instruments" Article 5 also highlights the importance of international standards in regional instruments, by calling on member states, to take the necessary action to ratify and implement ILO Instruments and to form regional mechanisms to assist Member States to comply with the ILO reporting system.⁴⁹¹

Article 2 sets out the objectives to be achieved by the Member States. Article 2(b) makes specific reference to the creation of productive employment opportunities and generation of income through the formulation and harmonisation of legal, economic and social programmes and policies. States Parties are further obliged to promote the development of institutional capacities as well as vocational and technical skills in the region.

Article 9 deals specifically with the right of PWDs, and stipulated as follows:

⁴⁸⁹ Article 25(5) of Southern African Development Community Protocol on Employment and Labour (2014).

⁴⁹⁰ *Charter of Fundamental Social Rights in SADC* 2003, hereafter Social Charter.

⁴⁹¹ Olivier and Govindjee *Social Protection Lessons from SADC for the Global South* 194.

1. Member States shall create an enabling environment such that all persons with disabilities, whatever the origin and nature of their disability, shall be entitled to additional concrete measures aimed at improving their social and professional integration.

2. The measures shall relate to, in particular, according to the capacities of beneficiaries, vocational training, accessibility and mobility, means of transport and housing and appropriate organisation of work and workplace to consider their needs.

In terms of Article 9, PWDs are entitled to social and professional integration and their needs must be considered when organising the workplace and the provision of vocational training.⁴⁹² The provisions of Section 9 of the *Social Charter* are reinforced by similar and related provisions in the *Code on Social Security in the SADC*.⁴⁹³

Social protection is emphasised in Article 10 of the Charter and Member States are urged to provide an enabling environment to provide such benefits, regardless of the status and the type of employment. Article 12 which deals with Protection of Health, Safety and Environment is another important provision. In terms of Article 12(h) workers have the right to services that provide, *inter alia*, for compensation for work-related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury. Member States are obliged to submit progress reports⁴⁹⁴ and the implementation of the Charter lies with the national tripartite institutions and regional structures.⁴⁹⁵ Article 12(h) thus provides that workers have the right to services which provide for *rehabilitation* and *reasonable job security* after injury.⁴⁹⁶ Article 12(h) of the Charter urges Member States to create an enabling environment so that workers have the right, *inter alia*, to services that provide for the prevention, recognition, detection and compensation for work-related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation-adjusted compensation. All Member States must submit regular progress reports.⁴⁹⁷ However, the definition of “regular”

⁴⁹² Olivier et al 2011 *PPCFSA* 33.

⁴⁹³ Olivier et al 2015 *ISLP* 45-47. Also see Christianson 2012 *Acta Juridica* 290.

⁴⁹⁴ Article 16(3) of the *Charter*.

⁴⁹⁵ Article 16(1) of the *Charter*.

⁴⁹⁶ Olivier M et al “Rehabilitation, reintegration and return-to-work of workers who have suffered occupational injuries or diseases (Policy prepared for the Compensation Fund of South Africa 2011) 35.

⁴⁹⁷ Article 16(3) of the *Charter*.

is unclear. Article 12(6) of the above-mentioned Charter provides that when dealing with occupational injuries and diseases, social security systems must provide “adequate rehabilitation and re integration measures”. It is the responsibility of all Member States to ensure that the appropriate preventative measures are put in place.⁴⁹⁸

If one considers the objectives of the Charter, it becomes clear that productive employment opportunities should be a priority for Member States. Member States must promote the harmonisation and formulation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and income generation.⁴⁹⁹ Member states must also promote the development of institutional capacities as well as vocational and technical skills in the Region.⁵⁰⁰ It is the responsibility of Governments to create an enabling environment in order for Member States to give effect to the objectives as set out in the *Charter*.⁵⁰¹

2.4.5.4.3 Code on Social Security in SADC, 2007/2008

The *Code on Social Security* was approved in June 2007 and aims to provide the SADC with guidelines as well as strategic direction for the development and improvement of its social security schemes. Furthermore, it provides Member States with general principles and minimum standards on social protection, as well as a framework that can be utilised to monitor social protection at both a national as well as a regional level. The Code is also used as an instrument for the coordination, harmonisation and merging of social security schemes in the SADC region.⁵⁰²

The main objectives of social security are to maintain income; provide healthcare and provide benefits to families.⁵⁰³ The Code does not only provide for social security, but also social protection which cover both social services and developmental social welfare and it is therefore not limited to protection against

⁴⁹⁸ Olivier et al 2015 *ISLP* 45-47.

⁴⁹⁹ Article 2(b) of the Social *Charter*.

⁵⁰⁰ Article 2(g) of the Social *Charter*.

⁵⁰¹ Article 2(2) of the Social *Charter*.

⁵⁰² Mpedi and Nyenti 2015 *CICLASS* 92.

⁵⁰³ Mpedi and Nyenti 2015 *CICLASS* 92.

income insecurity. Social protection is broader than social security. In terms of the Code, Member States must maintain their respective social security systems at an acceptable level to allow for ratification of ILO Conventions and also improve their social security systems to provide for protection at a higher level. The Code provides protection against a number of different contingencies, such as unemployment; occupational illness and injuries, maternity *et cetera*. It obliges Member States to be sensitive to the economic, social and political realities in the SADC region when providing protection to individuals.⁵⁰⁴ Member States are further obliged to assume pro-active policies and measures that strive for inclusive social and economic development to eliminate poverty and to integrate the formal and informal aspects of an economy.⁵⁰⁵ The main objectives of the Code are threefold: To maintain income; provide health care; and to provide benefits to families. For purposes of this study, the Code includes social protection, social allowance, social assistance and social insurance. The *Code* also highlights the importance of international standards in regional instruments, by its reoccurring reference to ILO instruments.⁵⁰⁶

The Code further provides social security protection for vulnerable groups such as PWDs and Member States need to ensure that their social security instruments warrant equal access and coverage for PWDs.⁵⁰⁷ The Code provides strategic direction and acts as a monitoring system for the convergence of social security. It also recommends social dialogue as a tool to support the development of social security, by involving community-based organisations, civil society, non-state agents, and national tripartite and regional structures.⁵⁰⁸ The Code also makes provision for an independent, promotional committee of experts, tasked with the responsibility of monitoring compliance with the Code as well as to make recommendations to the SADC on the realisation of the relevant provisions.⁵⁰⁹

Article 11.5 of the Code determines that Member States must provide suitable protection in the event of the unavoidable loss of employment. Article 12 of the

⁵⁰⁴ Mpedi and Nyenti 2015 *CICLASS* 94.

⁵⁰⁵ Mpedi and Nyenti 2015 *CICLASS* 94.

⁵⁰⁶ Olivier and Govindjee *Social Protection Lessons from SADC for the Global South* 191.

⁵⁰⁷ Mpedi and Nyenti 2015 *CICLASS* 95.

⁵⁰⁸ Olivier and Govindjee *Social Protection Lessons from SADC for the Global South* 188-189.

⁵⁰⁹ Olivier and Govindjee *Social Protection Lessons from SADC for the Global South* 191.

Code specifically deals with occupational injuries and diseases. Member states are obliged to provide compulsory coverage, either through private or public mechanisms, or a combination of the afore-mentioned. It is important to note that all types of disablement should be protected, regardless of whether the disability arose from the formal or informal sector. Article 12.6 provides as follows:

Social security systems should provide for adequate *rehabilitation and reintegration measures*.⁵¹⁰ Member States should ensure that appropriate preventative measures are in place.

Article 14.1 of the Code provides that all Member States are obliged to create an enabling environment to ensure that PWDs, *irrespective*⁵¹¹ of the nature and cause of disability or incapacity, are entitled to social security.

Article 14.3 of the Code speaks of the integration of PWDs and provide as follows:

Member States should promote the *social and professional integration* of persons with disabilities, through *measures* such as rehabilitation, vocational training, accessibility and mobility, means of transport and housing and the appropriate organisation of work and the working environment.⁵¹²

Article 14.4 of the Code reads as follows:

Member States should ensure that the special *needs* (including the need for assistive devices) and *circumstances* of persons with *disabilities* are provided for in national *social insurance and social assistance instruments*.⁵¹³

Article 19 of the Code provides that Member States should ensure that their social security systems are not focused primarily on compensation to integrate preventative and re-integrative measures. These re-integrative measures should also ensure that individuals who have been exposed to high-risk situations, are meaningfully integrated to protect their human dignity and independence. It is expected of member states to provide effective measures of rehabilitation; relief, reintegration, reconstruction, and revitalisation for affected communities. This

⁵¹⁰ Own emphasis added.

⁵¹¹ Own emphasis added.

⁵¹² Own emphasis added.

section thus emphasises both social and labour market integration, which requires active re-integration and rehabilitation measures.⁵¹⁴

Article 20(4) is also of relevance and determines that Member states must aim to develop a comprehensive and integrated social security system, including non-formal as well as formal, and direct and indirect forms of social support.

Article 12.6 of the Code requires adequate rehabilitation and reintegration measures. Article 14.3 echoes the provision in the *Charter* on social and professional integration of PWDs, while Article 14.4 obliges SADC Member states to ensure that the special needs are provided for in national social insurance and social assistance instruments. Article 19 emphasises the importance of effective *preventative and re-integrative measures* in the place of systems that are primarily compensation-based. Integration in both the labour and social market is emphasised as well as the importance of effective rehabilitation and re-integration measures.⁵¹⁵

In conclusion, the SADC Code provides crucial standards to promote the RTW of disabled workers. South Africa must ensure that it adheres to its regional obligations.

2.5 Summary of chapter

As a signatory to several international and regional instruments South Africa is obliged to implement these standards in its national legal system. The Treaties and Protocols serve as benchmarks for the country's domestic systems.

If one considers all discussions from both the regional and international perspectives, certain topics come to the fore. PWDs are entitled to decent and productive employment and three-tier social and security systems are needed to provide for prevention, compensation and the re-integration into society. All types of disability should be provided for, regardless of the cause of the disability. Member States need to have measures in place to assist PWDs to find, maintain and retain employment. They are entitled to participate in all aspects of life, including to return-to-work to contribute to the economy. They have a right to the best attainable

⁵¹⁴ Olivier et al 2015 *ISLP* 45-47.

⁵¹⁵ Olivier et al 2011 *PPCFSA* 33.

health care, which includes rehabilitation after disability. Services aimed at re-integration must be inter-active and have one common objective: To return disabled workers to work as soon as practically possible, and if applicable, to environments that have been properly adjusted.

The monitoring roles of the various regional and international organisations were scrutinised, which shed some light on the interpretation of rights as contained in the various treaties. Governments need to take additional measures to increase their budgets to promote and regulate reasonable accommodation measures. It must be remembered that rehabilitation services, even if they are costly, are necessary for PWDs to reach their full potential, even more so when disability was caused by a work-related incident. Member States need to ensure that duties relating to RTW programmes, vocational rehabilitation and job retention are regulated and provided for in their national systems. A multi-faceted approach to rehabilitation must be adopted. Reasonable accommodation measures need to be attended to on a case-to-case basis, and specific suggestions relating to the “case management” approach, which will be made in Chapter 4.

South Africa must adopt a broad categorisation of PWDs and revisit the definition clause in its legislation and policies. Member States must investigate measures to incentivise PWDs to increase their earning capacity.

South Africa must revise its legislation to make provision for international and regional obligations and must also ensure that it has the capacity to give effect to these measures. It is clear from the foregoing discussions that the obligations imposed by the international and regional arena could be daunting for South Africa, hence the need to highlight and clarify the role-players responsible for the various RTW duties.

Even though South Africa is still at an early stage of implementing some of its international obligations relating to comprehensive social security, it will need to contemplate the hurdles to be overcome and identify contingency plans to deal effectively with any shortcomings. For instance, a lack of coordination in state departments and proper training of staff are of concern.

Interventions should not only be focused on the individual, but also on the social, physical and legislative environments. PWDs need to be integrated into development programmes to improve their living standards and provide them with equal opportunities. For example, African countries should consider the following:

- they need to ensure the ratification and proper implementation of the CRPD;
- states need to adopt disability- sensitive legislation, put the necessary mechanisms in place; advance the implementation of current legislation;
- countries need more reliable data on disability, in order to determine the distribution of resources to effectively address poverty and social development;
- disability issues need to be mainstreamed in all programmes and sectors of both the government and civil society to optimise social inclusion, participation and representation of PWDs at all levels of society;
- member states need to inter alia: invest in allowing people access to health services in order to prevent disability;
- access to employment must be promoted;
- programmes and policies need to be adapted to allow for a barrier free environment for PWDs;
- a comprehensive social protection strategy needs to be created to allow for the delivery of services for PWDs;
- National disability councils also need to be advocated for.⁵¹⁶

African Governments need to institute plans to address the unemployment rate in Africa. For example, they need to evaluate their current legislative, administrative and other measures to determine whether they allow for equal access of PWDs in all sectors of the economy in line with the ILO Conventions.

⁵¹⁶ African Union "Social Policy Framework for Africa".

It is important that vocational rehabilitation services should be adjusted to meet each country's policies, abilities and conditions, and they could be developed over time. To allow for effective implementation of integration programmes as well as vocational rehabilitation, competent authorities need to cooperate with one another. Ineffective coordination, cooperation and evaluation may hinder the successful implementation of vocational rehabilitation. Legislation and policies need to be developed with the assistance of representative advisory committees. Committees must include employer and employee organisations and authorities specialising in vocational rehabilitation and organisations for disabled people.

South Africa must develop an RTW programme, firmly based on regional, international best practices as they are applied in other countries. In view of this, the next chapter provides a descriptive and comparative discussion of the legislative and policy framework relating to RTW in South Africa.

Chapter 3: Analyses of the constitutional and statutory framework with specific reference to disabled workers

3.1 Introduction

In the previous chapter, the extent to which international and regional systems and standards could promote the re-integration, rehabilitation and return-to-work programmes of disabled workers in the South African labour market was examined. The current chapter discusses the position of the rights of PWDs to be re-integrated and rehabilitated, by analysing the constitutional and statutory framework of South Africa. It focuses on the need for legislative reform and offers observations on the need for RTW programmes and DM for South Africa. The constitutional and legislative frameworks are then discussed to determine obligations regarding the re-integration and rehabilitation of PWDs before the relevant policy frameworks and a few best practices are explored. This is followed by a general summary of the chapter.

The following limitations must be duly noted. Due to length constraints the chapter will not provide an in depth analysis on the following aspects: The different approaches to disability or the relevance thereof for labour and social security law; substantive equality and different conceptions of disability; prohibition of discrimination; employment testing and the state's positive duties in respect of access to employment. The main focus will thus be on the positive non-discrimination duties, but more specifically on the duty to reasonably accommodate disabled workers, with specific reference to the duties relating to RTW programmes.

3.2 The case for RTW in South Africa

3.2.1 General observations

Disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation are provided, people with

disabilities⁵¹⁷ can contribute valuable skills and abilities to every workplace, and contribute to the economy of the country.⁵¹⁸

Ngwenya and Pretorius⁵¹⁹ argue that PWDs are a historically marginalised minority, who have the capacity to make a valuable contribution in the workplace.⁵²⁰ Employers and trade unions need to be made aware of the barriers that hinder PWDs in the workplace and strategies need to be in place to overcome them.⁵²¹

The Commission for Employment Equity's 2016 report indicated that little progress in the employment of PWDs has been made since employment equity legislation was promulgated in 1998, and when employed, they are often hired for menial tasks or appointed at entry level positions. Employers are urged to conduct research before they make decisions about their disabled employees.⁵²²

In 1995 the WHO stated that the most accurate global statistic of disabled persons was about ten percent.⁵²³ The same applies to South Africa. Watermeyer et al⁵²⁴ note that even though several surveys on disability were conducted, there is little consensus on the findings and that the models used to identify people with disabilities were not consistent throughout.⁵²⁵ A report from Statistics South Africa from 2014 indicated that the national disability prevalence rate is 7,5 percent and that persons with severe disabilities find it difficult to gain access to education and employment opportunities.⁵²⁶

Surveys conducted in South Africa have revealed major discrepancies on disability, which compromised their consistency and reliability.⁵²⁷ This could be ascribed to the fact that different definitions of the term "disability" were used and that the measuring tools varied. Watermeyer et al regard poverty as a consequence of

⁵¹⁷ People with Disabilities, hereafter PWDs.

⁵¹⁸ Foreword to the Code of Good Practice: Key aspects on the employment of PWDs p iii.

⁵¹⁹ Ngwenya and Pretorius 2003 *ILJ* 1838.

⁵²⁰ Ngwenya and Pretorius 2003 *ILJ* 1838.

⁵²¹ Ngwenya and Pretorius 2003 *ILJ* 1838.

⁵²² SABPP 2017 http://sabpp.co.za/wp-content/uploads/2017/10/Fact-Sheet_October_v002-with-active-links.pdf 4.

⁵²³ Watermeyer et al *Disability and Social Change* 209.

⁵²⁴ Watermeyer et al *Disability and Social Change* 209.

⁵²⁵ Watermeyer et al *Disability and Social Change* 209.

⁵²⁶ Statistics South Africa 2014 <http://www.statssa.gov.za/?p=3180>.

⁵²⁷ Watermeyer et al *Disability and Social Change* 228.

disability.⁵²⁸ The employment rate of PWDs is usually lower in comparison to their non-disabled counterparts; and both income and employment are usually negatively associated with the severity of the disability.⁵²⁹ Research has shown that the educational and literacy levels of disabled people are likely to be lower than the rest of the population.⁵³⁰ Even though they may have the required training, they are often under-employed, and are less likely to have savings and assets compared to the non-disabled population.⁵³¹ They may frequently work longer hours, with lower compensation and promotion prospects, under poor working conditions⁵³²

Disability affects not only the individual, but also has an adverse effect on households with PWDs.⁵³³ Disability causes additional financial burdens, for example special medical care; rehabilitative and restorative equipment and services *et cetera*.⁵³⁴

In developing countries like South Africa, PWDs invariably become the responsibility of their families. It is also common for PWDs to face obstacles in the form of inadequate and inappropriate transportation and learning opportunities, which will affect the employment and education of PWDs and reduce their role in society.⁵³⁵ Disability affects society as a whole and the state has a responsibility to protect itself and the disabled against the disadvantages and possible eventualities caused by impairment.⁵³⁶

PWDs have different circumstances and needs that have an impact on their general well-being and opportunities in life. A holistic and sensitive social security system will recognise that even though people have similar disabilities, they may have unique

⁵²⁸ Watermeyer et al *Disability and Social Change* 209.

⁵²⁹ Watermeyer et al *Disability and Social Change* 209.

⁵³⁰ Watermeyer et al *Disability and Social Change* 212.

⁵³¹ Watermeyer et al *Disability and Social Change* 212.

⁵³² Watermeyer et al *Disability and Social Change* 212.

⁵³³ Watermeyer et al *Disability and Social Change* 213.

⁵³⁴ Watermeyer et al *Disability and Social Change* 214.

⁵³⁵ Watermeyer et al *Disability and Social Change* 214.

⁵³⁶ Watermeyer et al "The South African Federal Council on Disability Social security" 124.

social, financial and physical environments that influence their capacity to function to their full potential.⁵³⁷

The South African Human Rights Commission indicated in a report in 2002, that PWDs can live independent and even abundant lives, if they have access to resources, opportunities and environments that allow them independence, self-sufficiency and responsibility.⁵³⁸ The author agrees that to minimise or even combat the consequences of disability (unemployment and dependency on disability grants) legislative reform is needed, as will be proposed in Chapter 6 of the study.

3.2.2 Policy and Institutional Framework in context

It was mentioned in the second chapter that PWDs are often stigmatised when in need of care. The first democratic government inherited problems, for instance, disability was not regarded as a human rights issue and discrimination against PWDs and social exclusion were rife.⁵³⁹ Very few statistics on disability before 1994 are available.⁵⁴⁰

From the mid-1980s, PWDs started mobilising and organising themselves as part of a broader liberation movement. In 1984 Disabled People South Africa (DPSA) was established to create awareness on disability and it established more local organisations that served as platforms for empowering PWDs. From this initiative, self-help groups were established, aligned with the DPSA, which in turn, led to the formation of grassroots organisations. The Disability Rights Charter of 1992 was instrumental in the creation of minimum demands for PWDs during the period of democratic transition. The Charter also provided the basis of minimum demands for PWDs.⁵⁴¹ The DPSA became the main body advocating for change for PWDs of all

⁵³⁷ Guthrie et al "The South African Federal Council on Disability Social security" 124.

⁵³⁸ SAHRC 2002

https://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf.

⁵³⁹ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 10.

⁵⁴⁰ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 10.

⁵⁴¹ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 11-12.

racism, and the Office on the Status of Disabled Persons, operating from the office of the Presidency, played a key role in the transformation of the image of disability.⁵⁴²

Until 1994, PWDs experienced severe inequality in a divided society brought about by social, economic and political systems that failed to provide the disabled with access to basic rights and adequate opportunities to share in the country's wealth. Since the advent of the democratic dispensation in 1994, a significant transformation has taken place on legislative and policy levels. If democratic values and the Preamble to the Constitution are taken into consideration, as discussed later in this chapter, the government's commitment to social justice and improvement in the quality of people's lives becomes clear.⁵⁴³

In November 1997 the White Paper on an Integrated National Disability Strategy (INDS) was developed to give effect to the government's constitutional mandate on disability, which led to the establishment of the Office on the Status of Disabled Persons to monitor its implementation. The INDS is founded on the social model of disability and has brought about a paradigm shift in the way disability is perceived. It is no longer being regarded as a condition of illness, associated with unproductive individuals in need of care. The INDS serves as guidelines for government as well as society on matters relating to service delivery, non-discriminatory development planning and programme implementation. Van der Byl argues that the timing of the INDS was auspicious as it was incorporated early into South Africa's transformation agenda, with the effect that all relevant laws and policies were revised or if necessary, developed within the vision of a broader transformation agenda where disability is regarded as a rights-based issue.⁵⁴⁴

It was important for the government to have strategies in place to redress inequalities in the disability sector and to ensure that PWDs remain a key target group as part of governmental initiatives relating to socio-economic development. Thus, all spheres of government had to be involved in providing PWDs with the

⁵⁴² Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 11.

⁵⁴³ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 11.

⁵⁴⁴ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 11.

opportunity to “become active participants in the development process, both as beneficiaries and service providers”.⁵⁴⁵

With the advent of democracy in 1994, the government made conscious attempts to address the social inequalities of the apartheid era. The dominant reason for reforming labour legislation was the requirements listed in Chapter 3 of the Interim Constitution, more specifically the right to equality and the freedom to engage in economic activity. However, poverty is still rife among the disabled⁵⁴⁶ and South Africa must investigate and implement strategies to address this in the form of poverty reduction and/or elimination strategies and concrete plans of action with deliverables and quantifiable targets.

As will be alluded to in more detail, the management of disabilities and diseases and the return-to-work of the injured or the disabled are areas in need of reform, especially in a developing country such as South Africa.⁵⁴⁷ The lack of a suitable return-to-work framework often results in injured or ill workers becoming unemployed and dependent on disability pensions or incapacity compensation.⁵⁴⁸ Thus, an RTW system that allows for injured or disabled workers to secure and retain suitable employment and promotion possibilities is essential in furthering the worker’s integration into the labour market and society in general. This can only be achieved through legislative frameworks, supported by institutional and organisational arrangements.⁵⁴⁹

Several factors have an influence on the RTW status of an employee, such as the length of rehabilitation, the emotional well-being of the employee and the rehabilitation services provided. Obstacles in the form of illness or client

⁵⁴⁵ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 11.

⁵⁴⁶ Guthrie et al “The South African Federal Council on Disability Social security” 9. For instance, it is reported that the low employment rate of PWDs have social economic implications, which includes poverty and dependency on the social security system. For more information, see Statistics South Africa 2014 <http://www.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>.

⁵⁴⁷ Olivier et al “Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries” 9.

⁵⁴⁸ Olivier et al “Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries” 9.

⁵⁴⁹ Olivier et al “Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries” 9.

characteristics, access to services and the conditions in the workplace also play a role.⁵⁵⁰ The rehabilitation and return to work of an employee must be managed in a collaborative and coordinated manner and require different role-players (both governmental and non-governmental) to succeed.

3.2.3 Broadening the scope of protection

This sub-section focuses on labour law and social security law and how these spheres could be broadened. A brief analysis of the assessment of disability will follow. Mention will be made of the need to follow a more comprehensive approach to social security.

To begin with, it is important to have an overview of what social protection entails and where RTW benefits fit in. Therefore, labour law and social security law need to be defined.

Mpedi⁵⁵¹ defines labour law as follows:

...it refers to the totality of rules in an objective sense that regulate legal relationships between employers and employees, the latter rendering services under the authority of the former, at the collective as well as the individual level, between employers mutually, and employees mutually, as well as between employers and the state.

The International Labour Organisation described social security⁵⁵² as follows:

...protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be covered by the stoppage or reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, death, provision of medical care and provision for subsidies for families with children.

The employer-employee relationship can be classified as the "gatekeeper to coverage".⁵⁵³ When social security was introduced in Europe and North America, it was aimed mainly at protecting employees who were formally employed.⁵⁵⁴ The

⁵⁵⁰ Ramano *Perception and practice of occupational therapist* 48.

⁵⁵¹ Mpedi 2012 *Acta Juridica* 270.

⁵⁵² Mpedi 2012 *Acta Juridica* 270-271 from ILO World Report 2000: Income Security and Social Protection in a Changing World (2000) 29.

⁵⁵³ Mpedi 2012 *Acta Juridica* 270.

⁵⁵⁴ Mpedi 2012 *Acta Juridica* 272.

premise for this were two systems, the so-called Bismarckian system,⁵⁵⁵ which is financed by contributions made commensurate to wages and the insured persons are employees, or productively employed⁵⁵⁶ and the Beveridge system, which is state funded and includes the entire population but entails uniform, lump-sum contributions.⁵⁵⁷

The Bismarckian system is prevalent in the South African social insurance system, which is why access to employment-related schemes largely depend on the existence of an employer-employee relationship.⁵⁵⁸ Independent contractors, the self-employed and workers in the informal sector are excluded from employment-based social insurance schemes.⁵⁵⁹

Current labour law and social security frameworks could be broadened by amending existing laws to incorporate the excluded and the marginalised.⁵⁶⁰ As the relationship between labour and social security law continues to evolve, the negative impact of the “employer-employee relationship” as prerequisite to labour and social security protection must be considered. Therefore, the concept of “employee” must be broadened by amending social insurance schemes to include workers that would normally be excluded, and the introduction of compulsory insurance schemes. Inconsistencies that may occur could be managed more effectively if the connection between labour and social security law is streamlined.⁵⁶¹

The question of whether a person will receive compensation (in the form of a defined benefit or disability grant), depends on the cause of the disability. Grounds of delict could be governed by the *Lex Aquiliae*, where a court of law will determine compensation, which is calculated fairly as set out in the common law in the form of delictual damages.

⁵⁵⁵ Mpedi 2012 *Acta Juridica* 272.

⁵⁵⁶ Mpedi 2012 *Acta Juridica* 272.

⁵⁵⁷ Mpedi 2012 *Acta Juridica* 272.

⁵⁵⁸ Mpedi 2012 *Acta Juridica* 272.

⁵⁵⁹ Mpedi 2012 *Acta Juridica* 272.

⁵⁶⁰ Mpedi 2012 *Acta Juridica* 279.

⁵⁶¹ Mpedi 2012 *Acta Juridica* 285.

In terms of COIDA, compensation is provided for disability caused by occupational injuries or diseases sustained or contracted by employees “in the course of their employment”, or for death because of injuries or disease. COIDA regulates compensation for accidents and illness sustained or contracted in the course of duty and the RAF regulates road accidents.⁵⁶²

The *Social Assistance Act 13 of 2004* makes provision for an individual to apply for a disability grant which is funded by taxpayers’ money. Disabled claimants undergo a qualification process *via* a means test, which has been heavily criticised. The *Act* “identifies disability type by category for eligibility and, in doing so, excludes large numbers of disabled people who do not meet the criteria”, for example, sensory and intellectually disabled, and non-evident disabilities such as epilepsy. Most importantly though, the current assessments methods do not consider factors and attitudes (positive and negative) or the specific person’s abilities and needs.⁵⁶³ The mere assessment of a person’s medical condition may lead to unfair outcomes (which is why the social model of disability might be useful).⁵⁶⁴ In South Africa the medical model still prevails. Experts responsible for testing disability are often not cognisant with the law, whereas the process usually demands experts from various disciplines. The fact that disability is a multi-faceted problem is often overlooked.⁵⁶⁵ Millar et al⁵⁶⁶ recommend that an assessment panel, comprising a senior social security official, rehabilitation therapist, a representative from the disability community or sector and any other person who may be deemed necessary be established in every district. This will ensure uniformity and may also combat fraudulent reporting of cases.

It is essential to ensure that PWDs are assessed thoroughly, rehabilitated as much as is possible and re-integrated into society. South Africa has a long way to go in

⁵⁶² As was discussed in Chapter 1, the thesis will only focus on COIDA however, writer hereof submits that protection should be broadened to those employed in the informal sector as well as to those who are self-employed, as well as to the mining sector (it falls without the ambit of the study due to length constraints).

⁵⁶³ Millard “Models to Assess Personal Injury” 698, from Klinck “People with disabilities” in Olivier et al *Social Security Law: A legal Analysis* (2003) 325.

⁵⁶⁴ Millard “Models to Assess Personal Injury” 699.

⁵⁶⁵ Millard “Models to Assess Personal Injury” 699.

⁵⁶⁶ Millard “Models to Assess Personal Injury” 699.

integrating its disability schemes and develop a “core value” approach to disability.⁵⁶⁷ Basson⁵⁶⁸ correctly observes that PWDs have not been privileged with dedicated disability specific legislation, have been dealt with in a piecemeal-fashion and sets out the rights to which they are entitled.⁵⁶⁹

During 2002 the Committee of Inquiry into a Comprehensive System of Social Security of South Africa stated that “modern social protection policy-making is no longer merely curative – in the sense of providing compensation, but also preventive and remedial/rehabilitative in nature”.⁵⁷⁰ As will be argued later in the chapter, South Africa requires more detailed legislative provisions on rehabilitation; re-integration and return to work.

In the next part of the chapter, South Africa’s statutory and policy frameworks with reference to RTW are analysed.

3.3 Analysis of South Africa’s domestic regulatory and policy frameworks

3.3.1 Policy frameworks

Policy documents from state departments reveal that provision is made for a theoretical and principled framework for the rehabilitation of PWDs. However, there is very little focus on connecting rehabilitation with RTW programmes.⁵⁷¹ As Olivier et al⁵⁷² explain, employees in the public sector who become disabled, are not usually rehabilitated and often retire early, owing to ill-health. Like employees in the private sector, they are subject to dismissal, without the backing of a policy and legislative framework for rehabilitation and RTW. It could, however, be argued that the

⁵⁶⁷ Millard “Models to Assess Personal Injury” 704.

⁵⁶⁸ Basson 2017 *PER / PELJ* 1.

⁵⁶⁹ Basson 2017 *PER / PELJ* 1.

⁵⁷⁰ The Taylor Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present – Protecting the Future (2002).

⁵⁷¹ Govindjee et al The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa 221. Some of the policy documents are to be discussed in the paragraphs to follow, with the INDS being the most important policy document.

⁵⁷² Govindjee et al The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa 221.

foundation for the current policy framework and supporting legislation for the possible introduction and implementation of RTW has been laid.⁵⁷³

3.3.1.1 1997 INDS (White paper on an Integrated National Disability Strategy)⁵⁷⁴

The White Paper on an Integrated National Disability Strategy was developed by the Office of the Status of Disabled Persons on a constitutional premise and influenced by the United Nations Standard Rules for the Equalisation of Opportunities for Persons with Disabilities and the Disability Rights Charter. The main aim of the INDS is as follows: "a society for all, where the needs of all citizens constitute the basis for planning and policy, and the general systems and institutions of society are accessible to all".⁵⁷⁵ The INDS became the principal yardstick for all future disability legislation and contributed towards the alignment of international and national legislation and development. During the drafting process of the INDS, PWDs across South Africa had the opportunity to raise their concerns and needs.⁵⁷⁶ This is said to be indicative of the government's commitment to self-presentation of PWDs, including the drafting process of legislation.⁵⁷⁷

The INDS can further be described as a historical breakthrough, thus moving away from the perception that disability is a medical or welfare-related condition. The fact that the removal of barriers that PWDs may experience in all the aspects of their lives is emphasised, shows that the INDS tried to formulate the roles and responsibilities of governmental departments and civil-society organisations in such a way as to contribute towards a more inclusive society for PWDs. This has had the effect that legislation and policies which followed thereafter, adopted a rights-based approach to disability.⁵⁷⁸

The INDS further allows for the development of a national rehabilitation policy and sets national guidelines for inter-sectorial responsibilities and coordination of

⁵⁷³ Govindjee et al The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa 221.

⁵⁷⁴ Integrated National Disability Strategy, hereafter INDS.

⁵⁷⁵ INDS 12.

⁵⁷⁶ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 12.

⁵⁷⁷ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 12.

⁵⁷⁸ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 12.

rehabilitation services in South Africa.⁵⁷⁹ This originated from the Presidents' Office and the integration of disability-related issues in all government development strategies, planning and programmes is anticipated.⁵⁸⁰ Du-Plessis and Grobler⁵⁸¹ describe it as follows:

The White Paper on an Integrated National Disability Strategy facilitates the promotion and protection of the rights of people with disabilities; it provides guidance for disability considerations in policy and legislative reform; the policy aims at integration of disability issues in all government development strategies, planning and programmes.

Its mission is inclusive and equitable socio-economic development and goal-directed outcomes are relevant to this study, such as that PWDs, irrespective of the type of disability, should be able to participate fully and on an equal basis to others, in social and economic life. PWDs must also be provided with services and interventions that could provide them with economic empowerment and security.⁵⁸²

The INDS represents a turning point for South Africa's disability sector. It triggered change and set the scene for the transformation of government and society. The INDS, influenced by the Constitution and *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*⁵⁸³ was a voice for PWDs and had an impact on the development of progressive policies and legislation across different sectors.⁵⁸⁴ It provides the foundation for a national disability policy, as disability affects a large section of the population and places a significant constraint on its human resources and on the disabled themselves and their families. It is predicted that disability figures in South Africa are set to rise, as is already the case internationally.⁵⁸⁵ South Africa has a legal mandate to address disability, taking the provisions of the Constitution and international agreements to which South Africa is a signatory, into account⁵⁸⁶ Taking command of the situation will facilitate the promotion and

⁵⁷⁹ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 11.

⁵⁸⁰ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 47.

⁵⁸¹ Grobbelaar-du Plessis and Grobler *African Disability Rights Yearbook* 321.

⁵⁸² INDS, 43.

⁵⁸³ *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, hereafter PEPUDA.*

⁵⁸⁴ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 21.

⁵⁸⁵ Transforming present into the future consolidated report Taylor et al 101.

⁵⁸⁶ Transforming present into the future consolidated report Taylor et al 102.

protection of the rights of PWDs and provide guidance on legislative and policy reform for the disabled. It is intended for disability issues to be integrated in all government programmes, developmental planning and strategies.⁵⁸⁷

It is stated that PWDs should be encouraged to “make contributions of their experience, capabilities and talents to both national and international development.”⁵⁸⁸ South Africa has developed legislation and policies in an aim to overcome the barriers experienced by PWDs, however its practical implementation is still a challenge. If one considers the wording of Section 3.2 of the *Employment Equity Act, 55 of 1998* “failure to observe it does not, by itself, render a designated employer liable in any proceedings, except where the code refers to obligations that are required by the Act”⁵⁸⁹, it creates the impression that the decision rests with the employer to shape employment of PWDs according to current policies. Often employers assume that PWDs have limited working capacity and that employing them will be problematic. Stigmatisation of PWDs is thus still a reality.⁵⁹⁰

The INDS regards disability as a developmental concern and thus adopts the social model of disability. It shifts the burden from an individualised medical treatment approach to a social model that recognises the structural and social problems disabled people encounter.⁵⁹¹ It further recognises the role therapeutic and rehabilitative interventions have in addressing shortcomings to enable disabled people to participate in activities and to achieve and maintain an optimal level of independence. This National Strategy recommends institutional structures that render services to disabled people and their families. The National Office on the Status of Disabled Persons (OSDP) that was established in 1997 is in line with this National Strategy. Several provincial disability desks have been established at local and community levels.⁵⁹²

⁵⁸⁷ Ngwenya *African Disability Rights Yearbook* 320.

⁵⁸⁸ Maja et al 2011 *SAJOT* 24.

⁵⁸⁹ Maja et al 2011 *SAJOT* 25.

⁵⁹⁰ Maja et al 2011 *SAJOT* 29.

⁵⁹¹ Gathiram 2008 *IJSW* 148.

⁵⁹² Gathiram 2008 *IJSW* 148.

Christianson asserts that the INDS calls for PWDs to be provided with a wide range of employment opportunities to meet their needs and offer actual possibilities of occupational choice.⁵⁹³

A critique of the present social security system is included and states as follows:

The present social security legislative framework, its administration and the allocation systems, tend to be discriminatory, punitive, insensitive to the specific needs of people with disabilities, uncoordinated, inadequate and riddled with high levels of fraud.⁵⁹⁴

The White Paper identified certain policy objectives, for example to provide for a coordinated and equitable system of social security to meet basic needs and develop capacity for independent living, self-sufficiency and integration of people into the mainstream of society. One may well ask how the word "integration" is defined and how it could be enforced on a practical level. Will it be accessible to all disabled people, for both occupational and non-occupational illness and disability?

The White Paper further addresses reasonable accommodation measures to ensure that PWDs may enjoy all human rights and fundamental freedoms. This is in line with the provisions of PEPUDA, which deals with reasonable accommodation. It entails, *inter alia*, measures to address stress factors in an environment, to improve the independence of PWDs, to ensure that they are included in decision-making *et cetera*. To reasonably accommodate a person will involve various types of assistance, such as assistive devices, personal assistance, amendment of work arrangements allowing for flexibility. The White Paper promotes the development of minimum standards and norms relating to reasonable accommodation, to provide equal access and participation.

Another basic tenet of the White Paper is to promote the human capital represented by PWDs. A study conducted by the ILO in 2009, determined that South Africa lost

⁵⁹³ Christianson 2012 *Acta Juridica* 286.

⁵⁹⁴ Christianson 2012 *Acta Juridica* 286.

an estimated 7 percent of its annual GDP because of the exclusion of PWDs from the workplace.⁵⁹⁵

The White Paper recommends that PWDs should be seen as an asset, rather than a liability, and an investment should be made in developing their skills and abilities as the ability to work is an essential element of human dignity. The White Paper highlights the fact that the EEA has not succeeded in improving the employment status of PWDs, as only minimal year-to-year improvements have been reported by the Commission on Employment Equity.

One of the options currently available to PWDs in South Africa is sheltered employment, which offers a disability grant and weekly remuneration. This option is flawed because of a lack of financial support for the organisations offering these opportunities.⁵⁹⁶ Other options include supported employment, which allows a worker to continue in employment with integrated settings and job coaching. The open labour market is still the goal, and labour market strategies must be in place to make provision for disability at all levels in different enterprises. These must include innovative recruitment procedures, the setting of minimum standards of employment and compliance with active labour market policies. Introducing RTW programmes will help workers to return to employment in the labour market and provide them with the necessary support to recover more rapidly from an injury and return to a supportive environment.

The White Paper contains certain directives that are significant for this study. Disability-related economic affirmative action targets must be set, in line with disability population demographics. The provision of affordable vocational rehabilitation and related programmes is among of the directives and requires that disabled employees “must have access to affordable vocational rehabilitation, skills development, job retention and return-to-work programmes after onset of disability”. Specific dates have been targeted. For the period 2015-2019, the aim was to have 50 percent of disabled employees enrolled in return-to-work programmes. For the period 2020 to 2030 that number should rise to 100 percent.

⁵⁹⁵ White Paper on the Rights of People with Disabilities, 91.

⁵⁹⁶ White Paper on the Rights of People with Disabilities, 95.

The Department of Labour is identified as the main player in executing these duties.⁵⁹⁷ Disabled employees must have access to skills development programmes, job retention and RTW programmes and vocational rehabilitation. Socio-economic development programmes (such as habilitation, rehabilitation, skills development, entrepreneurial and employment support programmes) must be provided to PWDs who feature on the national employment services database. This could enhance employment opportunities for PWDs.

Rehabilitation is specifically mentioned and described in the INDS to aid individuals in becoming fully participating members of society, with access to all benefits, including job and training opportunities. It is further submitted that appropriate rehabilitation services will enable people to live economically independent lives actively participating in society. The policy objectives are described as follows:

1. to enable people with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric, and/or social functional levels;
2. to provide people with disabilities with the tools to change their lives and to give them a greater degree of independence;
3. to prevent secondary disabilities or to reduce the extent of disability;
4. to take into account the specific needs of different disability groupings.⁵⁹⁸

Furthermore, the importance of training⁵⁹⁹ for those who will be involved in rehabilitation services, which should form part of the national inter-sectorial rehabilitation strategy, is also emphasised. Major stakeholders are involved, such as NGOs and government departments. The INDS also refers to vocational rehabilitation and states that it must be aimed at PWDs, whose prospects of attaining and retaining employment are substantially reduced because of their disability, but who have reasonable prospects of securing and retaining suitable employment. The need for assistive devices is provided for in the strategy, and is it

⁵⁹⁷ Anon 2017 https://www.gov.za/sites/www.gov.za/files/39792_gon230.pdf.

⁵⁹⁸ INDS 30.

⁵⁹⁹ (in the widest sense, including include general training, further training and in-service training, specialised training, retraining and re-orientation, as well as induction/introductory courses for personnel not directly involved in the rehabilitation process).

stated that for PWDs to participate as equal members of society, they need to have access to both affordable and appropriate assistive devices.

McClain-Nhlapo, World Bank Group Global Disability Advisor, describes the White Paper as follows:

I think the white paper has a lot in it that is good. However, right now it is just a paper. It needs to be a real life document with an investment in changing people's lives for the better.⁶⁰⁰

She was further of the opinion, being well-acquainted with policy implementation, that it could take up to fifteen years from baseline for the policy to be implemented step by step. There is much South Africa still needs to do to make the White Paper a reality. She further describes that "the real test of the summit lies in how the White Paper is going to become operational in real life".⁶⁰¹ She also urges PWDs to be aware and knowledgeable about their rights and to "be bold enough to hold your government accountable".⁶⁰²

The INDS refers to the employment of PWDs in other countries and specifically that legislation may be needed to remove discrimination barriers in the workplace. It should include mechanisms to ensure equal opportunities in the workplace. The following policy objectives are:

1. The unemployment gap between non-disabled and disabled job-seekers must be narrowed.
2. Conditions must be created to broaden the range of employment options for disabled people so as to provide them with real possibilities of occupational choice.
3. The vocational integration of people with disabilities must be facilitated, whatever the origin, nature or degree of the disability (ies).⁶⁰³

The INDS further refers to employment equity in the open labour market. It urges for legislation to be enacted to promote "equitable employment levels" for all

⁶⁰⁰ SABC News 2016 <http://www.sabc.co.za/news/a/4e2816004c0352439b629bf0bca466af/SA-disabilities-white-paper-comprehensive-and-solid>.

⁶⁰¹ SABC News 2016 <http://www.sabc.co.za/news/a/4e2816004c0352439b629bf0bca466af/SA-disabilities-white-paper-comprehensive-and-solid>.

⁶⁰² SABC News 2016 <http://www.sabc.co.za/news/a/4e2816004c0352439b629bf0bca466af/SA-disabilities-white-paper-comprehensive-and-solid>.

⁶⁰³ INDS 43.

disabled employees, in both the public and private sectors. Employment targets at both entry and higher levels are needed and tax incentives for organisations who achieve targeted employment levels must be investigated, as well as incentives for the training and employment of people with multiple or severe disabilities. Reasonable work environments must include the accommodation of work stations by means of: assistive devices; personal assistance; adjustments to equipment and the work environment; specialised and alternative technology; listing of the essential requirements of jobs to determine the suitability of those seeking employment; and promotion of alternative work hours and arrangements *et cetera*.⁶⁰⁴

A specific recommendation by the INDS, relating to this study is a call for effective and inclusive inter-sectoral collaboration between government departments in the administration of social security and personnel training. Regarding social security benefits, it was recommended (in recommendation 13b) that social security benefits be reviewed, to *inter alia*, to make provision for the removal of barriers and the development of national guidelines on how the transfer of PWDs currently receiving social benefits to self-employment or the open labour market. Recommendation 13C stipulates that the national guidelines and minimum norms and standards for the provision of assistive devices as well as other assistance be reviewed.⁶⁰⁵

The importance of a multi-sectorial, holistic approach enabling PWDs to participate in all aspects of society was highlighted. Government departments need to work closely with the Office on the Status of Persons with Disabilities, when laws and policies concerning PWDs are developed. Other stakeholders such as employer organisations and civil society organisations should also be consulted, to give guidance on matters such as job-coaching and on-the-job-training.

The need to review the implementation of laws concerning PWDs is an important part of the INDS. It advocates for the involvement of representatives of PWDs. It also calls for tax rebates to motivate companies to employ PWDs and for punitive measures for non-compliance. Furthermore, clear guidelines must be developed for the application of the relevant laws, and how to reasonably accommodate. The

⁶⁰⁴ INDS 44.
⁶⁰⁵ INDS 103.

application of incentives and non-compliance measures must also be clarified. Specific structures must be in place to ensure that laws and policies are implemented. The OSDP has an important role to play in coordinating and disseminating information in a transparent and accountable manner. All departments need to be involved, and the setting of targets for government officials must be considered.⁶⁰⁶

The manner in which disability grants are distributed must be reviewed by the Department of Social Development, in conjunction with the disability sector, to ensure that they make provision for encouraging PWDs to return to the labour market and addressing the fear they may have for losing their benefits if unsuccessful. A disability grant should supplement income and not replace it. Providing a person with a disability grant whilst employed should thus be considered as a further incentive to obtain employment.⁶⁰⁷

Role-players, like the government, employers, unions, education institutions and international agencies will need to coordinate their efforts towards reducing the inequality of PWDs. Legislation, policies, programmes and services must be more aligned.⁶⁰⁸

To summarise, the INDS contains important RTW directives and sends out a clear message that all role-players must collaborate to improve the lives of PWD's.

3.3.1.2 Other governmental Policies on RTW

Various other policies provide indirect support for the idea of RTW⁶⁰⁹ and a number of government departments will be involved in an RTW system.

3.3.1.2.1 National Rehabilitation Policy

The National Rehabilitation Policy 2000 was developed by the Department of Health in a direct response to the INDS.⁶¹⁰ The National Rehabilitation Policy of 2006 aimed

⁶⁰⁶ INDS 40.

⁶⁰⁷ INDS 40.

⁶⁰⁸ INDS 92.

⁶⁰⁹ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 11.

at securing the rights of equal access to services relating to healthcare, including equal access to mental health care and rehabilitation services.⁶¹¹ It aimed at assisting PWDs to attain maximum independence and to be included in all aspects of life. It also contained certain objectives relating to human resource development and the allocation of funding for assistive devices, whilst being sensitive to the needs of consumers and service providers. This was the first move to put the principle of equalisation for PWDs into practice.⁶¹² Access to rehabilitation services is now widely accepted as a prerequisite for the equalisation of opportunities.⁶¹³

3.3.1.2.2 The Department of Social Development Policy on Disability

This policy builds upon the framework as set out in the INDS by recommending that departments integrate disability affairs into their social development policies. Its further aim is to facilitate the transformation shift in line with the current policy framework in order to enhance the inclusion of PWDs. The policy adopts the social model of disability for the provision of social services. It also anticipates close collaboration between the Department of Health and the Department of Social Development in the provision of these services. The reference to the importance of social adjustment within the community is significant. The Policy further suggests the development of community-based strategies aimed at re-integrating persons with disabilities into their communities and creating awareness of available rehabilitation services.⁶¹⁴ In 2000 the Department of Health adopted a community-based rehabilitation model (CBR)⁶¹⁵ which may help to rehabilitate and return employees to work.

3.3.1.2.3 Disability Framework for Local Government (2009–2014)

In response to the ratification of the CRPD, the Disability Framework for Local Government for the period 2009–2014 was developed by the South African Local Government Association (SALGA). For the first time, local governments in South

⁶¹⁰ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 14.

⁶¹¹ Ngwenya et al *African Disability Rights Yearbook* 324.

⁶¹² Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 14.

⁶¹³ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 14.

⁶¹⁴ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 47.

⁶¹⁵ Gathiram 2008 *IJSW* 148.

Africa addressed disability. In terms of this framework, municipalities need to develop partnerships with the disability sector, advance equal opportunities and access to services for PWDs at local level. Unfortunately, some administrative and governance related problems weakened the success of this framework at local government level.⁶¹⁶ An example is the *National Land Transport Act 5 of 2009* being amended in recent years to make provision for accessible transport for PWDs, an area neglected in the past.⁶¹⁷ The Disability Framework for Local Government 2015 – 2020 accordingly followed. It calls, *inter alia*, for the mainstreaming of disability into all spheres of local government; ensure equitable representation of PWDs across occupational categories and levels; create barrier free environments; oversee training and development opportunities for PWDs *et cetera*.⁶¹⁸ With reference to reasonable accommodation, the Framework also calls upon municipalities to “take all reasonable steps to ensure that a supportive work environment is created”.⁶¹⁹ For instance, provision needs to be made for the development and provision of facilities, such as programmes; equipment and devices to increase independence and productivity. It is important to note that consultation with disabled employees is also encouraged as well as the involvement of technical experts.⁶²⁰

3.3.1.2.4 The National Development Plan (2030 vision)

The National Development Plan, which was approved in 2012, describes South Africa as a country “wherein all citizens have the capabilities to grasp the ever-broadening opportunities available”.⁶²¹ An approach that gives credence to “one size fits all” should be discouraged and the mainstreaming of disability in so far as it forms part of all aspects of planning is encouraged.⁶²² The Government states that social security mechanisms must be in place to “cover risks associated with informal employment”. The state will bear the primary responsibility to ensure that its visions

⁶¹⁶ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 17.

⁶¹⁷ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 17.

⁶¹⁸ The Disability Framework for Local Government 2015 – 2020, vi; 4.

⁶¹⁹ The Disability Framework for Local Government 2015 – 2020, 22.

⁶²⁰ The Disability Framework for Local Government 2015 – 2020, 23.

⁶²¹ Foreword to the *National Development Plan (2030 vision)*.

⁶²² *The National Development Plan (2030 vision)* 52.

are achieved.⁶²³ A specific commitment is made as follows: "Social security must not be limited to those who have made private contributions to private schemes", and it should thus be extended to those working in the informal sector,⁶²⁴ Even though RTW is not directly addressed, it is hoped that provision will be made through other legislative measures, but that coverage will specifically be extended to those employed in the informal sector, as discussed above.

3.3.1.2.5 Department of Labour: Annual Performance Plan 2016/2017

One of the key initiatives of the Department of Labour was the development of a policy on Rehabilitation, Reintegration and RTW for Injured and diseased workers, after the INDS enquiry emphasised that COIDA made little mention of RTW policies and programmes.⁶²⁵ Since then, the Compensation Fund began with the process of developing a comprehensive policy framework for rehabilitation, RTW and re-integration of workers. The aims of the policy framework are: To promote the functionality of persons through skills development, rehabilitation and alternative employment; the re-integration of ill or injured employees; to promote the RTW or functionality of workers suffering from an occupational illness or injury; and the relation of RTW strategies to the compensation system. The Minister of Labour approved the policy framework, and the chapter on RTW will form part of the amendments of the COIDA, as will be discussed later in the chapter.

In 2005, the Cabinet set a target of 2 percent for employment equity of PWDs in all government departments.⁶²⁶ Although progress has been made during the last eight years, from 0.16 percent in 2005 to 0.32 percent in 2010/11 and 0.36 percent in 2011/12, it still falls short of the 2 percent target. Hence, numerous frameworks and initiatives have been introduced to assist with the 2 percent employment quota target. For example, the JobACCESS Strategic Framework for Recruitment,

⁶²³ *The National Development Plan (2030 vision)* 230.

⁶²⁴ *The National Development Plan (2030 vision)* 368.

⁶²⁵ Department of Labour 2013 <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/compensation-fund-strategic-plan/2013-2019/cfstratplan2013.pdf>.

⁶²⁶ Mpofo 2012 <https://www.iol.co.za/dailynews/news/departments-failing-to-meet-disabled-employment-targets-1246383>.

Employment and Retention of Persons with Disabilities in the Public Service Workplace was introduced in 2009.⁶²⁷

Additional information available on the reasonable accommodation of PWDs can be found in a Handbook on Reasonable Accommodation for People with Disabilities in the Public Service.⁶²⁸ It encourages a case management approach to reasonable accommodation. Public service state departments must have a policy in place on how to manage the needs of PWDs “on an individualized, case-management basis”, based on best practices principles. The advantages of case management are highlighted, such as an improvement in employee morale, increased productivity and a successful return to work after a protracted period of absence.⁶²⁹ The functions of case management officers are also discussed, and some of which may include *inter alia* the following: To act as the coordinator amongst the different role-players; to identify individuals in need of DM or support to return to work; to coordinate the functional needs assessment of individuals, more specifically to determine the inherent requirements of the job; to make sure the participants rights are protected and that confidentiality is ensured through the process; and to collect reports for an inter-disciplinary review to interpret assessment; manage reasonable accommodation and termination if necessary. The case manager is a key role-player and must “link” expertise and opinions in the assessment process. Case management requires “effective coordination of the many factors and staff involved”.⁶³⁰ The Handbook also lists other role-players who may be involved, such as line managers, health and safety officers, trade union representatives, health professionals, disabled people organisations, employee job coaches *et cetera*.⁶³¹

It is uncertain whether the above principles are in fact applied and adhered to in the Public Service. If one considers the Annual Report on Employment Equity in the

⁶²⁷ Van der Byl *Twenty year Review: South Africa: Background paper disability: 1994-2014* 22.

⁶²⁸ Department of Public Works and Administration Handbook on Reasonable Accommodation for People with Disabilities in the Public Services 11.

⁶²⁹ Department of Public Works and Administration Handbook on Reasonable Accommodation for People with Disabilities in the Public Services 11.

⁶³⁰ Department of Public Works and Administration Handbook on Reasonable Accommodation for People with Disabilities in the Public Services 12.

⁶³¹ Department of Public Works and Administration Handbook on Reasonable Accommodation for People with Disabilities in the Public Services 13.

Public Service 2015/2016 it is indicated that a shortfall of its 2 percent representation target still exists.⁶³² These figures indicate that South Africa must have stronger mandatory RTW frameworks than handbook guidelines that are not being enforced. It is submitted that the case management approach, as suggested above, should form part of the COIDA proposed amendments, or of a mandatory RTW policy.

Various policies providing indirect support for the idea of RTW exist. Some contain valuable components of rehabilitation, re-integration and return to work, which will have to be considered when legislation is amended.

3.3.2 Constitutional framework

It is common cause that RTW, rehabilitation and re-integration measures in South Africa are not provided for sufficiently. A discussion on the right to social security, as well as its realisation will follow. A comparison will also be drawn between the duty to realise the right to social security in terms of the Constitution against the backdrop of South Africa's international obligations, after which an investigation on whether the Constitution provides support for the introduction of an RTW arrangement will be conducted. The right to equality as far as it relates to RTW will also be analysed, followed by a discussion of relevant South African case law.

3.3.2.1 Introduction

The Preamble to the Constitution promises the establishment of a society founded on social justice and fundamental rights so as to "improve the quality of life of all⁶³³ citizens and free the potential of each person".⁶³⁴ Section 2 of the Constitution confirms that the Constitution is the supreme law of the Republic and that obligations imposed by it must be fulfilled. Any law or conduct inconsistent with it is invalid.

⁶³² Annual Report on Employment Equity in the Public Service 2015/2016, 33.

⁶³³ Own emphasis added.

⁶³⁴ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 9.

3.3.2.2 The right to social security and the progressive realisation thereof

Section 27 of the Constitution makes provision for the rights of PWDs to be protected:

Section 27(1)(c) Everyone has the right to have access to social security, including if they are unable to support themselves and their dependents, appropriate social assistance,

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

The concept of social security was first introduced in South Africa through the inclusion of a right to access to social security in Section 27(1)(c) of the Constitution.⁶³⁵ Klinck states that social security usually comprises both social assistance and social insurance, but section 27(1)(c) mentions social assistance in a separate provision.⁶³⁶ Social security can also be described as the body of arrangements shaping the solidarity of people facing lack of earnings, or who are threatened by it.⁶³⁷ Section 27(2) thus places a constitutional duty on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.⁶³⁸ Thus, the inclusion of these qualifications can be seen as an acknowledgment that the right to social security “cannot be fulfilled by the state immediately and completely”.⁶³⁹ Mandatory RTW obligations will allow for a more comprehensive approach to social security, which the government will have to adopt to assure that PWDs have the right to social security, even during periods when resources are under stress.

With reference to “progressive realisation”, it will be seen that this closely resembles the wording in section 2(1) of the International Covenant on Economic, Social and Cultural Rights. The amount of resources available, the special needs of disadvantaged and vulnerable groups, and the ultimate goal of providing access to social security are factors that must be considered when the question of

⁶³⁵ Klinck 2001 *EJLF* 165.

⁶³⁶ Klinck 2001 *EJLF* 163.

⁶³⁷ Klinck 2001 *EJLF* 169.

⁶³⁸ Olivier and Janse van Rensburg 2000 *LDD* 87-88 and 90.

⁶³⁹ Committee Report No 3: Constitutional framework of Social Security in South Africa: regulation, protection, enforcement and adjudication, 50.

reasonableness is raised, as stated in Section 27(2).⁶⁴⁰ If one considers the United Nations' Comment No 3 Paragraph 11 by the Committee on Economic, Social and Cultural Rights, it becomes clear that the state must ensure the widest possible enjoyment of the right when resource constraints are prevalent. The available resources as quoted in Section 27(2) must be effectively and equally utilised.⁶⁴¹

In the case of *The Government of the Republic of South Africa and Others v Grootboom*⁶⁴² the Court interpreted reasonableness as follows:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁶⁴³

The Court further emphasised that policies and programmes must be reasonable, both in their conception and implementation. It is also important to understand reasonableness in the context of the Bill of Rights as a whole.⁶⁴⁴ The Court further stated as follows:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁶⁴⁵

With further reference to *Grootboom*, the Court stated that that rights cannot be realised immediately, and that the goal of the Constitution is to ensure that the basic

⁶⁴⁰ Guthrie et al "The South African Federal Council on Disability Social Security" 36.

⁶⁴¹ Guthrie et al "The South African Federal Council on Disability Social Security" 37.

⁶⁴² *The Government of the Republic of South Africa and Others v Grootboom 2000 (11) BCLR 1169 (CC)*.

⁶⁴³ Para 41 of *Grootboom*.

⁶⁴⁴ Olivier and Janse van Rensburg 2000 *LDD 91*.

⁶⁴⁵ Para 44 of *Grootboom*.

needs of societies are effectively met and that “progressive realisation” must be understood to mean that the state needs to take certain steps in order to meet this goal.⁶⁴⁶ In *Grootboom*, the Court also referred to the case of *Soobramoney v Minister of Health (Kwazulu Natal)*⁶⁴⁷ where the Court interpreted the phrase “available resources” by emphasising that the obligations imposed by sections 26 and 27 of the Constitution are dependent on the availability of resources. In *Grootboom*, the Court further emphasised that there should be a balance between goals and means. The Court stressed as follows:

The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.⁶⁴⁸

Olivier and Janse van Rensburg⁶⁴⁹ emphasise that the availability of resources is merely one of the factors to be considered when determining whether a right was infringed. Drawing from *Grootboom*,⁶⁵⁰ it is important for the state to manage its limited resources to address claims. At times it may be necessary to adopt a holistic approach to prudently meet the larger needs of society instead of focusing on the specific needs of individuals.⁶⁵¹ If RTW programmes are properly managed they may alleviate the burden of the state in relation to its limited resources.

With reference to the wording “right to access to social security”, guidance is once again obtained from the *Grootboom* judgment. The Court explained that “right to access to” entails a wider interpretation than “the right to”. Access to a certain right thus requires a broader spectrum of conditions to be met. For instance, access to adequate housing implies more than mere bricks and mortar – land, water and sanitation services are also involved. The same argument can be made for the right to access to social security.⁶⁵²

⁶⁴⁶ Olivier and Janse van Rensburg 2000 *LDD* 91.

⁶⁴⁷ *Soobramoney v Minister of Health (Kwazulu Natal)* 765 (CC); 1997 (12) *BCLR* 1696 (27 November 1997), hereafter *Soobramoney* case.

⁶⁴⁸ PAR 46 of *Grootboom*.

⁶⁴⁹ Olivier and Janse van Rensburg 2000 *LDD* 92.

⁶⁵⁰ PAR 31 of *Grootboom*.

⁶⁵¹ Olivier and Janse van Rensburg 2000 *LDD* 92.

⁶⁵² Olivier and Janse van Rensburg 2000 *LDD* 92.

Olivier and Janse van Rensburg further explain that “access” thus means more than just a pure right. The state will have to provide, by way of legislative and other measures, for all to have access to social security protection.⁶⁵³ As will be argued later in the chapter, the government will have to amend its current legislative framework to allow for a more comprehensive approach to social security protection, including the introduction of more detailed RTW programmes for PWDs to enable them to return to work rather than rely on disability grants.

Drawing from the discussion in Chapter 2, it is important to note that the right to access to social security⁶⁵⁴ is not limited to the “access to” qualifier, but its implementation is still limited, owing to the fact that the rights must be implemented progressively and that states parties need to report on the progress they have made in implementing these rights.⁶⁵⁵ Since South Africa recently ratified the ICESCR, the government will have to report on how these rights were being implemented and what specific measures were being taken.

All States Parties are thus obligated to progressively achieve the full realisation of rights and thus compelled, notwithstanding their national wealth, to move as swiftly as possible towards the realisation of socio-economic and cultural rights. States Parties may not, with reference to the right to social security, subject the realisation of rights to “deliberate retrogressive measures”.⁶⁵⁶ With reference to the United Nation’s General Comment 3 by the Committee on Economic, Social and Cultural Rights, States Parties must take all appropriate measures, within a reasonable period, to ensure compliance with the requirements of fulfilling the rights of the ICESCR. The ICESCR thus provides that States Parties need to ensure or provide for the realisation of rights to the maximum of their available resources, and in times of financial difficulty, must still realise minimum core obligations.⁶⁵⁷

⁶⁵³ Olivier and Janse van Rensburg 2000 *LDD 93*.

⁶⁵⁴ Article 9 - The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

⁶⁵⁵ Olivier “Social Security Framework” 157.

⁶⁵⁶ Olivier “Social Security Framework” 157.

⁶⁵⁷ Olivier “Social Security Framework” 159.

It is important to note that South Africa has ratified the ICESCR⁶⁵⁸ and that it must be reminded by section 39 of the Constitution that the ICESCR is a valuable source of interpretation for South African courts. The UNCESCR in its General Comment no 3 Par 10 refers to minimum core obligations as follows:

...The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. . . . If the Covenant were to be read in such a way as to not establish such a minimum core obligation, it would largely be deprived of its *raison d'être*. The failure by the state to provide for the basic subsistence needs of the population may be considered as a *prima facie* violation of the Covenant.

With reference to legislative and other measures, it is proposed that legislation needs to be enacted, however if States do take other measures (such as administrative, judicial, social, educational or other methods), they will need to show that these measures were appropriate.⁶⁵⁹ States parties, when reporting, need to indicate not only the measures they have taken, but also provide an explanation why these measures were considered the most "appropriate".

Since South Africa ratified the ICESCR, it will need to move towards the minimum core requirement, and away from the reasonableness requirement. I agree with the submission by Olivier that South Africa will need to identify and address its minimum core obligations as it relates to social security.⁶⁶⁰

Article 2 of the ICESCR thus compels States Parties as follows:

...take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources" to with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

With reference to General Comment 5, as discussed in Chapter 2, the Committee emphasised that the obligation of progressive realisation requires governments to do more than merely refrain from taking measures which may negatively impact on

⁶⁵⁸ ESCR-Net 2015 <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>.

⁶⁵⁹ Olivier "Social Security Framework" 159.

⁶⁶⁰ Olivier "Social Security Framework" 160.

PWDs. The Committee⁶⁶¹ also stated that at times, additional resources may have to be made available (including specially tailored measures), to achieve the full participation and equality of PWDs.

For South Africa to meet its international obligations, it will need to take positive measures, such as making additional resources available to ensure that the right to social security is realised. The core duty lies with the government, but it may also be expected of the private sector to contribute to the progressive realisation of the rights of PWDs. South Africa thus needs to identify its core obligations, also with reference to its RTW obligations, as imposed by the Constitution and other international instruments. Tailored policies and programmes must be legislated to address obstacles to social security. This should be carried out in close collaboration with representative groups of PWDs.

Section 7 of the Constitution is significant for this study. It provides that the State “must respect, protect, promote and fulfil the rights in the Bill of Rights”. However, the rights in the Bill of Rights are subject to limitation, as set out in Section 36⁶⁶² of the Constitution or elsewhere in the Bill. It is thus important to read section 7 in conjunction with section 36 to determine to what extent access to social security could be limited.⁶⁶³ In the case of *S v Zuma*,⁶⁶⁴ the Constitutional Court explained that the constitutional analysis of a constitutional provision consists of two phases. First, the applicant must be able to show that there was an infringement on the duty to respect, promote and fulfil the rights in the Bill of Rights. The respondent must

⁶⁶¹ Paragraph 10 General Comment 5.

⁶⁶² Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁶⁶³ Olivier and Janse van Rensburg 2000 LDD 88.

⁶⁶⁴ *S v Zuma and Others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995).*

then prove that the infringement was justifiable and that the particular right was legitimately restricted as *per* the criteria set out in Section 36. Thus, if an infringement of the right to social security is alleged (in terms of either current or future legislation), it needs to be measured against the limitation clause, section 36 of the Constitution.⁶⁶⁵

Most of the rights contained in the Bill of Rights apply to “everyone” and most of the rights set out in this chapter are applicable to and include PWDs.⁶⁶⁶ It is important to adopt a holistic approach in analysing the rights of PWDs. Guthrie et al⁶⁶⁷ are of the opinion that the rights to equality and human dignity are inter-related and should underpin the realisation of the rights of PWDs.⁶⁶⁸ Restoring the earning capacity of PWDs by way of RTW arrangements in cases where it is possible to do so, is inherent to restoring the dignity of individuals. A holistic approach must also be adopted when developing RTW-specific legislation or amending the current legislative framework, by considering all the relevant constitutional rights and values that apply to RTW arrangements.

The Bill of Rights represents a substantive constraint of public power and requires the State to refrain from violating fundamental rights and to promote and fulfil the rights contained in the Bill of Rights. It must once again be emphasised that the rights are applicable to all, including PWDs.⁶⁶⁹ Attention must be paid to groups of people who are excluded from the formal system, such as the self-employed and those in the informal sector.

It is vital for the State to adopt concrete legislative measures to assist PWDs with the introduction of RTW programmes, thus fulfilling their rights as set out in the Constitution.

⁶⁶⁵ Olivier and Janse van Rensburg 2000 *LDD* 89.

⁶⁶⁶ Ngwenya et al *African Disability Rights Yearbook* 315.

⁶⁶⁷ Guthrie et al “The South African Federal Council on Disability Social Security” 34.

⁶⁶⁸ Guthrie et al “The South African Federal Council on Disability Social Security” 34.

⁶⁶⁹ Grobbelaar-du Plessis and Grobler *African Disability Rights Yearbook* 315.

3.3.2.3 Implicit support for the introduction of RTW arrangements in South Africa

Chapter 3 of the Constitution applies to all sectors of government and they must conduct their affairs as set out in section 41 of the Constitution. This can be interpreted to support the introduction of an RTW system in South Africa.⁶⁷⁰ Section 41 stipulates that all organs of state must:

secure the well-being of the people of the Republic; provide effective, transparent, accountable and coherent government for the Republic as a whole; co-operate with one another in mutual trust and good faith by - (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another.

The Bill of Rights provides implied support for an RTW system; and there are a number of sections which may be interpreted as supporting of the general notion of RTW provisions, in addition to the right to access to social security. This applies in particular to the right to human dignity; the right not to be unfairly discriminated against; the right to fair labour practices; the right to an environment that is not harmful; and access to health care services.⁶⁷¹ Other rights indirectly applicable are, *inter alia*, the right to life (section 11); the right to freedom and security of the person (Section 12); and the right to freedom of trade, occupation and profession (section 22).⁶⁷²

The constitutional framework thus provides for the introduction of RTW arrangements. Considering the various government policies on disability (which will be discussed later in the chapter), it becomes clear that they are generally progressive in nature and in line with the constitutional principles such as equality, dignity and social justice.⁶⁷³ However, in most of the policy documents, there is little emphasis on combining rehabilitation with RTW policies and programmes. Thus, although some elements which support an RTW system are embedded in law, they are "intermingled with different documents" and fall under the various ambits of

⁶⁷⁰ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 9.

⁶⁷¹ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 9.

⁶⁷² Grobbelaar-du Plessis and Grobler *African Disability Rights Yearbook* 315.

⁶⁷³ Olivier et al *The role of standards in labour- and social security law: international, regional and national perspectives* 235.

political masters. There is a need for a system of inter-governmental coordination and collaboration, this being one of the biggest challenges for the introduction of an RTW programme in South Africa.⁶⁷⁴ A substantial amendment to COIDA, after consultation and coordination with ministerial leadership, may contribute to the introduction of RTW into current legislation and policy documents.⁶⁷⁵ The amendments are to be discussed later in the chapter, and as will be argued, further amendments will be necessary in order to successfully return workers back to work.

3.3.2.4 The right to equality

Section 9 of the Constitution provides as follows:

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

Sub-section 3 states that the state may not unfairly discriminate, either directly or indirectly against anyone on one or more grounds, including disability. Subsection 4 places a duty on all persons to not discriminate unfairly on the listed grounds, including disability. The State is also obliged to enact legislation to prevent or prohibit unfair discrimination. PWDs are thus included in this section and the state must take positive measures to promote equality for *inter alia*, PWDs.⁶⁷⁶

Section 9 provides for the vertical application of the rights listed in section 9(3) in that the *state* may not unfairly discriminate directly or indirectly on the grounds set out in section 9(3). Section 9(4) provides for a horizontal application in that *no person* may unfairly discriminate on the grounds as discussed in section 9(3). It is interesting to note that section 9(3) and section 9(4) are the only two provisions in the Constitution that directly address disability in the Constitution.⁶⁷⁷ The prohibition

⁶⁷⁴ Olivier et al *The role of standards in labour- and social security law: international, regional and national perspectives* 235.

⁶⁷⁵ Olivier et al *The role of standards in labour- and social security law: international, regional and national perspectives* 237.

⁶⁷⁶ Guthrie et al "The South African Federal Council on Disability Social Security" 34.

⁶⁷⁷ Ngwenya C et al *African Disability Rights Yearbook* Vol 1 (Pretoria University Law Press Pretoria 2013) 315.

of unfair discrimination does not require identical treatment of relevant parties in all circumstances. The actual circumstances people find themselves in must be considered and specific measures must be taken to address those circumstances.⁶⁷⁸

3.3.2.4.1 The relevance of the right to equality for RTW

The concept of substantive equality is important and comes down to the fact that a substantive approach to equality should be adopted when RTW plans are considered. It is important to reflect on the impact the equality provision may have when certain social security arrangements are applicable to some beneficiaries only.⁶⁷⁹

In *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others*⁶⁸⁰ the Constitutional Court⁶⁸¹ described equality as follows:

Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do. Equality in respect of access to socio-economic rights is implicit in the reference to “everyone” being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.

The Court also interpreted the reasonableness of the legislative or other measures⁶⁸² by the state and found that that the enquiry should not be whether “other or more desirable or favourable measures” could have been implemented or whether public funds could have been spent more wisely.⁶⁸³ The Court further stated that a wide range of possible measures could be adopted by the state in order to meet its obligations and to meet the requirement of reasonableness. The Court emphasised the importance of context and when one is tasked to consider whether an exclusion to a social security benefit is reasonable, one should be mindful of the “purpose

⁶⁷⁸ Guthrie et al “The South African Federal Council on Disability Social Security” 35; *President of RSA v Hugo* (CCT11/96) [1997] ZACC 4.

⁶⁷⁹ For instance, seasonal workers, those who are self-employed et cetera.

⁶⁸⁰ *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 6 BCLR 569 (CC), hereafter *Khosa*.

⁶⁸¹ PAR 42 *Khosa*.

⁶⁸² PAR 48 *Khosa*.

⁶⁸³ PAR 48 *Khosa*.

served by social security” as well as the impact the exclusion may have on other inter-connected rights.⁶⁸⁴

In the case of *Prinsloo v Van der Linde*, the Constitutional Court confirmed as follows:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.⁶⁸⁵

In *Harksen v Lane*⁶⁸⁶ the Court found that when determining whether section 9(1) of the Constitution has been violated, the following enquiry needs to be conducted, namely, whether the provision differentiates between people or categories of people? If the answer is in the affirmative, it must be established whether the differentiation bears a rational connection to a legitimate government purpose. If not, it would constitute a violation of section 8(1). If it does bear a rational connection, it may still amount to discrimination. In order to establish whether differential treatment amounts to discrimination, a two-tier analysis is required.

Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant.⁶⁸⁷

The Court went on to state that the test of unfairness is measured primarily by the impact the discrimination may have on the complainant and others in a similar position. If it is found that the discrimination is unfair, it must be determined whether it may still be justified in terms of Section 36 of the Constitution.⁶⁸⁸

⁶⁸⁴ PAR 49 Khosa.

⁶⁸⁵ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (hereinafter the *Prinsloo case*).

⁶⁸⁶ *Harksen v Lane* 1997 11 BCLR 1489 (CC); 1998 1 SA 300 PAR 53 (CC).

⁶⁸⁷ Para 53.

⁶⁸⁸ Section 33 of the Interim Constitution.

With reference to the case of *Du Toit & Another v Minister of Welfare and Population Development & Others*⁶⁸⁹ Smith⁶⁹⁰ praised the manner in which the Constitutional Court approached equality, and asserted as follows:

The Constitutional Court adopted a substantive notion of equality, as it embraced the notion of equality of recognition emphasising the importance of accepting people for what they are and not based on stereotypical prejudices which prohibits people from enjoying and exercising their rights and fundamental freedoms simply because they are 'different' from the rest of society.

In *Minister of Finance v Van Heerden*,⁶⁹¹ the Court explained that the substantive notion of equality recognises that "besides uneven race, class and gender attributes of society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist". The Court, drawing from the *Hoffmar*⁶⁹² case, emphasised that the Constitution requires of us to dismantle such differential practices to prevent new patterns of disadvantage coming to the fore. Moseneke J (as he then was) states that all courts were obliged to, in each equality claim, to scrutinise the following:

... the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.⁶⁹³

When assessing fairness, a "situation-sensitive"⁶⁹⁴ approach is needed, since patterns of hurtful discrimination and stereotypes vary in different societies. The courts also confirmed that the unfair discrimination enquiry requires several stages, as was set out in *Harksen v Lane NO and Others*. Moseneke J went on to say that a comprehensive understanding of the notion of equality requires a harmonious reading⁶⁹⁵ of all the provisions of section 9.⁶⁹⁶ Moseneke J further stated that

⁶⁸⁹ *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC).

⁶⁹⁰ Smith African Human Rights Law 623.

⁶⁹¹ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 27.

⁶⁹² *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).

⁶⁹³ PAR 27.

⁶⁹⁴ As was set out in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 126.

⁶⁹⁵ Para 28: "A comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law.

restitutionary measures such as affirmative action”, may be taken to promote the achievement of equality.⁶⁹⁷ Olivier⁶⁹⁸ also confirms that affirmative action measures⁶⁹⁹ may be implemented to address inequality.

In line with the above discussion, it will be necessary for South Africa to introduce RTW, rehabilitation and re-integrative plans in a manner that does not create barriers, therefore, a substantive approach to equality must be followed. The legislature, when amending or enacting legislation, will need to be sensitive about the fact that some individuals are more disadvantaged than others and may need intensive intervention measures to be re-integrated fully into society. The courts need to use substantive equality as a yardstick when confronted with a case where discrimination occurs on the basis of a person’s disability. One needs to be reminded constantly of the fact that a “one size fits all” approach does not work, especially when reasonable accommodation measures could have been deployed to avoid discrimination.

The inter-relatedness of the right to equality to other constitutional rights should be mentioned briefly since previous case law suggests a strong link between equality rights and social security rights.⁷⁰⁰ For example, in *Mashavha v President of the Republic of South Africa*⁷⁰¹ it was emphasised that the right to equality is not only a fundamental right but also a foundational value. In this case, any inconsistencies in the value of old-age pensions and childrens’ grants in different provinces, was held as having impaired the human dignity and led to division. In *Khosa*, the Court confirmed the inter-relatedness of constitutional rights and Mokgoro J found as follows:

On the other hand, section 9(3) proscribes unfair discrimination by the state against anyone on any ground including those specified. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination”.

⁶⁹⁶ Para 28.

⁶⁹⁷ Para 28.

⁶⁹⁸ Olivier Social Security Law 104.

⁶⁹⁹ Affirmative action measures are discussed later in the chapter.

⁷⁰⁰ Olivier Social Security Law 104.

⁷⁰¹ *Mashavha v President of the Republic of South Africa* 2005 2 SA 476 (CC); 2004 12 BCLR 1243 (CC).

The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom. Jacob J observed in *Government of the Republic of South Africa and Others v Grootboom and Others* that the proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on these values.

The Court⁷⁰² described equality (as a foundational value of the Constitution), to form part of the reference to “everyone” in terms of section 27, thus “everyone” is entitled to access to social security. It is a demonstration of the inter-relatedness of the different constitutional provisions.

Mokgoro J asserted that the Constitutional Court has, on several occasions, confirmed that Sections 27(1) and (2) could be viewed as “separate or discrete rights creating entitlements and obligations independently of one another”.⁷⁰³ The ambit of the protection afforded by section 27(1) could not be determined without reference to the reasonableness criteria set out in section 27(1).

The Court⁷⁰⁴ emphasised the importance of considering rights such as life, dignity and equality along with the availability of human and financial resources, when determining whether socio-economic rights have been fulfilled in terms of the constitutional standard of reasonableness. However, the Court confirmed that this should not be seen as a closed list and that the facts and circumstances of each case will determine the relevant factors to be considered. If the state is able to justify why benefits are not being paid to “everyone” entitled to such benefits in terms of section 27 (using criteria such as affordability) on which its decision is based, it must still be consistent with the Bill of Rights as a whole. Thus, if the means chosen by the legislature to give effect to the government’s obligation as set out in section 27, should unreasonably limit other constitutional rights, they must be considered.

⁷⁰² Para 42.

⁷⁰³ Khosa judgment, para 43.

⁷⁰⁴ Para 44.

In the case of *WH Bosch v The Minister of Safety and Security & Minister of Public Works*⁷⁰⁵ the Equality Court in Port Elizabeth highlighted the importance of human dignity:

There is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or potential violation of the disabled person's right to equality and maintenance of his dignity that was tendered or averred by the respondent.

In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration & Others*,⁷⁰⁶ the Bank failed to meet the provisions of the Code of Good Practice on Dismissal. The court highlighted the underlying constitutional rights to human dignity, equality and fair labour practices as well as the right to choose an occupation. The Judge made the following noteworthy statement:

...the marginalisation of PWDs in a workplace is not because of their ability to work, but because the disability is seen as an abnormality or flaw; that integration and inclusion in mainstream society aim not only to achieve equality, but also to restore the dignity of persons with disabilities.⁷⁰⁷

Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected", and once again the term "everyone" clearly includes PWDs. The right to human dignity thus effectively requires that all persons have access to their fundamental human rights in a manner that respects their human dignity.⁷⁰⁸

Olivier⁷⁰⁹ observes that vast categories of people are currently excluded from social protection, considering the fact that South Africa still follows a strict categorical approach, for instance: people who are not formally employed; people who do not qualify on the basis of an income and assets test; and those who are employed but do not have sufficient coverage and are often not assisted. Olivier further asserts that the government must fulfil its constitutional obligations and continue to develop

⁷⁰⁵ *WH Bosch v Minister of Safety and Security* (EqC) unreported case number 25/2005 Port Elizabeth (19 May 2006).

⁷⁰⁶ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration & Others* (2008) 29 ILJ 1239 (LC) (25 December 2007).

⁷⁰⁷ Grobbelaar-du Plessis and Grobler *African Disability Rights Yearbook* 320.

⁷⁰⁸ Guthrie et al "The South African Federal Council on Disability Social Security" 36.

⁷⁰⁹ Olivier Social Security Law 106.

jurisprudence and roll out a comprehensive programme addressing their plight.⁷¹⁰ South Africa's social security system in its current "unequal, exclusionary and inequitable structure" does not conform to the prescribed prohibition of unfair discrimination as set out in the Constitution. He also proposed that it will be appropriate and constitutionally feasible to adopt social security measures that are "redistributive" in nature and will give priority to vulnerable groups, including PWDs.⁷¹¹

In the Labour Court judgment of *Standard Bank*, the court devoted some of its discussion to the inter-relatedness of the right to be accommodated and other constitutional rights. The Labour Court⁷¹² found that in some instances, employers find it more convenient to budget for a disability dismissal instead of attempting to accommodate an employee. Such behaviour needs to be addressed, since it poses a direct infringement on the right to equality. Further, with reference to human dignity, I agree with the following submission of the Labour Court:⁷¹³

When employers accommodate employees effectively, they restore dignity to employees. Restoring the dignity of employees is also about returning the employee to the same job if possible. By returning Hoffman to his job as cabin attendant for South African Airways, the Constitutional Court aimed specifically at restoring his dignity.⁷¹⁴

The Labour Court⁷¹⁵ referred to the constitutional rights of freedom to pursue a trade, occupation and fair labour practices and declared that both employers and employees were entitled to such rights. With reference to dismissal, reference is drawn to the LRA, EEA and the respective Codes which enable "parties to strike the appropriate balance between their respective rights by providing processes for

⁷¹⁰ Olivier Social Security Law 106.

⁷¹¹ Olivier Social Security Law 106.

⁷¹² Para 61 *Standard Bank* case.

⁷¹³ Para 66 *Standard Bank* case.

⁷¹⁴ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 52 the Court explained that reinstatement to employment of a person who has been wrongfully denied from it, serves an important constitutional objective. "It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in the Constitution".

⁷¹⁵ Para 67 *Standard Bank* case.

avoiding unfair dismissal".⁷¹⁶ Reasonable accommodation of an employee and unjustifiable hardship are "countervailing forces" in an attempt to balance the rights of the respective parties with the employment relationship. If it is not possible for an employer to accommodate the disabled employee without unjustifiable hardship, he/she may dismiss.⁷¹⁷

In the case of *SA Airways Pty Ltd v Jansen van Vuuren and Another*⁷¹⁸ the Labour Court explained the aim of the EEA as follows:

Two of the main objects of the EEA are to promote and protect the employee's constitutional rights to equality and dignity and to eliminate unfair discrimination in employment. In terms of section 5 of the EEA, every employer is obliged to promote equal opportunity in the workplace and to eliminate any unfair discrimination in any employment policy or practice.

Further, the Labour Court⁷¹⁹ found that when considering fairness in terms of the EEA, the interests of employer and employee must be balanced. The impact that discrimination has on the victim, should be seen as the determining factor. In reference to whether Article 36 applies to the EEA, the Labour Court explains as follows:

Unlike in the case of an equality analysis under section 9 of the Constitution which also allows for a further step, namely a justification analysis in terms of section 36 where one is dealing with the law of general application, the EEA does not allow for justification of unfair discrimination. Its language is clearly prohibitive.

It is submitted that South Africa should work towards a situation of greater harmony between different constitutional rights and obligations. Furthermore, the obligations imposed by the Constitution as well as by national legislation need to be aligned with international obligations, given the fact that South Africa is a signatory to various international instruments that are relevant for RTW. There must be more harmony in the interpretation of the right to have access to social security on a conditional level and how the obligation is qualified in international instruments, such as the ICESCR.

⁷¹⁶ Para 67 Standard Bank case.

⁷¹⁷ Para 67 Standard Bank case.

⁷¹⁸ *SA Airways Pty Ltd v Jansen van Vuuren and Another* [2013] 10 BLLR 1004 (LC) (1 November 2012) PAR 28.

⁷¹⁹ *SA Airways Pty Ltd v Jansen van Vuuren and Another* [2013] 10 BLLR 1004 (LC) (1 November 2012) PAR 28.

As was argued in Chapter 2, South Africa will need to move away from the “reasonableness” qualifier, and rather move towards a minimum core requirement obligation, as it relates to social security, which also includes a comprehensive approach to social security, including RTW plans to ensure PWDs are re-integrated into the labour market. Without South Africa having an appropriate and detailed RTW framework, ill or injured employees stand the risk of losing their employment and becoming dependent either on family members and/or disability grants. This may have a direct impact on other constitutionally guaranteed rights, such as the right to dignity. If South Africa could find a way for different governmental sectors to cooperate closely with the private sector, it may just succeed in approaching social security in a more comprehensive manner. Should it adopt a formal approach to equality by relegating the South African social security sector to a compensatory function only, the country will not have the necessary framework in place to allow PWDs to be re-integrated into society. The government will have to determine how partnerships with other sectors (Department of Health, the private sector and disability organisations) may be strengthened to allow for an appropriate roll-out of RTW programmes on a national level. The judiciary must continue, as it has so far, to send out a clear message to employers that discrimination against PWDs will not be tolerated.

The legislature specifically has to consider how the equality provision will impact on the way legislation will be drafted to introduce RTW arrangements, such as further amendments to COIDA. Should individuals be excluded from the ambit of protection from COIDA, a different policy to provide for alternative arrangements for those who are self-employed or employed in the informal sector, will be required. The differential treatment for occupational and non-occupational illness and accidents must also be considered. Socio-economic aspects must be factored into any proposed changes to legislation.

3.3.3 Legislative framework

In this part of the chapter I intend to illustrate that much needs to be done to improve the re-integration of disabled workers into the workplace. Furthermore, the concept of disability management has not yet taken root in South Africa.

3.3.3.1 *Employment Equity Act 55 of 1998*⁷²⁰

There are three distinct, but related aspects that will be discussed: Prohibition of unfair discrimination; the reasonable accommodation of PWDs and affirmative action measures.

3.3.3.1.1 The Aim of the EEA

The purpose of the Act is set out in Section 2 as follows:

2. The purpose of this Act is to achieve equity in the workplace by-
 - (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
 - (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Marylyn correctly asserts that PWDs form part of the designated groups.⁷²¹ Thus, unfair discrimination on the basis of disability is forbidden. Chapter 3 specifically deals with the duty of the employer regarding affirmative action. It prescribes the implementation of affirmative-action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workplace.⁷²²

The Preamble to the EEA emphasises that there are pronounced disadvantages for certain categories of people, with reference to income, employment and occupation. The EEA is an outcome of South Africa previous political dispensation and recent attempts by the legislature to provide a commitment to the eradication of past

⁷²⁰ *Employment Equity Act 55 of 1998*, hereafter EEA.

⁷²¹ Marylyn 2004 *ILJ* 879.

⁷²² Cole and Van der Walt 2014 *Obiter* 506.

inequalities. It also gives expression to the broader constitutional right to equality as enshrined in section 9 of the Constitution, adapted to suit the workplace, and further aims to give effect to the obligations of the Republic of South Africa as a member of the ILO.⁷²³

3.3.3.1.2 The Prohibition of unfair discrimination

Section 6 of the EEA contains the main prohibition against unfair discrimination and it reads as follows:

1. No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
2. It is not unfair to-
 - a) take affirmative action measures consistent with the purpose of the Act; or
 - b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Section 5 determines that “every employer must take steps to promote equal opportunity in the workplace by elimination of unfair discrimination in any employment policy or practice”. Marumoagae⁷²⁴ submits that the EEA instructs all employers to strive towards employment equity, and diversify their workforce, which includes the employment of suitably qualified PWDs. The EEA aims to correct the national demographic imbalance of South Africa’s workforce by commanding employers to remove barriers that hinder designated groups,⁷²⁵ including PWDs, by way of affirmative action.⁷²⁶

Basson et al⁷²⁷ submit that discrimination is often compared to differentiation and that several reasons may exist why an employer would differentiate between employees. Although differentiation does not necessarily amount to discrimination, the question arises as to what would constitute an unacceptable reason for

⁷²³ Cole and Van der Walt 2014 *Obiter* 524.

⁷²⁴ Marumoagae PER 349.

⁷²⁵ PWDs is defined as follows in section 1 of EEA: ““people with disabilities” means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”.

⁷²⁶ Grogan Workplace Law 85.

⁷²⁷ Basson et al Essential Labour Law 233.

differentiation? The listed grounds in section 6(1) of the EEA, as quoted above could be the starting point. Grogan⁷²⁸ observes that although there might not have been an intention to discriminate, the impact of the discriminatory practice will be decisive. The discriminatory practice must also affect the dignity of the individual, who must be a member of a group worthy of protection –without a doubt PWDs belong to this group. The onus of proof of discrimination rests on the employee, then shifts to the employer to prove that he/she has not acted unfairly.⁷²⁹ In instances where the discrimination case is based on one of the unlisted grounds, the onus rests on the employee to prove both the discrimination as well as its unfairness.⁷³⁰

Discrimination could be either direct or indirect, with the first said to occur when adverse action is taken precisely because the person possesses one of the characteristics listed in section 6, or similar attributes.⁷³¹ Indirect discrimination may be more difficult to identify and usually occurs in instances where an employer applies a certain policy disproportionately to certain groups of employees, worthy of protection. Such discrimination may begin as equal treatment but could end in differentiation.⁷³² The list in Section 6(1) is not exhaustive and the amendment of the EEA to include “any arbitrary ground” confirms that there may be other grounds that are also prohibited.⁷³³

Dubber and Garbers⁷³⁴ state that the prohibition of unfair discrimination is addressed by several instruments through which the right to equality can be protected, and ideally also promoted. The EEA is the principal legislation for the protection and promotion of the right to equality and was designed to overcome the disadvantages many historically disadvantaged groups, such as PWD’s have faced.⁷³⁵

⁷²⁸ Grogan Workplace Law 87.

⁷²⁹ Grogan Workplace Law 87.

⁷³⁰ Basson et al Essential Labour Law 234.

⁷³¹ Grogan Workplace Law 88.

⁷³² Basson et al Essential Labour Law 235.

⁷³³ Grogan Workplace Law 89.

⁷³⁴ Dubber and Garbers Acta Juridica, 244-269.

⁷³⁵ Marumoagae PER 348.

In support of the above, it is worth analysing case law in which beneficiaries pursued successful unfair discrimination cases. For instance, in the case of *IMATU obo Strydom v Witzenberg Municipality & Others*⁷³⁶ the court⁷³⁷ referred to the works by Pretorius et al (Employment Equity Law 2001 par 7.3-7.4) and agreed with the submission made by them that, the duty of reasonable accommodation of employees by an employer is not confined to the EEA, but is also a duty implied by the concept of unfair discrimination in the general sense and it is further “one of the judicial and legislative tools for realising substantive equality”. I agree with the submission by both Pretorius and the Labour Court, in that a substantive approach to equality will be necessary in assisting PWDs to be re-integrated into the labour market and by removing discriminatory barriers, such as a refusal of reasonable accommodation. The judge asked whether non-compliance with such an important constitutional imperative would have an impact on both the procedural as well as the substantive fairness of the dismissal. The Court found that the provisions of items 10 and 11 of the Code of Good Practice: Dismissal⁷³⁸ were “inextricably tied” and non-compliance with these, will render a dismissal to be substantively and procedurally unfair.⁷³⁹

It is vital to have a clear understanding of the employer’s duty to reasonably accommodate employees, which will be discussed in the following paragraphs.

3.3.3.1.3 Reasonable accommodation of PWDs in terms of the EEA

PWDs are defined in Section 1 of the *Act* as follows:

...means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.

Reasonable accommodation is defined in the same section as follows:

⁷³⁶ *IMATU obo Strydom v Witzenberg Municipality & others* (2012) 33 *ILJ* 1081 (LAC), hereafter Strydom case.

⁷³⁷ Para 8 of the Strydom case.

⁷³⁸ To be discussed in paragraph 3.3.3.2.

⁷³⁹ Para 9 Strydom case.

...any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.

The duty to reasonably accommodate should be seen against the backdrop of substantive equality. Equal treatment of two persons, one whom is disadvantaged, could perpetuate inequality. I agree with the submission by Pretorius et al⁷⁴⁰ that reasonable accommodation is a functioning principle, which recognises individual as well as group differences to promote substantive equality when determining unfair discrimination.

The duty of reasonable accommodation is linked to the duty to determine whether unfair discrimination may be justified,⁷⁴¹ as set out in sections 9(3) and 36. Thus, the duty to reasonably accommodate cannot function without setting some limits on its functioning, since it does impose a burden on an employer. Pretorius et al⁷⁴² explain that the duty to reasonably accommodate is not an "open-ended one" and may not impose a disproportionate burden that will not withstand the test of fairness (Section 9) and the test of proportionality (Section 36) on the employer.

In the case of *MEC for Education: Kwazulu-Natal and Others v Pillay*,⁷⁴³ Langa CJ (as he then was)⁷⁴⁴ submitted as follow with reference to the positive duty to accommodate:

...Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.

Langa CJ states that it is not that difficult to decide that positive steps must be taken, but rather how far the community must go to "enable those outside the mainstream to swim freely in its waters".⁷⁴⁵ Langa CJ⁷⁴⁶ also found that reasonable

⁷⁴⁰ Pretorius et al Employment equity law par 7.2.

⁷⁴¹ Pretorius et al Employment equity law par 7.2.

⁷⁴² Pretorius et al Employment equity law par 7.2.

⁷⁴³ *MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).*

⁷⁴⁴ PAR 75 Pillay.

⁷⁴⁵ PAR 76 Pillay.

accommodation in a sense amounts to an exercise of proportionality which will ultimately be determined by the merits of the case.

Ngwenya⁷⁴⁷ explains that “reasonable accommodation” requires an examination to weigh up the disability of an employee against the requirements of his job and the nature of the employment environment. One can thus infer that “reasonable accommodation” complements the social construction of disability⁷⁴⁸ and infers alternatives to overcome society’s socio-economic barriers against PWDs⁷⁴⁹ to enable them to be self-supporting and productive. The accommodation must be tailored according to the essential functions of the job and the capacity of the PWD. The accommodation can be of a temporary or permanent nature and involves a fine balance between the employer’s duty to reasonably accommodate and the employee’s right to employment equity. The employer’s defence that such accommodation would constitute an “unjustifiable hardship” must also be addressed.⁷⁵⁰ Employers are thus obliged to take steps to accommodate PWDs, unless such accommodation results in an unjustifiable hardship. Unjustifiable hardship is not defined in the EEA, but in the Code of Good Practice: Disabilities in section 6 as follow: “Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.

Both the Code of Good Practice: Key aspects on the Employment of People with Disabilities as well as the Technical Assistance Guidelines contain valuable information pertaining to the duty to reasonably accommodate, which is discussed in the paragraphs to follow.

⁷⁴⁶ PAR 76 Pillay.

⁷⁴⁷ Behari 2017 *ILJ* 2226; *Ngwenya 2005 Stell LR* 538.

⁷⁴⁸ Behari 2017 *ILJ* 2239.

⁷⁴⁹ Behari 2017 *ILJ* 2238.

⁷⁵⁰ Marylyn 2004 *ILJ* 879.

3.3.3.2 The Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002⁷⁵¹

The Code⁷⁵² was adopted by the Department of Labour in August 2002 and subscribes to “reasonable accommodation” as set out in the EEA. It is not an authoritative summary of the law, nor does it create additional rights and obligations. However, it does state that courts and tribunals who interpret and apply the EEA must consider the Code. It is a valuable guideline for employers to develop, implement and improve their disability equity programmes and policies to suit the specific needs of a workplace.⁷⁵³ The Code helps employers to determine how disability should be defined and managed in the workplace, although failure to comply with it does not in itself render a person liable. The Code is based on the underlying principles of the ILO as contained in the Vocational Rehabilitation and Employment Convention 159 of 1983 and was drafted to assist employers to comply with the EEA and set out their obligations with reference to PWDs in the workplace.⁷⁵⁴

The Code embraces the social model of disability where the focus is not on the impairment but rather on the effect of the disability and how it effects the working environment.⁷⁵⁵ Disability is thus viewed in a social context.⁷⁵⁶ Effective inter-action between the disabled and the workplace environment will lead to a better understanding of the barriers faced by people with disabilities.⁷⁵⁷ The Code provides a solid foundation for the different role-players (for instance employers, employees and representative organisations) to develop, enhance and implement policies and programmes aimed at safeguarding the rights of PWDs, as set out in the Constitution.⁷⁵⁸ According to Behari⁷⁵⁹, the requirements as set out in the Code are consistent with the right to fair labour practices, as provided by section 23 of the

⁷⁵¹ The Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002, hereafter the Code.

⁷⁵² Codes issued in terms of the LRA are merely guidelines, and don't have the force of law.

⁷⁵³ Cole and Van der Walt 2014 *Obiter* 521.

⁷⁵⁴ Cole and Van der Walt 2014 *Obiter* 522.

⁷⁵⁵ Ngwenya and Pretorius 2003 *ILJ* 1820.

⁷⁵⁶ Ngwenya and Pretorius 2003 *ILJ* 1820.

⁷⁵⁷ Ngwenya and Pretorius 2003 *ILJ* 1820.

⁷⁵⁸ Ngwenya and Pretorius 2003 *ILJ* 1838.

⁷⁵⁹ Behari 2017 *ILJ* 1524.

Constitution. Furthermore, they are also in harmony with the Preamble to the Constitution, providing for quality of life and realisation of potential of all citizens.⁷⁶⁰

As discussed earlier⁷⁶¹, accommodating PWDs is part of substantive equality. Thus, the reasonable accommodation of PWDs is of vital importance for the promotion and protection of their equality. It is further important that employers have clear guidance on what their duty to provide “reasonable accommodation” entails. I support the view of Ngwenya and Pretorius that PWDs will still be confronted by structural barriers; unless clarity is given in this regard.⁷⁶²

The Disability Code sheds some light on what “reasonable accommodation” entails. For instance: Re-organising work stations; amending assessment and training materials and systems; adapting facilities and equipment; the assignment of non-essential functions to another; and adjustment of leave and working time *et cetera*. In cases where employees are injured or disabled while on duty, the employer has a more onerous burden to accommodate the employee. Employers need to consult with employees to find ways on how they could be accommodated, and employees need to be open about their disabilities.⁷⁶³

Section 188(2) of the LRA provides as follows:

...any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure *must take into account any relevant code of good practice*⁷⁶⁴ issued in terms of this Act.

It is also important to consider the Code of Good Practice: Dismissals, which determines when the termination of employment based on incapacity (arising from ill health or injury) is thus recognised, provided it is handled fairly.⁷⁶⁵ The Code of Good Practice: Dismissals, in Item 11 provides as follows:

11. Any person determining whether a dismissal arising from ill health or injury is unfair should consider

⁷⁶⁰ Behari 2017 *ILJ* 1524.

⁷⁶¹ Paragraph 3.3.1.4

⁷⁶² Ngwenya and Pretorius 2003 *ILJ* 1832.

⁷⁶³ Marumoagae 2012 *PER* 352.

⁷⁶⁴ Own emphasis.

⁷⁶⁵ Grogan *Workplace Law* 186.

- (a) whether or not the employee is capable of performing the work;
- (b) if the employee is not capable—
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate the disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
 - (iii) the availability of any suitable alternative work.

Item 10 elaborates further on the matter and explains that incapacity on the grounds of ill health or injury may be either temporary or permanent. In instances where the employee is temporarily unable to work, the employer must investigate the extent of the incapacity or injury. If it is revealed that the employee is likely to be absent for a period that could be “unreasonably long” in the circumstances, the employer must investigate all possible alternatives short of dismissal, including a period of absence or finding a temporary replacement. Other relevant factors to consider are the nature of the job and the extent of the illness or injury. In instances of permanent incapacity, the employer must determine the possibility of securing alternative employment, or adapting the employee’s duties or work circumstances to accommodate the disability.⁷⁶⁶ Throughout this investigation, the employee must be allowed the opportunity to state his case and to be assisted by a trade union representative or a colleague.⁷⁶⁷ Another aspect to be considered when determining whether dismissal is fair, is the degree of and cause of incapacity,⁷⁶⁸ particularly where an employee was injured or incapacitated in the workplace. The duty to accommodate employees in such instances, is more onerous.⁷⁶⁹

The Code of Good Practice places a duty on employers to “assess and adopt” the most cost-effective measures to remove barriers to enable PWDs to perform their duties, with equal access to opportunities and benefits. Employers thus have a duty

⁷⁶⁶ All these duties are set out in Item 10(1) of the Code. One can draw the assumption here that the Code also makes implicit provision for RTW arrangements.

⁷⁶⁷ Item 10(2) of the Code.

⁷⁶⁸ Item 10(3) of the Code.

⁷⁶⁹ Item 10(4) states as follow” Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances”

to ensure that they treat PWDs in a fair manner and “do all that is necessary to accommodate them”.⁷⁷⁰

Grogan⁷⁷¹ highlights the importance of the procedures listed in items 10 and 11 of the Code and states as follows:

Incapacity, arising from any physical impairment must be dealt with in terms of items 10 and 11, *irrespective*⁷⁷² of how the impairment may have been occasioned. Special consideration should be given to work-related sickness or injury,⁷⁷³ it follows by implication that employees injured off duty, or who contract a sickness unconnected with the workplace, are deserving of less consideration still less where the injury or illness arises from the employee’s negligent or intentional conduct.

The Code further distinguishes between temporary absences due to illness or injury and periods of absence deemed “unreasonably long”.⁷⁷⁴ Grogan⁷⁷⁵ submits that when absence from work is relatively short, dismissal will be inappropriate. This may change when an employee is repeatedly absent for short periods. The Code does not prescribe an uninterrupted period of absence before dismissal can be considered. Whether the period could be deemed “unreasonably long”, depends on the circumstances of each case and certain factors need to be considered, such as: the strategic importance of the employee’s job; length of service and the ease with which an employee may be temporarily replaced; whether the employer has the financial capacity to make arrangements to replace the absent employee; whether there are prospects for recovery; and the effect the employee’s absence would have on colleagues. In the case of permanent incapacity, employers are not obliged to retain an employee.⁷⁷⁶

Grogan⁷⁷⁷ states that a pre-dismissal inquiry into incapacity needs to take the form of a disciplinary hearing, however the employee must be afforded the opportunity to

⁷⁷⁰ Behari 2017 *ILJ* 1524.

⁷⁷¹ Grogan *Workplace Law* 290.

⁷⁷² Own emphasis.

⁷⁷³ *Free State Consolidated Gold Mines (Operations) Bpk h/a Western Holdings Goudmyn v Labuschagne* (1999) 20 *ILJ* 2823 (LAC); *E C Lenning Ltd t/a Besaans Du Plessis Foundries v Engelbrecht* (1999) 20 *ILJ* 2516 (LAC); *Bennett and Mondipak* (2004) 25 *ILJ* 583 (CCMA).

⁷⁷⁴ Item 10(1) of the Code.

⁷⁷⁵ Grogan *Workplace Law* 290.

⁷⁷⁶ Grogan *Workplace Law* 291.

⁷⁷⁷ Grogan *Workplace Law* 293

persuade the employer that his/ her disability “is not so serious as to justify dismissal”, or to suggest alternatives to dismissal.

It would be fair to dismiss sick or injured employees “only when there is no prospect of their recuperating in a time during which the employer can cope without suffering significant loss as a result of the employee’s absence”.⁷⁷⁸ This type of dismissal resembles that of dismissal for operational requirements, although the employee is not entitled to severance pay.⁷⁷⁹

An employer needs to take into consideration any sectoral determinations, collective agreements or provisions of the *Basic Conditions of Employment Act 75 of 1997*⁷⁸⁰ when deliberating on whether to keep an incapacitated employee in its service. It is worth noting that in terms of the BCEA, all employees are entitled to sick leave, and incapacitated workers should be protected against dismissal during such leave.⁷⁸¹

3.3.3.3 Interplay between the LRA⁷⁸² and the Code

The LRA is the leading piece of legislation overseeing employment relations in South Africa and contains one of the government’s most important objectives, to “re-arrange and democratise the economy in the labour relations field”.⁷⁸³ Botha⁷⁸⁴ states that the LRA has made a noteworthy change in the statutory framework of the labour relations of South Africa. Section 1 of the LRA states, *inter alia*:

The purpose of this *Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution ;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

⁷⁷⁸ Grogan *Workplace Law* 293.

⁷⁷⁹ Grogan *Workplace Law* 293.

⁷⁸⁰ *Basic Conditions of Employment Act 75 of 1997, hereafter BCEA.*

⁷⁸¹ Grogan *Workplace Law* 291.

⁷⁸² *Labour Relations Act 66 of 1995, hereafter LRA.*

⁷⁸³ Van Niekerk et al *Law @ Work* 39.

⁷⁸⁴ Botha 2015 *De Jure* 328.

The LRA was the first phase of the Department of Labour's five- year plan to reform labour legislation. It *inter alia*, encourages the settlement of disputes and collective bargaining and, most significantly, ensuring job security by defining the circumstances in which employees may be dismissed and creating platforms for determining the fairness of a dismissal and provision for remedial action.⁷⁸⁵ When unfair dismissal is alleged it must be established first whether the applicant had in fact been an employee, and secondly whether the termination of the relationship amounted to a dismissal.⁷⁸⁶

The Common law recognises two forms of dismissal, those with and without notice. Section 186(1) of the LRA extends the concept of dismissal to make provision for more forms. This study is concerned with dismissal for incapacity or poor work performance.⁷⁸⁷

Section 188 of the LRA provides as follows:

188. Other unfair dismissals

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice⁷⁸⁸ issued in terms of this Act.

The LRA provides that dismissal may be justified in instances where the employer is able to prove that it was fair, and caused by either the employee's conduct, capacity or operational requirements. Grogan⁷⁸⁹ submits that there must be a clear

⁷⁸⁵ Grogan *Workplace Law* 141.

⁷⁸⁶ Grogan *Workplace Law* 141.

⁷⁸⁷ Grogan *Workplace Law* 142.

⁷⁸⁸ Schedule 8, the Code of Good Practice: Dismissal.

⁷⁸⁹ Grogan *Workplace Law* 276.

differentiation between dismissals related to misconduct as opposed to incapacity or operational requirements. Incapacity dismissals arise from circumstances “for which the employee is not be blamed” and constitute a so-called “no-fault” dismissal.⁷⁹⁰

The Code of Good Practice provides that dismissal may be justified in cases of incapacity and poor work performance. Basson et al⁷⁹¹ explain that poor work performance might occur when the employee “simply does not have the necessary skill or ability to do the work”. Incapacity refers to the employee’s inability to meet the required performance standard on the grounds of ill health or injury.

However, it must be noted that dismissal on the grounds of incapacity or poor work performance may overlap with automatically unfair dismissals. When services are terminated on the grounds of incapacity, this may fall within the ambit of the provisions relating to automatically unfair dismissals or within the scope of the EEA (as well as the applicable Code) for an infringement on the prohibition of discrimination on the basis of disability. A distinction between disability and incapacity exists.⁷⁹² Employees can now institute action for automatically unfair dismissal under the LRA for dismissal for disability and incapacity.

3.3.3.4 Technical assistance guidelines on the Employment of Persons with Disabilities⁷⁹³

The Technical Assistance Guidelines complement the Code and provide practical guidelines for employees, employers and trade unions to promote diversity, equality and fair treatment to eliminate unfair discrimination. They form part of the broader agenda to promote equality for PWDs to receive recognition in the labour market. As with the Code, the TAG are the basis for the implementation of the EEA and are used by the courts as a guide when disputes arise.⁷⁹⁴

⁷⁹⁰ Grogan *Workplace Law* 276.

⁷⁹¹ Basson et al *Essential Labour Law* 151.

⁷⁹² Grogan *Workplace Law* 276.

⁷⁹³ The TAG was revised in July 2017, hereafter TAG.

⁷⁹⁴ Cole and Van der Walt 2014 *Obiter* 522.

The TAG guidelines were developed in 2004⁷⁹⁵ and aim to assist employers, employees, PWDs and trade unions in understanding the Code of Good Practice on the Employment of PWDs and the EEA. It is emphasised that the re-integration of PWDs in the workplace should not be regarded an *ad hoc* activity to meet the requirements of the Act, it could also be to the advantage of management. The Guidelines highlight the fact yet again that PWDs can make a skilled contribution to the workplace when reasonable accommodation and opportunities are provided.

The Guidelines address the retention of employees⁷⁹⁶ by prescribing that employers need to assist staff with disabilities by providing them with rehabilitation, training and other appropriate measures and to ensure that the employee will remain in his/her current position. The employer must remain in contact with the employee to encourage an early return to work, if possible. Thus it may require a variety of interventions such as vocational rehabilitation, adjustment of work arrangements, transitional work programmes, and temporary or even permanent flexible working hours if possible. The purpose of reasonable accommodation is to lessen the impact of impairment on an employee's ability to perform adequately. Such accommodation may entail modifications or alterations to the job description, but will depend on the work environment, the impairment and the type of job. The TAG propose similar guidelines to the Code of Good Practice, as was earlier discussed.

The Guidelines⁷⁹⁷ further describe that reasonable accommodation consists of three inter-related factors: First, the accommodation should remove barriers that hinder an employee to perform adequately. The employer thus needs to follow steps, where reasonably practical, to lessen the effects the disability may have and to enable the employee to realise his/her full potential in the workplace. The disabled person must enjoy equal access to the opportunities and benefits of normal employment. In meeting the above criteria, employers must operate cost-effectively. Should an employee become unable to perform the essential functions, notwithstanding reasonable accommodation, the employer is not obligated to create a new job for the employee or assign essential functions to another employee. What

⁷⁹⁵ Van der Byl Twenty year Review: South Africa: Background paper disability:1994-2014 1-3.

⁷⁹⁶ Par 6.3.7 of TAG.

⁷⁹⁷ Par 6.2 of TAG.

could be required is a restructuring of the job by re-allocating marginal, non-essential functions. The Guidelines encourage employers to accommodate PWDs, especially in light of the high rate of unemployment in South Africa. TAG⁷⁹⁸ also provide guidance on the definition of unjustifiable hardship:

...action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.

Citing unjustifiable hardship as grounds for not providing specific accommodation requires an objective process, which entails examining the effectiveness of the reasonable accommodation, and its implementation may have caused difficulty or expenditure that disrupted business operations. Such an assessment must take into consideration whether reasonable accommodation, or failure thereof may affect the employee, and inequality in society. The objectives of the Constitution as well as the *Act* should be considered.

Chapter 17 of the TAG deals specifically with the objective of retaining PWDs. When an employee leaves as a result of illness or injury, the real impact manifests itself not only in medical and replacement expenditure but also in a loss of skills and a decrease in productivity and efficiency. In certain instances, customer relations may also be affected. Given South Africa's high unemployment rate, employers cannot afford to lose valuable staff members as a result of poor health management and disability. Some employers have embraced disability management strategies as a workplace intervention and can be described as follows:

It seeks to prevent disability from occurring, and when necessary, to intervene early following the onset of a disability by using coordinated, cost-conscious, quality case management and rehabilitation services that reflect an organisation's commitment to continued employment of those experiencing functional work limitations.

In disability management, it is important that the elements of case management, individual care and benefits are inter-linked to complement one another. Integrated disability management coordinates both occupational and non-occupational disability benefits. For instance, paid leave programmes are coupled with a focus on an early

⁷⁹⁸ Par 6.12 of TAG.

return to work. Disability management is often implemented in conjunction with other services such as health and behavioral care, medical management services, health promotion, disease management and employee assistance programmes. The TAG address the implementation of disability management in terms of the EEA. When an employee becomes ill or is injured, to the employee must be directed to the disability management programme, which will determine what disability benefit option⁷⁹⁹ will be most appropriate and reasonable. To comply with the Act, reasonable and flexible benefits and sick leave management must be considered. Employees need to have access to benefits via a variety of platforms. Effective management of leave and benefits will serve to encourage return- to-work as soon as is medically feasible.

An important aspect of disability management is the determination of what the essential function of the job is.⁸⁰⁰ Essential function is not the same as job description, individual job tasks or job skills. Essential job functions are the standard against which the competencies and qualifications of PWDs are measured to determine if reasonable accommodation is available and must form part of RTW recommendations to determine what essential job functions must be fulfilled. DM programmes could identify the work limitations that may exist. Organisations can develop RTW programmes, with the assistance of case managers, specialists and PWDs. The aim is to facilitate the process of modification of work and RTW, clearly identifying work limitations and appropriate treatment procedures. Transitional work assignments must be sensitive to the nature and extent of limitations of employees, even before permanent accommodation arises. If limitations continue to exist, employers should attempt to understand and confirm these as they may change over time. One of the most essential parts of disability management is to facilitate RTW as soon as the employee is medically able. Organisations need to develop policies and training material to support the RTW process, with the disability management programme acting as guide. Another key element for organisations is to consult with employees in a meaningful manner regarding basic work options.

⁷⁹⁹ For instance sick leave, salary continuance, workers' compensation, short term or long term disability and retirement disability.

⁸⁰⁰ Par 11.1 of the TAG.

Supervisors must also be in a position where they feel comfortable about the nature of the employee's work limitations. The dialogue between the employer and supervisor needs to commence as early as possible after the disability has become evident. Once again, the disability management plan is a vital link between the employees, physicians and supervisors to facilitate discussion and address aspects which may arise during the RTW process.

Returning to work, or to reasonably accommodate the employee may involve transitional work,⁸⁰¹ for example where duties are temporarily changed, to modify the job (where changes are made to the equipment; work methods; tasks and/or schedules) or alternative work, which entails the reassignment of the person to a different job.

The Technical Assistance Guidelines on the Employment of PWDs were revised in June 2017. The retention of PWDs is now provided for in Chapter 11. The impact on the employer of the loss of skilled employment (medical expenses and replacement costs) owing to disability is highlighted yet again. Knowledge and experience that are lost have a ripple effect on productivity and customer relations. Given the skills shortages in South Africa, the 2017 TAG emphasise that no employer can afford to lose even one valued employee because of disability or ill health. The Guidelines also re-emphasises that disability management should continue to be a workplace "prevention and remediation strategy". Disability management firstly seeks to prevent disability from occurring, and if necessary, it also entails early intervention following the onset of disability by adopting coordinated, cost-effective and quality case management and rehabilitation services, which in turn will reflect an organisation's commitment to continue employing those experiencing functional limitations. Disability management should not be complicated, provided that individual care, benefit and case management are connected in such a manner that they complement one another. Coordinated disability management, in its simplest form, coordinates both occupational and non-occupational disability benefits, for instance absence and paid leave programmes, coupled with a focus on an early return to work strategy. Disability management programmes also coordinate a

⁸⁰¹ Par 11.1 of the TAG.

variety of services, such as behavioural health care, health promotion, disease management, medical case management services and employee assistance programmes. All of these are aimed at improving the general health of workers, lessen the administrative burden and provide a “seamless set of benefits” for workers with disabling illness or injuries.⁸⁰² Interestingly, the TAG then list a few primary disability management functions “which intersect with EEA compliance”.⁸⁰³

First, access to benefits are mentioned.⁸⁰⁴ It is stated that many DM programmes merely coordinate access to income replacement benefits. When injury or illness sets in, employees should be directed to a DM programme which will determine the appropriate disability benefits. Such benefits may include salary continuance, workers’ compensation, sick leave and short- or long-term disability. The TAG state that employers could enhance compliance with the EEA through “reasonable and flexible” benefits and sick leave management.⁸⁰⁵ This could provide employees with immediate and seamless access to benefits by way of an on-line system, phone or personal contact. The Guidelines further advise employees about coverage. Effective processing of benefits and leave, will in turn mean that RTW and accommodation efforts will commence as soon as medically feasible.⁸⁰⁶

The identification of essential job functions resembles the description in the previous TAG, discussed earlier. However, in the 2017 amendments of the TAG, specific mention is made of the following:

The *Act* and Code state that an individual with a disability must be suitably qualified (i.e. a person may be suitably qualified for a job as a result of any one of, or any combination of that person’s – formal qualifications; prior learning; relevant experience, or the capacity to acquire, within a reasonable time, the ability to do the job) to perform the “essential job functions” of the position which a person holds or seeks in order to seek reasonable accommodation.

⁸⁰² Par 11.1 of the TAG.

⁸⁰³ It is not clear what is meant with this particular statement, since the EEA and the Code both fail to specifically define disability management.

⁸⁰⁴ Par 11.1 of the Tag.

⁸⁰⁵ We need more clarification in this regard. Will small and large companies bear the same duties to accommodate and return workers back to work? COIDA will need to play a supporting role, especially for small companies. How far must companies go to return workers back to work? Will the “undue hardship” criteria also be applicable in RTW programmes?

⁸⁰⁶ Once again, this begs more questions than answers. Who will bear the responsibility in this regard? How will such a system function? Who will play a leading role in coordinating the whole process?

These essential job functions should be the standard against which the qualifications and competencies of the disabled employee are evaluated to determine whether any “reasonable accommodation” options exist. The TAG then describe that most companies do develop human resource policies and supervisory training material “to reinforce and support the RTW process with guidance from the DM programme”. It is not clear on what evidence this is based.

As in the previous edition of the Guidelines, the importance of meaningful engagement with employees and an early RTW are encouraged. RTW or reasonable accommodation options, may include modified⁸⁰⁷ work, transitional⁸⁰⁸ work or alternative⁸⁰⁹ work. It is emphasised that a reasonable accommodation process needs to be followed, even if restrictions are expected to be temporary, to make appropriate RTW decisions. The necessity to determine the essential functions of the job is also described in the revised Guidelines. Job descriptions must be analysed to determine their essential functions and disability-related restrictions to meet the work restrictions requirements of the disabled employee. The needs of the employee and the company’s expectations will thus be met, resulting in a more productive work environment.

3.3.3.5 Case law: Employer’s duty to reasonably accommodate PWDs

In *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration*,⁸¹⁰ an employee was dismissed after being injured in a car accident. The bank failed to accommodate the employee and did not adhere to the Code of Good Practice on Dismissal. The dismissal was held automatically unfair. Lechwano, with reference to this case, asserts that in order for employers to prevent discrimination, they need to assess their duty to accommodate employees with a disability.⁸¹¹ Furthermore, if employers fail to reasonably accommodate such employees and summarily dismiss them, the dismissal will not only be unfair but also automatically

⁸⁰⁷ For instance changes in work tasks, schedules, methods, or equipment.

⁸⁰⁸ Temporary changes in job duties or techniques during periods of recuperation.

⁸⁰⁹ Reassignment to a different job if accommodation cannot be made in the original position.

⁸¹⁰ *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration* 2008 4 BLLR LC 356-390.

⁸¹¹ Lechwano 2012 <http://www.saflii.org/za/journals/DEREBUS/2012/89.html>.

unfair.⁸¹² Employers who unreasonable refuse to accommodate employees by using measures that fall short of unjustified hardship or fail to provide reasons for not accommodating the disabled employee, are judged irrational.⁸¹³

The Court also relied on the Code and stated that consultation and accommodation were critical when a decision on discrimination based on disability, was judged fair.⁸¹⁴ The Court found it difficult to understand what possible hardships the respondent could suffer by allowing the employee to return to work. On the contrary, because the applicant's position remained vacant, the respondent's business suffered disruption which could have been avoided had the applicant been allowed to resume work.⁸¹⁵

With reference to unjustifiable hardship, the court stated as follows:⁸¹⁶

Unjustifiable hardship means more than mere negligible effort. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. Some hardship is envisaged. A minor interference or inconvenience does not come close to meeting the threshold but a substantial interference with the rights of others does.

Furthermore, the Court ⁸¹⁷ emphasised that reasonable accommodation entails a multi-lateral enquiry. For instance, employers need to consult employees or trade union representatives when information relating to medical reports for example, is needed. Disregarding medical advice on whether to accommodate amounts to discrimination. The court emphasised as follows:

The process should be interactive, a dialogue, an investigation of alternatives conducted with a give and take attitude. Outright refusal to accommodate shows a degree of inflexibility contrary to the spirit and purpose of the duty to accommodate.

⁸¹² Lechwano 2012 <http://www.saflii.org/za/journals/DEREBUS/2012/89.html>.

⁸¹³ Lechwano 2012 <http://www.saflii.org/za/journals/DEREBUS/2012/89.html>.

⁸¹⁴ In the *Smith v Kit Kat Group Pty Ltd* case.

⁸¹⁵ Id at para 63.

⁸¹⁶ Id at para 98.

⁸¹⁷ *Supra* at paras 91 – 92.

Nxumalo⁸¹⁸ highlights the role the organisation could have played in transforming the minds of other employees:

The employer in this case had a duty to encourage its employees to accept the employee's disfigurement rather than to argue that the presence of Mr. Smith would remind them of that unfortunate event. If one looks at the manner in which the employer dealt with this matter, it is clear that a shift in mind-set towards transformation was lacking. It is necessary to reach a point where employer's thinking can be transformed to accept employees with disabilities.

Numerous reasons were given for the bank's failure to reasonably accommodate the employee. A panel of doctors recommended that modifications needed to be made to the employee's work station and that the applicant had to undergo posture training which would have allowed her to perform her previous job. The bank failed to respond to this and claimed "cost-effectiveness" as a defence. Furthermore, the employer did not offer the employee an alternative to a dismissal, for instance, a part-time position. The bank's conduct amounted to a dismissal for incapacity without trying to reasonably accommodate the employee. It amounted to a breach of the employee's right to equality and non-discrimination on the basis of disability.⁸¹⁹

The Court⁸²⁰ relied on the LRA Guidelines for incapacity dismissal and explained that before an employer considers an incapacity dismissal, a four-step enquiry is needed. First, the employer must determine whether the employee with the disability is actually able to perform his/her work. If this can be answered in the affirmative, it warrants the end of the enquiry and the employer must restore the employee to his/her former position or one substantially similar to it (if possible, the job should correspond to the employee's own choice and their individual suitability for it). If this is not possible and the employee's injuries are long-term or permanent, then a three-stage enquiry must begin. The second stage entails an enquiry by the employer into the extent to which the employee is able to perform his/her work. This is a factual analysis, and the assistance of medical or other experts may be necessary. The third and fourth stages were described by the court as follows:

⁸¹⁸ Behari 2017 *ILJ* 1523.

⁸¹⁹ Pretorius et al Employment equity law par 7.2.

⁸²⁰ Para 70-76 Standard Bank.

Stage Three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee. During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including "*the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement*" for the employee. Stage Four: If no adaptation is possible, the employer must enquire if any suitable work is available.

The court's reasoning suggests that the emphasis should be on the effect of the disability on the working environment, and not on the impairment itself.⁸²¹ Employers need to familiarise themselves with their employees' conditions to gain an insight into what it means to accommodate them.⁸²² I submit that mandatory RTW plans can and will play a major role in such instances. A full understanding of the limitation, in consultation with experts, could be one the first step towards adopting a holistic approach to reasonably accommodate employees with a disability.⁸²³

The Standard Bank case is also a demonstration of the thin line between automatically unfair dismissals for disability and "ordinary" dismissals based on incapacity. In this case, the Court emphasised that a claim for unfair dismissal based on incapacity "goes further than the LRA may seem to suggest"⁸²⁴. Dismissals on the grounds of disability implicates a number of constitutional rights, such as the right to equality, human dignity, right to fair labour practices and the right to choose an occupation. However, the finding by the Labour Court that Standard Bank had discriminated against the applicant, did not assist her in her CCMA case. However, the observations made by the court serve as a wake-up call for employers as well as pension schemes of the duty to reasonably accommodate a person with a disability. Had the employee approached the Labour Court with an unfair discrimination claim,

⁸²¹ Behari 2017 *ILJ* 1530.

⁸²² Behari 2017 *ILJ* 1530.

⁸²³ Behari 2017 *ILJ* 1523.

⁸²⁴ This can be explained by the fact that all employers are obliged to also investigate in cases of incapacity, whether the person also may have a disability, as contemplated in the EEA and the relevant Codes and guidelines.

right from the start, she would most likely have been awarded compensation equivalent to two years' salary.⁸²⁵

According to Grogan⁸²⁶, incapacity suggests "that the employee concerned is incapable of performing his or her duties", whereas disability suggests that "the person may do so with reasonable accommodation". In instances where employees face dismissal and also suffer from disability, an overlap may occur. Should that be the case, employers must follow the guidelines as set out in the Code.

Employers should beware of confusing incapacity with misconduct, as is illustrated in the case of *LS v CCMA*⁸²⁷ where the employer used disciplinary action as a way to deal with incapacity. When the employee's performance deteriorated after a series of personal tragedy, she sought assistance from her employer. She was referred to the staff wellness programme⁸²⁸ and a psychologist recommended "long-term therapeutic intervention". However, her performance remained under par and she was charged with misconduct. At the CCMA hearing, the Commissioner stated that the matter should have been dealt with as a case of incapacity, as mental distress could have influenced her performance.

The court, nonetheless found that the applicant failed to prove the personal circumstances she sought to rely on to justify the claim of poor work performance. She also failed to lead any independent evidence to support her claim that "she was medically unfit to work". She was accordingly found guilty of breach of contract, gross insubordination and poor work performance and the applicant's dismissal for misconduct was upheld. The Court acknowledged that instances where the lines between incapacity and misconduct were blurred could exist, however they did not exempt the employer from his obligations to follow the correct guidelines and procedures determined by the circumstances of each case. The description of a medically ill employee's behaviour as misconduct, rendered the protection accorded in terms of the LRA meaningless. The Court found that the employer had continued

⁸²⁵ Grogan *Workplace Law* 276.

⁸²⁶ Grogan *Workplace Law* 276.

⁸²⁷ *LS v CCMA (2014) 35 ILJ 2205 (LC) (hereinafter the LS case)*.

⁸²⁸ Grogan *Workplace Law* 287.

with misconduct proceedings against the employee while being aware of her medical condition and the applicant's claim that her mental health was influencing her performance. The employee was awarded compensation.⁸²⁹

In the case of *National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*⁸³⁰ the Arbitrator⁸³¹ first stated that it seemed as if items 10 and 11 of the Code only related to dismissal on the basis of incapacity. However, if an employee had an impairment which amounted to a disability, he/she was entitled to be reasonably accommodated, as set out in the EEA. It is clear that the scope of the Code of Good Practice is much broader than the LRA, since it deals with the full employment cycle.⁸³²

The Arbitrator⁸³³ questioned whether he/she or the court would be obliged to consider the EEA Code in a dispute regarding the fairness of a dismissal, for which a breach in terms of the EEA had not specifically been pleaded. The Arbitrator referred to *Andre van Zyl v Thebe Employee Benefits Risk Group (Pty) Ltd*⁸³⁴ where the Commission concluded as follows:

Section 54(1)(a) of the EEA is the enabling provision in this Act: the codes of good practice are intended to provide employers with information that may assist them in implementing the EEA. The aims of the disability code are set out in item 2. This notes, inter alia, that this code is a guide on promoting equal opportunities and fair treatment for people with disabilities as required by the EEA (item 2.2). As regards its status, it is noted that it should be read in conjunction with other relevant codes of good practice issued by the Minister of Labour (item 3.2). In terms of legal framework it is stated that this code is based on the constitutional principle that no one may unfairly discriminate against a person on the grounds of disability (item 4).

The Arbitrator⁸³⁵ took into consideration whether the LRA's incapacity provisions included "disability" and it was found that if a person was incapacitated the

⁸²⁹ Grogan *Workplace Law* 289.

⁸³⁰ *National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape) (2004) 25 ILJ 2091 (BCA)*.

⁸³¹ Para 26.

⁸³² It applies to the following phases: recruitment and selection, to induction and placement, training and development, rehabilitation and retention as well as return to work from illness and injury, and to termination.

⁸³³ Para 26 National Education case.

⁸³⁴ *Andre van Zyl v Thebe Employee Benefits Risk Group (Pty) Ltd* Case no GA 32808-03 of 7 July 2004.

⁸³⁵ Para 29 National Education case.

employer needed to determine whether this would fall within the ambit of the definition of PWDs as set out in the EEA. The predominant aim of the Act is to promote procedural and substantive fairness in relation to PWDs and to encourage employers to keep PWDs in employment if they can be reasonably accommodated.

In *Wylie and Standard Executors & Trustees*,⁸³⁶ the CCMA agreed with the view of the Arbitrator in the case as discussed above and found that had the applicant had a disability, the employer would have been duty-bound to investigate *how* they could have reasonably accommodated the applicant before dismissing her. The Commissioner also considered whether the terms “disability” and “incapacity for ill health or injury” could be used inter-changeably, but this was rejected. The difference lies in the fact that “incapacity” implies that the employee can no longer perform the essential functions of the job, whereas “disabled” describes an employee who is suitably qualified, with reasonable accommodation and is able to perform the essential functions of the job. These cases confirm that the Code as well as the TAG require much more of an employer in the case of a disabled employee. It further provides clarity that the definition of PWDs (in terms of section 1 the EEA) should be read alongside the definition of physical impairment (as set out in Item 5 of the Disability Code) when determining whether a condition amounts to a disability, when the duty becomes more onerous. Employers must guard against treating employees with a disability as poor performers, but rather consider ways and means of reasonably accommodating the disability.

In the case of *IMATU obo Strydom v Witzenberg Municipality & Others*,⁸³⁷ the Labour Appeal Court confirmed that the requirements set out in the Code were mandatory.⁸³⁸ In that case, the Labour Appeal Court heard an appeal from the Labour Court,⁸³⁹ that had found the dismissal of an employee due to incapacity, as a result of stress at work, inevitable and fair. However, the Labour Appeal Court considered several factors (as set out in the Code), including the extent of the duty

⁸³⁶ *Wylie and Standard Executors & Trustees* (2006) 27 ILJ 2210 (CCMA).

⁸³⁷ *IMATU obo Strydom v Witzenberg Municipality & others* (2012) 33 ILJ 1081 (LAC), hereafter Strydom case.

⁸³⁸ Grogan *Workplace Law* 286.

⁸³⁹ *Strydom v Witzenberg Municipality & others* (at 1081) 2008) 29 ILJ 2947 (LC).

of the employer to accommodate the employee's incapacity, or to adapt his duties, or to provide him with alternative work. The Labour Appeal Court found that the employer had failed to fulfil the obligations as *per* the Code, which rendered the dismissal both substantively and procedurally unfair.⁸⁴⁰

In the *Strydom* case⁸⁴¹, the court emphasised that when employees are found to be permanently incapacitated, the enquiry would not stop there. The employer is obligated to determine whether the work environment and duties could be adapted to accommodate the employee's incapacity. The possibility of providing alternative work should also be investigated.

In the case of *Smith v Kit Kat Group (Pty) Ltd*,⁸⁴² the applicant was employed as manager of a wholesale retail store and was regarded a trusted and valued senior employee. After an attempted suicide, the employee sustained severe facial injuries, including a minor speech impediment. He underwent reconstructive surgery and was allowed a few months sick leave to recover, after which he attempted to resume his duties. However, the employer seemed reluctant to allow this and eventually it became clear that he was labelled "cosmetically unacceptable" or "not facially acceptable" and although prohibited from returning to work, he had not been dismissed formally. Although he expressed the wish to return to work, the employer insisted "that his facial appearance was not acceptable and that it would remind employees of the unfortunate event" The employee's speech was estimated to be 70 percent to 80 percent comprehensible. The employer proposed that he put in a claim for disability from the provident fund. As his disability was self-inflicted, the employee was hesitant to proceed. The employer did not heed further requests for an RTW. Eventually, a meeting took place at which the employee was informed that "he could not resume his duties for cosmetic reasons", without being formally dismissed. After the employee instituted an unfair labour practice with the *Commission for Conciliation, Mediation and Arbitration (CCMA)*, the CCMA informed

⁸⁴⁰ Anon 2012 <https://juta.co.za/newsletter/newsletter/ilj-monthly-preview-may-2012/>.

⁸⁴¹ Par 6.

⁸⁴² *Smith v Kit kat Group (Pty) Ltd (JS787/14) [2016] ZALCJHB 362; [2016] 12 BLLR 1239 (LC); (2017) 38 ILJ 483 (LC) (23 September 2016)*, hereafter the Smith case.

him that it had no jurisdiction, because it was a late referral with no supporting documentation. The employee then decided to approach the Labour Court, in terms of section 10 of the EEA, which prohibits discrimination on the grounds of disability. The Labour Court found that it was clear that the employee had a disability as defined in the EEA.

In his argument, the employee referred to the Code of Good Practice on the Employment of People with Disabilities. In line with the Code, employers must reasonably accommodate the needs of PWDs. Only in instances where reasonable accommodation may impose “unjustifiable hardship” for the employer’s business, could a qualified applicant or employee with a disability be denied reasonable accommodation.⁸⁴³ The employers must then engage in consultation with the employee to determine what mechanisms may be required to accommodate the disability, for instance the services of technical experts.⁸⁴⁴ In the *Smith* case, the employer failed to do this. The Labour Court stated that “once an employer (not the employee) thinks that a disability may impact an employee’s job, the employer must ensure that it does not discriminate against the employee based on disability”.⁸⁴⁵ The Court found that the employer had not followed the correct procedure and even though the employee had not been dismissed formally, the employer’s refusal to allow him to resume his duties amounted to a dismissal. It is worth pointing out that the Labour Court questioned whether an unjustifiable hardship could have informed the employer’s passive approach. The court confirmed that the unjustifiable hardship of both employer and employee should be considered. Lumb et al⁸⁴⁶ emphasise as follows:

It is clear from this judgment that the Labour Court considers a blatant failure to address the needs of a disabled employee in a very serious light. An employer’s obligations in terms of the EEA and the Code to accommodate employees who have disabilities, are disregarded at an employer’s own peril.

⁸⁴³ Section 6(11) of the Code.

⁸⁴⁴ Para 59 Smith case.

⁸⁴⁵ Lumb 2018 www.labourguide.co.za.

⁸⁴⁶ Lumb 2018 <http://www.labourguide.co.za/most-recent/2366-disabled-employees-a-duty-to-act> Disabled employees.

Snyman J observed that the speech impediment would have required minimal accommodation by the employer, since the employee was still able to perform his duties. The employer did not investigate the extent of the impairment; neither did he consider whether the employee could have been accommodated differently in the organisation. Snyman J further observed, with reference to the Code, that an employer need not accommodate an employee should it cause undue hardship. However, in this instance, it would not have caused undue hardship had the employer allowed the employee to return to work and prove that he could perform his duties. Should the employee not have been able to perform his duties, the employer could then have initiated an incapacity process. Snyman J held as follows: "The fact that he just refused to allow the employee to return to work amounted to discrimination on the grounds of disability".⁸⁴⁷ The employee was awarded damages amounting to twenty-four months' remuneration, plus a further six months compensation as *solatium* for the humiliation suffered. The employer was ordered to pay costs.

This case demonstrates that reasonable accommodation is an inter-active process, that requires cooperation between employer and employee.⁸⁴⁸ The *Smith* case made it clear that the court must consider several factors (as listed in the Code) when determining whether the employer took reasonable measures in accommodating the employee.⁸⁴⁹ It gave effect to substantive equality by proportionally balancing the hardship faced by the employer when reasonably accommodating the employee against the losses the employee may suffer. There was enough proof that the employer would not have suffered "unjustifiable hardship" by reasonably accommodating the employee.⁸⁵⁰

It is clear that the Court thoroughly analysed the classification of PWDs as set out in section 1 of the EEA, as well as the enquiries needed to determine whether a person with a disability had been discriminated against unfairly. As emphasised by Behari:

⁸⁴⁷ Jefferson 2017 <http://www.derebus.org.za/employment-law-update-dismissal-for-disability/>.

⁸⁴⁸ Behari 2017 *ILJ* 2226; Ngwenya 2005 *Stell LR* 555.

⁸⁴⁹ Behari 2017 *ILJ* 2239.

⁸⁵⁰ Behari 2017 *ILJ* 2239.

The Labour Court's recourse to the social construct of disability, was effective in ensuring that substantive equality was applied to prevent the discrimination of an employee with disabilities.⁸⁵¹

The case further highlighted the protection afforded PWDs in cases of unfair discrimination in terms of the EEA and shed some light on the barriers caused by discrimination, and measures to eliminate them.⁸⁵²

The Labour Court confirmed that employers have a duty of care in instances of disability and clarified the distinction between incapacity and disability.⁸⁵³ Drawing from the *Standard Bank* judgment, the Court emphasised that they are neither "synonymous nor interchangeable". In *Standard Bank v CCMA*⁸⁵⁴ the court made the following important statement:⁸⁵⁵

Disability is not synonymous with incapacity. An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.

The Smith judgment, reinforcing the judgment in *Standard Bank*, will assist with further clarification of the concepts of disability and incapacity, and will ensure proper implementation of workplace disability policies.⁸⁵⁶

The Labour Court found the way the company handled this matter unacceptable. When the employee offered his services, he should have been allowed to return, and should the company have been of the opinion that the applicant was "cosmetically unacceptable" and his speech impediment problematic, it could have dealt with this by instituting incapacity proceedings or by conducting an enquiry as prescribed in the EEA. However, the employer disregarded the relevant legislation and failed to show empathy with the applicant's situation. The company's argument that the mere presence of the applicant would remind other employees of the unfortunate event,

⁸⁵¹ Behari 2017 *ILJ* 2240.

⁸⁵² Behari 2017 *ILJ* 2240.

⁸⁵³ Behari 2017 *ILJ* 1524.

⁸⁵⁴ *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALC 98; [2008] 4 BLLR 356 (LC); (2008) 29 *ILJ* 1239 (LC) (25 December 2007).

⁸⁵⁵ Par 94 from the *Standard Bank* case.

⁸⁵⁶ Behari 2017 *ILJ* 1530.

did *not*⁸⁵⁷ justify the fact that he was not re-appointed and constituted inhumane conduct which had a negative effect on the dignity of the employee.⁸⁵⁸

In another Labour Court judgment, *Jansen v Legal Aid South Africa*, it was confirmed that employers need to conduct incapacity inquiries in order to determine how employees with a disability could be reasonably accommodated. The applicant had been employed as a paralegal and was recognised as an excellent worker. He was diagnosed with major depression and anxiety, brought about, *inter alia*, by work stress. He submitted all medical records to his employer and made several attempts to discuss the matter with the respondent, but to no avail. Although the employer had enough evidence to embark on a meaningful disability management process, he failed to do so. After the applicant took part in the employer's wellness programme, a clinical psychologist made a specific recommendation, which reads:

I would recommend that Mr Jansen be granted sick leave for a considerable amount of time. He needs to divorce himself from work and try to refocus and prioritise his life. Therapy alone is not enough. His resources for impulse control seems (sic) limited therefore he needs timeout. This is of great importance. Please take note.⁸⁵⁹

However, the applicant was disciplined for insolent insubordination. The Court found that he had succeeded in proving that his mental condition was the main reason for his dismissal. Mthombeni J found that this amounted to an automatically unfair dismissal in terms of section 187(1)(f) of the LRA and also constituted an unfair discrimination in terms of Section 6 of the EEA. The Court ordered that the applicant be reinstated with full retrospective effect and also ordered the respondent to pay *solatium* equivalent to six months' salary for distress suffered,⁸⁶⁰ and costs for the employer. In its judgment, the Court emphasised that the applicant's behaviour was not in dispute, although it could have been caused by his depression. The applicant submitted proof that his depression was triggered by workplace stress. The respondent was aware of the applicant's disability and had a duty to reasonably

⁸⁵⁷ Own emphasis.

⁸⁵⁸ Behari 2017 *ILJ* 1523.

⁸⁵⁹ Para 29.

⁸⁶⁰ The applicant was evicted from his property and he and his children suffered because of his financial loss.

accommodate.⁸⁶¹ The Court did not, however, provide any recommendations on how the employer could have reasonably accommodated Mr. Jansen, nor was any reference drawn to the applicable Codes and Guidelines imposing such duties.

In relation to the applicant's disability, the Court stated as follows:

In my view, the conduct of the respondent in ignoring the applicant's condition and deciding to dismiss him in the circumstances, when viewed subjectively against the applicant's depression, had potential to impair the applicant's fundamental human dignity and, accordingly, falls within the grounds envisaged by Section 187 (1) (f) of the LRA.⁸⁶²

The respondent did not consult with Jansen, neither did he investigate alternatives to dismissal. The respondent further failed to take steps to comply with the guidelines as contained in the Code of Good Practice. Although the Court did not refer to or investigate the unjustifiable hardship qualification, it is my opinion that the respondent would not have suffered unjustifiable hardship, and the applicant's capacity to perform the essential functions of the job he was hired for would not have been affected, had his mental condition been managed properly. The fact that this was never investigated by the employer, shows yet again that the employer failed to embark on an incapacity enquiry.

Pretorius et al⁸⁶³ confirm that the case law on disability and reasonable accommodation "remains relatively small" but that there is an increase in awareness of the principle of reasonable accommodation by the CCMA and the Labour Court. The need for a legislative framework for mandatory disability management obligations will enable employers to have a better understanding of their duty to reasonably accommodate disabled employees.

The roles and responsibilities of trade unions and other role-players need to be identified and employers must ensure that they are engaged during the entire RTW process and request feedback as part of the monitoring process. Should a collective agreement be reached, employers must respect and adhere to its provisions and ensure that the organisation's RTW policy is in line with such agreement. If an RTW

⁸⁶¹ Para 43.

⁸⁶² Para 46.

⁸⁶³ Pretorius et al Employment equity law par 7.2.

professionals have been appointed, they must nurture a good relationship with trade unions and be able to resolve conflicts. It is advisable to develop tools to monitor the effectiveness of the RTW system.⁸⁶⁴

Trade unions should be aware of the inherent benefits and functions of RTW, to communicate effectively with their members. In their capacity as representatives of employees, unions can exert influence on employers to appoint experienced RTW coordinators who can support the development of RTW programmes. Unions can, through collective bargaining, encourage employers to consider flexible working arrangements.⁸⁶⁵

In support of the above submissions, and considering the unique South African context, trade unions should be acknowledged role-players in the RTW process. A collective agreement must be scrutinised closely to avoid conflicts or strikes. Unions also have a valuable role to play in removing the stigma around disability and raise awareness among employers that PWDs could perform when they are reasonably accommodated, and structural and attitudinal barriers have been removed. Furthermore, they could help union members with problems that could hinder participation in RTW programmes, for example, raising awareness among members about unemployment benefits and injury prevention of which the outcome is unsuccessful. Unions must encourage members to participate in RTW programmes and once workers have returned to work, union representatives need to remain in contact with members and should provide ongoing support for at least six months. Unions, like employers, need to adhere to conflict management procedures agreed upon during collective bargaining agreement, and should avoid premature strike action.

⁸⁶⁴ Guideline 23 - ISSA Guidelines RTW and Reintegration.

⁸⁶⁵ International Association of Industrial Accident Boards and Commissions 2016.
<https://www.ini.wa.gov/Main/WorkingSolutions/Docs/ReturnToWorkFoundationalApproachReturnFunction.pdf>.

3.3.3.6 Justifying an alleged claim of unfair discrimination

Grogan⁸⁶⁶ submits that several defences are available to employers when faced with unfair discrimination allegations. First, the employer could try to persuade the court that the act or omission did not amount to discrimination. The onus rests on the employee to prove that discrimination has occurred. A second possible defence may arise from instances of vicarious liability. The third line of defence, as set out in Section 6(2) of the EEA reads as follows:

It is not unfair discrimination to—

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Section 6(2) does not contain justifications for unfair discrimination. The Act provides that it would not be unfair discrimination to take affirmative measures consistent with the purposes of the EEA or to distinguish, exclude or prefer any person by reason of an inherent requirement of the job. They are absolute defences to an allegation of unfair discrimination.

An in-depth analysis of affirmative action measures is not within the ambit of this study, nevertheless a brief discussion of the interplay between the duty to reasonable accommodation and affirmative action measures, as provided for in the EEA would be useful here.

Basson et al⁸⁶⁷ refer to the case of *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)*⁸⁶⁸ where the Constitutional Court stated that affirmative action should not be seen as an “exception to equality, but rather as an integral part of it” and when affirmative action measures are taken, they should not be seen as discrimination on the listed grounds, which are presumed unfair.

⁸⁶⁶ Grogan Workplace law 96.

⁸⁶⁷ Basson et al Essential Labour Law 238.

⁸⁶⁸ *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae* 2014 35 ILJ 2891 (CC).

It is significant to note the difference between reasonable accommodation and affirmative action measures, since the first is considerably more than an affirmative action duty. Pretorius et al⁸⁶⁹ explain this by considering the specific duties imposed by sections 5 and 6 of the EEA. Reasonable accommodation and affirmative action both embrace a substantive approach to equality; and require positive action to dismantle patterns of systematic discrimination. However, reasonable accommodation does not assign preference to certain groups only. Reasonable accommodation is not primarily aimed at achieving a certain rate of participation in the workplace by people belonging to a certain group but requires an individual assessment of a disadvantage and need, before eligibility can be established. The question of whether a duty of affirmative action may give rise to an enforceable claim for unfair discrimination, has been interpreted differently by South African courts.⁸⁷⁰

Affirmative action measures aim to achieve representivity⁸⁷¹ and employment equity plans.⁸⁷² Section 13 states that all designated employers, after consulting with employees, and plans have been drafted, must report to the Director-General on progress made with implementation of the equity plan. Section 20(3) of the EEA explains that a person will be viewed as "suitabl[y] qualified" if he has one, or a combination of the following: Formal qualifications; prior learning; relevant experience; and the capacity to acquire, within a reasonable time, the ability to do the job. Christianson⁸⁷³ observes that a designated group that has not benefitted from affirmative action, seems to be PWDs. She⁸⁷⁴ regards Mitra's research as instructive and even though PWDs are protected in terms of the South African Constitution and other legislation and programmes, she indicated that research

⁸⁶⁹ Pretorius et al Employment Equity Law PAR 7.4.

⁸⁷⁰ Pretorius et al Employment Equity Law PAR 7.4 For instance, Pretorius observes that the Labour Court in the case of *Harmse v City of Cape Town* (2003) 24 ILJ 1130 found that the failure to implement affirmative action could amount to unfair discrimination. On the other hand, in the case *Dudley v City of Cape Town & Another* (2004) 13 LC 1.19. The Labour Court took a different approach and found that "an unfair discrimination claim could not be imported into the affirmative action framework in Chapter III of the *Employment Equity Act*". I agree with Pretorius that the latter view present a more correct view.

⁸⁷¹ See section 15 of the EEA for more detail in this regard.

⁸⁷² Section 13 of the EEA.

⁸⁷³ Christianson *Acta Juridica* 299.

⁸⁷⁴ Christianson *Acta Juridica* 299.

studies conducted in both the public and private sector showed a decline in the employment of PWDs in South Africa.⁸⁷⁵ In her report, Mitra⁸⁷⁶ investigates the possible causes for this, stating that the growth of South Africa's disability grant system and the prevalence of HIV may have been contributing factors. She also observes that employment rights legislation, such as the EEA, may have affected employment trends. For instance, the requirements set by the EEA, that prohibit employers from discrimination, as well as the reasonable accommodation clause pertaining to employees with a disability could have resulted in organisations not hiring PWDs to avoid possible future litigation.

Christianson⁸⁷⁷ also refers to the Taylor report,⁸⁷⁸ which reflected on the effectiveness of equality laws and concluded that affirmative action, as a rule, does not apply to a business with fewer than fifty employees. Thus, small and medium-sized employers have "little legislative incentive or prompting to appoint and accommodate applicants who suffer from a disability".⁸⁷⁹ This supports the claim that affirmative action measures and the duty to reasonably accommodate, do not impose similar obligations, since reasonable accommodation requires a more needs-sensitive approach, guided by individual circumstances and a duty to prohibit discrimination, as set out in section 6 of the EEA.

In the *Standard Bank* case, referred to earlier, the Labour Court⁸⁸⁰ compared the duty to reasonably accommodate to the general obligation to implement affirmative action. Because reasonable accommodation measures protect against automatically unfair dismissals, it is more onerous than the obligation to implement affirmative action. The Labour Court also found that that the duty to reasonably accommodate PWDs is more onerous than say, accommodating religious or cultural beliefs, since

⁸⁷⁵ Christianson *Acta Juridica* 299.

⁸⁷⁶ S Mitra 'The recent decline in the employment of people with disabilities in South Africa 1998–2006' Discussion Paper No 2008–12 (July 2008) 6-7.

⁸⁷⁷ Christianson *Acta Juridica* 301.

⁸⁷⁸ The Taylor Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present – Protecting the Future (2002) 362 para 9.2.1.1.

⁸⁷⁹ The Taylor Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present – Protecting the Future (2002) 362 para 9.2.2.3.

⁸⁸⁰ Para 84 Standard Bank.

PWDs may be a burden to the economy if not reasonably accommodated. Pillay J⁸⁸¹ further explains the difference as follows:

Another difference between an employer's obligations to implement affirmative action and reasonably accommodate people with disabilities is that measures to affirm employees apply generally to all employees within the group, whereas to accommodate employees with disabilities the employer has to tailor modifications and adjustments for the specific disabilities of each employee.

The Labour Court found that a "pragmatic common sense approach" is necessary to determine what the modification or adjustment would entail, taking into consideration the nature of the position, the employee's circumstances and the way the workplace is configured.⁸⁸²

In *National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*⁸⁸³ it was stated as follows:

Disability status is not to be considered only as a sword to claim special treatment under the affirmative action provisions in chapter II of the EEA; it should also be considered as a shield to protect a person who has a disability from being dismissed from employment for a reason related to that disability.

3.3.3.7 *Compensation for Occupational Injuries and Diseases Act 130 of 1993*⁸⁸⁴ (COIDA)

3.3.3.7.1 Introduction and Background

As far back as 2002, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa suggested that policy makers should introduce measures to enforce market re-integration. Vocational training and rehabilitation and where circumstances permit, the linking of benefits payment to participation are basic means to achieve re-integration.⁸⁸⁵

The Department of Labour's Annual Report for the term 2016/2017, stated that amendments to COIDA had "reached an advanced stage in the Department during

⁸⁸¹ PAR 85 Standard Bank.

⁸⁸² PAR 86 Standard Bank.

⁸⁸³ *National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape) (2004) 25 ILJ 2091 (BCA) PAR 28.*

⁸⁸⁴ *Compensation for Occupational Injuries and Diseases Act 130 of 1993, hereafter COIDA.*

⁸⁸⁵ Transforming present into the future consolidated report Taylor et al 114.

this term". The Department, shortly referred to legislative revisions and indicated that an amendment to COIDA was under consideration, to develop a rehabilitation, re-integration and RTW policy for injured or diseased workers "to ensure integration⁸⁸⁶ with other South African Policies and Programmes which provide a framework for rehabilitation of people with disabilities which stresses the importance of vocational integration".⁸⁸⁷ The proposed amendments was debated at NEDLAC in 2017.⁸⁸⁸ It is further important to note that COIDA Amendment Bill was published for public comment on 17 December 2018.⁸⁸⁹

Prior to the suggested, COIDA has the following aim:

To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.

The aim of the COIDA Amendment Bill currently read as follows:

To amend the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 so as to substitute, insert, delete and repeal certain sections and definitions; to provide coverage for domestic employees, to provide for 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 reopening of claims; to provide for criminal and administrative penalties; to regulate compliance and enforcement, to provide for no fault based compensation system and to provide for matters connected therewith.

Thus, rehabilitation, reintegration and return to work is now included as aims, whereas previously the focus was merely on the payment of compensation. However, it is necessary to carefully scrutinise the provisions in order to determine whether the COIDA Amendment Bill will assist disabled workers to be returned to work. If one considers the amended aim of the Act, it thus suggest extensive

⁸⁸⁶ At this stage, it is unclear which policies and programmes the Compensation Fund is referring to. It will be important for The Compensation Fund to guard against piecemeal recognition of return to work arrangements.

⁸⁸⁷ Department of labour 2016/2017 <http://www.labour.gov.za/DOL/documents/annual-reports/annual-report-pfma/2017/annual-report-of-the-department-of-labour-2016-2017>.

⁸⁸⁸ NEDLAC 2017 <http://nedlac.org.za/development-chambers-2/>.

⁸⁸⁹ South African Institute of Occupational Safety and Health 2018 <https://www.saiosh.co.za/news/424855/COIDA-Amendment-Bill-2018-and-Regulations-published-for-public-comment.htm>.

obligations relating to the re-integration and rehabilitation of an employee.⁸⁹⁰ Further, the Compensation Fund⁸⁹¹ indicated that they are still the process of developing a policy framework employers' incentives to assist with compliance in terms of the Act.

First, it is important to consider some of the definitions in section 1 of the Act. Prior to the amendments, disablement was defined to include temporary partial disablement, temporary total disablement, permanent disablement or serious disfigurement. The former definition didn't provide for mental disability. "Disability" is now defined as follows:

...disability means for purposes of rehabilitation in terms of this Act a permanent or term or recurring physical or mental disability which substantially limits the prospects of a person to obtain by virtue of any service, employment or profession the means needed to enable that person to provide for maintenance.

Rehabilitation was not previously defined in COIDA, but has now been included, to include both clinical vocational and social rehabilitation (as provided for in chapter VIIA of the COIDA Amendment Bill), with the aim to reintegrate employees, who were exposed to occupational injury or disease, not only back to work but also to reach 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". Occupational diseases, now include, post-traumatic stress disorders. However, a reading of section 1 revealed that it will be necessary to include further definitions such as "re-integration"; and "return to work". Furthermore, it is essential to amend some of the current definition clauses to bring it in line with the aim of RTW, rehabilitation and re-integration, and such will be explained as the discussion below continues.

⁸⁹⁰ However as will be argued, COIDA Amendment Bill in its current format will need to include more detailed provisions on *how* these objectives will be reached and provisions relating to improve compliance with the new proposed obligations. Also, it will be necessary to determine how other social security reforms will impact the role of the Compensation Fund, for instance will duties be delegated to the national social security fund instead. Furthermore, other Acts will need to be amended to ensure that all labour legislation function in harmony, to ensure that disabled workers are returned back to work.

⁸⁹¹ Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>.

The former definition of “Medical aid”, still stands and it is defined as follows:

...means 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.

This definition will also need to be broadened, to include assistive devices in the workplace. It is further suggested that the term “reasonable accommodation” also be included in the Act, to make provision for adjustments or modifications to either the job itself or the working environment to allow an employee to have access to employment, or even advance in it.

Of particular relevance is Chapter V11A, which deals with rehabilitation, re-integration and early return to work. It places a duty on the Compensation Fund to provide rehabilitation and reintegration. It is an extremely brief chapter and the entire chapter reads as follow:

70 A 1. Subject to the provisions of this Act the Compensation Fund may provide as the case may be facilities services and benefits aimed at rehabilitating employees suffering from occupational injuries or diseases to return to their work and to reduce an disability resulting from their injuries or diseases.

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

(a) 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

(b) vocational rehabilitation to assist an employee to maintain employment; obtain employment, regain or acquire vocational independence and

(c) social rehabilitation to assist in restoring an employee’s independence and social integration to the maximum extent practicable.

As was argued in Chapter 2, rehabilitation requires a multi-faceted process with the involvement of different stakeholders. It will thus be necessary for the Compensation Fund to ensure the participation of all stakeholders involved, in order to truly give effect to this provision of the Act. Staff capacity and ongoing training of staff involved in the rehabilitation process will need to be investigated. Further, if one considers this chapter, it does not make provision for the legal obligation of employers or obligations of other role-players to return disabled workers back to

work. It seems as if the duty will rest solely on the Compensation Fund and that compliance by employers will only be awarded with incentives, as was mentioned earlier. It would have added value if large employers had concrete RTW obligations, to alleviate the burden of the Compensation Fund. As will be proposed in the concluding chapter of the thesis, the Compensation Fund need to consider enacting legislation which will regulate the appointment and functions of designated case managers; the development of an online date-basis as well as disability management measures in order to assist to return workers back to work.

Further, in a media statement last year, the Compensation Fund stated that the “The rehabilitation, re-integration and return to work programs as outlined in the new Chapter shall be implemented by all *employers*”⁸⁹². This insertion is one of the biggest changes⁸⁹³ However, as was argued above, the chapter in its current format stipulates that the Compensation Fund bears the duty to rehabilitate and reintegrate. The dual role of the Compensation fund and employers thus requires further clarification and possible amendments.

It is important to also consider some of the other provisions of COIDA in order to determine whether further amendments may be necessary.

Chapter 4 of the Act “Compensation for Occupational injuries”, and more specifically section 22 provides that employees are entitled to the benefits prescribed by the Act, should they be involved in an accident resulting in disablement. However, this entitlement is qualified in Section 22(3) by stating that “If an accident is attributable to the serious and willful misconduct of the employee, no compensation shall be payable in terms of this Act”. However, the section goes further and provides that this provision shall not apply if such an accident resulted in the serious disablement or if the employee had passed away leaving behind financially dependent next-of-kin. By virtue of Chapter V11A, similar provisions for qualification applicable to RTW programmes must also be included as part of the Act.

⁸⁹² Own emphasis.

⁸⁹³ Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>.

With reference to Section 26, it is important to note that the Director General may refuse award if the death or disablement of the employee was either caused, prolonged or aggravated by the “unreasonable refusal or wilful neglect” of the employee to submit him/herself to medical aid and/or rehabilitation. Considering the hefty implication of this sub-section, it will be of utmost importance to have more detailed provisions in COIDA clarifying the roles of all stakeholders involved.

Section 85 of the Act now makes provision for employers’ rebates on assessments payable by him, for participating in the rehabilitation of his employees. As was argued above, even though the use of positive incentives is commended, it must be expected of at least large employers to have mandatory disability management functions, which in turn can be motivated by both positive and negative incentives. Negative incentives may for instance include, the payment of fines for non-compliance.

Another important provision to consider is Section 41 which deals with the facts of the claim. Currently, section 41 provides that an employee is obliged to furnish information and documents as prescribed or directed by either the employer or commissioner, as well as “any such documents as may be requested” Furthermore, employers must, within seven days, after receiving a medical report or other related documents or information, submit such information or documents to the commission. This section is important for RTW, since documents containing medical evidence will prescribe the applicable RTW intervention and rehabilitation. The submission of such notices should be compulsory, to ensure early and successful participation in the rehabilitation and RTW processes. Obtaining relevant information will also be crucial for the development of a proper RTW plan.

Section 42(1) provides that an employee who wishes to claim compensation, or to whom compensation has been paid, is required to, after reasonable notice has been served, to undergo a medical examination as well as examination for rehabilitation. This section needs to be broadened to provide for a multi-disciplinary examination by professionals like medical, occupational or rehabilitation experts establish the capability of an employee, which will allow them to either return to pre-injury duties

or alternative interim employment. Follow-up examinations during the RTW process could contribute to a faster return to work. Where participation in the return to work programme was unsuccessful, COIDA must make it mandatory for the employee to undergo a final multi-disciplinary assessment to establish why the employee was unable to return to work.

Section 38 of COIDA still states that an employee is obliged to notify the employer as soon as possible after an accident. Considering the provisions of chapter V11 A, this section will be important because it allows for timeous intervention by either the employer or the Compensation Fund. Failure by the employee to give notice, may hinder his chances of successfully returning to work, since early intervention and appropriate rehabilitation may reduce absence from work and improve prospects of returning to work.⁸⁹⁴ It is proposed that this section be amended to make it compulsory to report an accident within 48 hours.

Section 39 places an obligation on the employer to report an accident to the Commissioner within seven days. It is proposed that this section should rather read that the employer is obliged to report the accident as soon as possible but no later than seven days after occurrence, and also that it must be mandatory for the employer to communicate with the case manager or RTW coordinator appointed by the Compensation Fund, which will allow for the drafting of the RTW plan to begin as soon as possible. The Act fails to make provision for dismissal protection during participation in a rehabilitation and/or return to work programme.

Section 40 of the Act provides that the Director General, upon receiving notice of an accident, conduct an inquiry into the viability of the claim. Employees and employers must furnish the Director-General with particulars relevant to the accident or injury, as required. It is submitted that the payment of compensation and the commencement of RTW and rehabilitation cannot be determined and measured by the same time-frames and inquiry processes. It is commendable that an inquiry process about the accident should be conducted, however the Act needs to make provision for interim RTW services to start as soon as possible. If there is *prima facie*

⁸⁹⁴ Awang et al *J Rehabil Med* 525.

proof that an occupational injury has occurred, the RTW process must start promptly, with an inquiry running concurrently. It is the author's opinion that this section must also make provision for the Director-General to appoint delegates to assist with inquiries.

The process for claiming compensation is regulated by section 43 of COIDA. It states that claims must be lodged by or on behalf of the claimant in the prescribed manner and within twelve months after the date of accident or death. If one considers the obligation which are now imposed in Chapter VIIA, it will be necessary to either amend section 43 to regulate the time-frames by which requests to participate in RTW must be submitted, or to add a new section to make provision for similar RTW arrangements.

COIDA contains a prescription clause in section 44, which states that rights to benefits will be forfeited if the accident were not lodged with the Commissioner; employer or relevant mutual organisation, within twelve months. Since this section refers to "benefits", it is assumed that it will also apply to the benefits introduced by Chapter VIIA.

Section 45 as it currently reads, provides that the Director-General shall "consider and adjudicate on a claim for compensation". To realise this, the Director-General may investigate or hear the claim formally. This section also needs to be broadened, to make provision for claiming for participation in return to work, and/or adjudication of such a claim.

Chapter 7 of COIDA deals specifically with occupational diseases and includes reference to various related aspects, including compensation; calculation; and submission of notices. Section 70, which is noteworthy, makes provision for the appointment of medical advisory panels by the Director-General. Considering the new obligations imposed by Chapter VIIA, this section also requires amendment to

make provision for the appointment of other advisory panels⁸⁹⁵, since the rehabilitation and return to work programmes entail more than medical services.

Chapter 9 of COIDA prescribes the obligation of employers, and more specifically section 80, states that all employers are obliged to register with the Commissioner and submit the prescribed information in the format and time-frames required by the Commissioner. For purposes of RTW and recovery prospects, employers need to be made aware of the importance of record-keeping and enforcing compliance with this provision. RTW programmes must be supported by an up-to-date data basis.

Section 93 makes provision for the appointment of inspectors, and their functions are set out in section 93 B and comprise of the following:

- a) Advising employees and employers on their duties;
- b) Conducting inspections to ensure compliance;
- c) Investigating complaints made to the Director-General;
- d) Issuing compliance orders and
- e) Performing any other function related to this Act.

The Compensation Fund made the following important public statement last year:

The Bill also makes provision for the appointment of Disability Managers by the Fund whose main responsibility will be to co-ordinate the implementation of rehabilitation and reintegration programs in consultation with Case Managers appointed by employers in the workplace.⁸⁹⁶

However, a reading of the Act did not reveal any direct reference to the appointment of designated disability managers or appointment of case managers. If one considers section 93, it is also not clear whether the Compensation Fund envisions inspectors to fulfil such duties. Clarification of duties will thus be essential in order to ensure compliance with the Act.

Section 97(1)(i) determines that the Minister may make regulations, after consultation with the Board, rehabilitation, reintegration and return to work and

⁸⁹⁵ For instance, specialised panels who can advise on rehabilitation and RTW services and obligations. It will thus become necessary to move towards a multi-disciplinary approach in order to effectively move towards the successful return to work of workers. There also needs to be a focus on prevention of illnesses or injuries.

⁸⁹⁶ Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>.

section 97(1)(j) makes provision for regulations relating to inspection, compliance and enforcement. It will be important to scrutinise regulations once they are promulgated, if any.

3.3.3.8 Other relevant legislation

It is also important to consider the influence of the COIDA Amendment Bill on other legislation. This will be indicated as the discussion progresses.

3.3.3.8.1 *The Unemployment Insurance Act 63 of 2001*⁸⁹⁷

The UIA provides income protection to those who lose their jobs.⁸⁹⁸ Although it applies to all employers and workers, some are excluded.⁸⁹⁹ The aim of the UIA is as follows:

To establish the Unemployment Insurance Fund; to provide for the payment from the Fund of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependant's benefits related to the unemployment of such employees; to provide for the establishment of the Unemployment Insurance Board, the functions of the Board and the designation of the Unemployment Insurance Commissioner; and to provide for matters connected therewith.

It is noteworthy to consider how some of the provisions of the UIA might be affected with the introduction of rehabilitation, re-integration and RTW by the COIDA Amendment Bill.

First, section 20 of the Act describes the "Right to illness benefits" and determines that a contributor is entitled to benefits as prescribed by the Act if: He is unable to perform work on account of illness; he fulfils the prescribed requirements in respect of the specified illness; and an application is made for an illness in accordance with the prescribed requirements and provisions of the Act. Subsection 20(2)(ii) is important and specifies that the contributor will not be entitled to illness benefits if

⁸⁹⁷ *The Unemployment Insurance Act 63 of 2001 (Hereafter, UIA).*

⁸⁹⁸ Department of Labour 2019 <http://www.labour.gov.za/DOL/legislation/acts/unemployment-insurance-fund/unemployment-insurance-act-no-63-of-2001>.

⁸⁹⁹ Workers working less than 24 hours a month for an employer; learners; public servants; foreigners working on contract; workers who get a monthly State (old age) pension; or workers who only earn commission.

he “without just reason, refuses or fails to undergo medical treatment or to carry out the instructions of a medical practitioner, chiropractor or homeopath”. The author agrees with the submission by Oliver et al⁹⁰⁰ that in order to improve participation in RTW, the above provision should also be applied in instances where a person should fail or refuse to participate in an RTW-based rehabilitation programme that consists of more than medical treatment.

Section 16 of the Act contains provisions that regulate the contributor’s entitlement to unemployment benefits. For instance, section 16 (1) (a) states that the contributor will be entitled to benefits if he were dismissed in terms of section 186 of the LRA. It is the author’s submission that it will be necessary to amend section 16 to include that the contributor will be entitled to receive unemployment benefits, if he had participated in the RTW programme as prescribed by the RTW plan but had been unable to return to work. Such a condition would motivate workers to participate in RTW programmes, without fear of losing their unemployment benefits, should the outcome not be favourable to them.

Olivier et al⁹⁰¹ submit that a key element for the introduction of an RTW system in South Africa would be the re-training of workers who have been affected by disability or illness. This has a direct impact on the way unemployment insurance benefits will be calculated.

Section 51 prescribes the information the employer must provide to the Commissioner, such as personal and remuneration details of employees and business details of the employer. It is submitted that this section must be amended to include information pertaining to those employees who participated in RTW programmes, since this will influence whether they are also entitled to other benefits, such as unemployment or illness benefits.

Section 57 mandates the Commissioner to create and maintain a database of beneficiaries, contributors and employers. Correct record-keeping will be crucial,

⁹⁰⁰ Olivier et al *The role of standards in labour- and social security law: international, regional and national perspectives* 235,231.

⁹⁰¹ Olivier et al “Rehabilitation, Reintegration and Return-to-Work of Workers”12.

even more so if different information systems are used in the recording of rehabilitation, return-to-work, compensation and other benefits. It is suggested that a unified data- capturing system is employed.

Dispute resolution forms an important part of any benefit-providing system. The UIA, in section 36, makes provision for the suspension of benefits and stipulates that the Commissioner may suspend benefits in case of fraudulent applications. The contributor is entitled to an appeal and if still dissatisfied, to refer the matter for arbitration to the CCMA.⁹⁰² COIDA will need to make provision for a multi-level dispute resolution framework that must be aligned with the dispute resolution processes contained in other legislation, such as the UIA or the possibility should be investigated to have one unified multi-level dispute resolution process for claims relating to benefits as well as programmes aimed at the re-integration of employees.

3.3.3.8.2 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

This Act was enacted to give effect to section 9(4), read together with item 23(1) of Schedule 6 of the Constitution, to prevent and prohibit unfair discrimination and harassment; promote equality, prevent hate speech and to provide for other related matters. It is not intended to displace the EEA, which governs equity in the workplace. It must be viewed in a broader sense, hence covering matters not provided for in the EEA, such as the protection of employees and employers excluded by the EEA. It aims to ensure that PWDs are treated with respect and enjoy the same rights as non-disabled people. The Act identifies unfair practices that discriminate against persons from designated groups on certain prohibited grounds, disability being one of the grounds, as prescribed in section 9 of the Act. The Act further aims “to give effect to the letter and the spirit of the Constitution” and to promote equality and the equal enjoyments of all rights and freedoms by every person.⁹⁰³

Section 9 of the Act further prohibits unfair discrimination on the grounds of disability, including as follows:

⁹⁰² Section 37 of the UIA.

⁹⁰³ Cole and Van der Walt 2014 *Obiter* 523.

- a. denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- b. contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- c. failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

It is thus possible, both in theory and in terms of the Act, for a designated group to have recourse under the Act when employers fail to make the workplace accessible.

PEPUDA places an obligation on the state to eliminate discrimination and promote equality for all, including the disabled and places a responsibility on all citizens to promote equality. Furthermore, it places an obligation on the state to take appropriate legislative measures to fulfil its duties towards PWDs. One could argue that PEPUDA provides implicit support for RTW, specifically with reference to Section 9(c) as quoted above. PWDs are entitled to be reasonably accommodated, hence the inclusion of RTW support. It must be noted that the Act fails to provide a definition for both "disability" as well as for "reasonable accommodation". It is submitted that it will be necessary to include such definitions, in order to provide more clarity of what the duty to reasonably accommodate a disabled person entails. It is further submitted that a similar definition be used in the different Acts which either prescribe or protect the reasonable accommodation of PWDs, for instance the EEA, the LRA or its relevant Codes.

Section 25 of the Act is worth mentioning since it provides that the State, with the assistance of the relevant constitutional institutions must, *inter alia*:

- (1)(b) take measures to develop and implement programmes in order to promote equality; and
- (c) where necessary or appropriate--
 - (i) develop action plans to address any unfair discrimination, hate speech or harassment;
 - (ii) enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of this Act;

(iii) develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation;

It is clear that Section 25 provides a broad, but specific instruction for the state to give effect to the right of equality, which includes the enactment of new legislation or Codes of Good Practice, specifically aimed at understanding the duty to reasonably accommodate PWDs, which may include RTW, rehabilitation and re-integration obligations.

In 2016 the Commission for Employment Equity published a report indicating that little progress had been made with the employment of PWDs since Employment Equity legislation were promulgated in 1998 and 1999 respectively. This was exacerbated by the fact that when employed, PWDs are often hired for menial tasks or are employed at entry level. Employers were urged to conduct research before making any decision about disabled employees.⁹⁰⁴ Taking the afore-mentioned into consideration, it is vital, for the government; employers and other role-players to know what the duty of reasonably accommodating PWDs entails. This duty must be coupled with compulsory guidelines for role clarification. Since several Acts that regulate the duty to reasonable accommodate exist, it is submitted that these Acts or guidelines be synchronised to allow for a better understanding of compliance with duties.

3.3.3.8.3 *Skills Development Act 97 of 1998*

The Skills Development Act's main purpose is to facilitate the improvement of skills and productivity, enabling South Africa to compete internationally. Furthermore, it aims to improve workers' quality of life; afford disadvantaged individuals improved opportunities; and promote productivity in the workplace.⁹⁰⁵ This Act provides the framework for the state's responsibility for the training of workers and also connects to the capacity-building strategy as set out in the EEA. For example, the Act makes

⁹⁰⁴ SABPP 2017 http://sabpp.co.za/wp-content/uploads/2017/10/Fact-Sheet_October_v002-with-active-links.pdf.

⁹⁰⁵ Ganie *An Exploration of the Experiences and Perceptions of Employer And Caregivers* 24.

provision for ways to redress disadvantages by way of training and education and various forms of levies and grants.⁹⁰⁶

If one considers section 2(1)(c) of the Act, it provides that the Act also has, as one of its aims:

... to encourage employers -

- (i) to use the workplace as an active learning environment;
- (ii) to provide employees with the opportunities to acquire new skills;
- (iii) to provide opportunities for new entrants to the labour market to gain work experience; and
- (iv) to employ persons who find it difficult to be employed;

From the above, it seems that employers play a key role in the development and even the retainment of skills in the labour market. Section 2(1)(g) provides that the Act aims to assist work-seekers find work; retrenched workers to re-enter the labour market; and employers to source qualified employees. The rehabilitation of disabled workers and compulsory RTW programmes also aim at re-integrating workers (even after retrenchment) and give effect to the aim of the *Skills Development Act*.

Section 30B(1) of the Act also makes provision for the Minister to establish a national standard of good practice in skills development. Section 30B(3) makes it possible for the Director-General to finance any activity in terms of this section from the National Skills Fund. This Section thus includes a national standard of good practice for the development of skills that could make it possible for disabled workers to return to employment.

An RTW system must include, as one of its core elements, the full opportunity for employees to be able to retrain and/or re-skill themselves to improve their chances for total rehabilitation and re-integration into productive employment. With reference to the *Skills Development Act*, Olivier et al ⁹⁰⁷ submit that the Minister of Labour has the authority to include skills development for those suffering from an occupational

⁹⁰⁶ Cole and Van der Walt 2014 *Obiter* 526.

⁹⁰⁷ Olivier et al *The role of standards in labour- and social security law: international, regional and national perspectives* 231.

illness or injury (of from another form of contracted disability) as a national standard of good practice. The Minister may also, after consultation with the National Skills Authority, make regulations to improve the chances of employer compliance with reference to their duties of skills development for affected employees.⁹⁰⁸

3.3.3.8.4 *Occupational Health and Safety Act 85 of 1993*⁹⁰⁹

It is essential to examine briefly the sections of this Act to determine whether any provisions may be affected by the COIDA amendments. The OHSA aims:

To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.

This Act does not make any special provision for the health and safety of PWDs in the workplace nor does it make provision for the enforcement of special-needs safety.⁹¹⁰ The Presidency has announced that the OHSA will be amended to ensure that employers have a responsibility to create a healthier and safer working environment.⁹¹¹ However, as of date no such legislation has surfaced. It is suggested that this Act must at least contain a provision relating to the prevention of re-occurrence of accidents or illnesses that may hinder the future employment or return-to-work.

⁹⁰⁸ Olivier et al *The role of standards in labour- and social security law: international, regional and national perspectives* 231.

⁹⁰⁹ *Occupational Health and Safety Act 85 of 1993, hereafter OHSA.*

⁹¹⁰ Cole and Van der Walt 2014 *Obiter* 526.

⁹¹¹ The Presidency 2017 <http://www.thepresidency.gov.za/content/sona-2015percent3A-legislation-come-parliament>.

3.3.3.8.5 *Mine Health and Safety Act 29 of 1996*⁹¹²

This Act, like the OHS Act discussed above, does not make any special provision for PWDs in the workplace. Its objectives⁹¹³ relate to the general health and safety of mineworkers.⁹¹⁴ It is unclear whether the amendments to COIDA will also be applied to the MSHA.

3.3.3.8.6 *The Basic Conditions of Employment Act 75 of 1997*

The aim of the BCEA is to advance social justice and economic development and, to give effect to the right to fair labour practices by regulating the basic conditions of employment. The provisions of the BCEA are relevant to the duty of employers to provide reasonable accommodation to employees. In support of RTW arrangements, the author suggests that it may be possible for employers to adjust the working conditions of PWDs by allowing for weekly recuperation periods and sick leave. However, it must be noted that the Act contains no specific provisions or allowances for PWDs.⁹¹⁵ Employers and employees, in conjunction with the RTW coordinator, could negotiate working hours, with which I agree. I therefore submit and recommend that the provisions of the BCEA may have to be amended in future, to make provision for flexible RTW arrangements.

⁹¹² *Mine Health and Safety Act 29 of 1996*. As was noted in Chapter 1, it falls without the ambit of the study to do an analysis of the positions in mines as well.

⁹¹³ For instance, some of the objectives are: To protect the health and safety of persons at mines; to provide for effective monitoring of health and safety conditions at mines; to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines; *et cetera*.

⁹¹⁴ For instance, section 1 (a-b) determines that the objects of this Act are (a) to protect the health and safety of persons at mines; (b) to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines. Section 5 determines that Section 5.

5. Employer to maintain healthy and safe mine environment.-(1) As far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees. (2) As far as reasonably practicable, every employer must (a) identify the relevant hazards and assess the related risks to which persons who are not employees may be exposed; and (b) ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety

⁹¹⁵ Cole and Van der Walt 2014 *Obiter* 522.

3.3.3.8.7 *The Protected Disclosures Act 26 of 2000 and the Employment Services Act 4 of 2014*

The disclosure of information regarding disability poses an ethical dilemma but employees cannot demand adjustments to the workplace (or to be reasonably accommodated otherwise), if they are not prepared to disclose any disabilities. The TAG and the Code are also useful in assisting employers on how to deal with disclosed information. The *Protected Disclosure Act* serves as a guideline to employers on how not to discriminate against disabled employees after disclosure of disability.⁹¹⁶

The *Employment Services Act*⁹¹⁷ was promulgated in 2014, and its main aim is to regulate the establishment of schemes to promote the employment of young workers and other vulnerable persons. PWDs are defined as in the *EEA*. The *Act* makes provision for the employment of PWDs in the form of Supported Employment Enterprises⁹¹⁸ with the following objectives: To coordinate supported employment; to provide work opportunities for PWDs and to develop and implement programmes promoting the employability of PWDs, also making provision for those with a permanent disablement as set out in COIDA. However, it is important to consider how and to what extent supported employment enterprises would be effective in returning employees to the open labour market. Would there be provision for RTW arrangements whilst the person works in supported employment? Once COIDA is finally amended it will also be necessary to investigate how it will impact supported employment enterprises in South Africa.

3.3.4 *Best Practices*

Several best practice models on the rehabilitation and re-integration of occupationally injured or ill workers exist in South Africa, mainly in the form of so-called employee wellness or employee assistance programmes. Employee assistance programmes aim to assist employees with problems that may affect their functioning

⁹¹⁶ Cole and Van der Walt 2014 *Obiter* 524.

⁹¹⁷ *Employment Services Act 4 of 2014*.

⁹¹⁸ Basson 2017 *PER / PELJ* 12.- DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1216>.

at home or at work. Employee wellness programmes include strategies, methods and action plans to advance the emotional, mental and physical health of all employees to improve productivity.⁹¹⁹ Their scope includes prevention, early identification and treatment of health risks, as well as other general health programmes, reinforcing good health practices by eliminating poor habits and behaviour.⁹²⁰ These programmes do not have RTW strategies and re-integration as core objectives. Nonetheless, there are companies that have incorporated elements of RTW strategies that focus on rehabilitation and the functional assessment of employees. The companies that have developed DM strategies, and their best practice models are discussed below.

3.3.4.1 Anglo Gold Ashanti

Anglo Gold Ashanti is the third largest global mining company, with its headquarters in Johannesburg.⁹²¹ It has a Functional Work Capacity Programme, which is run in conjunction with the Comprehensive Rehabilitation and Functional Assessment Programme during which a worker's capacity for a specific occupation is assessed, and the necessary rehabilitation and training for an alternative job provided.⁹²² This programme is part of a series in the company's medical surveillance programme and the results obtained are utilised by the occupational medical practitioner to conduct further tests.⁹²³

3.3.4.2 Anglo Platinum

Anglo Platinum is the world's leading platinum producer with headquarters in Johannesburg. The company is committed to working towards a "safe, sustainable, competitive and profitable business: in benefit to the country, the community, their people and shareholders".⁹²⁴ It conducts regular routine medical examinations on all

⁹¹⁹ Olivier et al The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa 216,221.

⁹²⁰ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 44.

⁹²¹ Anglogold Ashanti 2017 <http://www.anglogoldashanti.com/company/overview/>.

⁹²² Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 44.

⁹²³ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 44.

⁹²⁴ Anglo American 2017 <http://www.angloamericanplatinum.com/about-us/what-we-do.aspx>.

employees to monitor their fitness for work and identify any medical condition needing attention.

Various rehabilitation and functional assessment centres are located in Rustenburg, Thabazimbi and Modikwa respectively and the so-called Rehabilitation and Functional Assessments Test Battery is used to identify, prevent and correct the workers' medical condition.⁹²⁵ Functional work capacity testing for specific jobs is also carried out. The Test Battery is employed as a rehabilitation programme that supplies the in-house medical practitioner with information about the worker's fitness for work, the seriousness of an injury and therapy required. If a worker is found not fit for work, he/she must participate in a rehabilitation programme and undergo further tests until they are declared fit for work. Employees undergoing a medically boarding process, are also assessed and even considered for alternative employment.⁹²⁶

3.3.4.3 Sasol

A good best practice example is the occupational health management programme of Sasol, the international integrated chemicals and energy company.⁹²⁷ Sasol believes in promoting a healthy workforce by adopting an "integrated health and wellness approach", which contributes to the health and safety of its employees, and therefore improves productivity and efficiency.⁹²⁸ The Occupational Health Management Programme addresses risk and prevention and also offers a rehabilitation and an RTW programme.⁹²⁹

⁹²⁵ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 44.

⁹²⁶ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 44.

⁹²⁷ Sasol 2017 <http://www.sasol.com/about-sasol/company-profile/overview>.

⁹²⁸ Sasol 2017

http://www.sasol.com/extras/AIR_2015/sites/sasrep_live_sdr2015/files/Promotingpercent20thepercent20safetypercent20andpercent20healthpercent20andpercent20wellbeingpercent20ofpercent20ourpercent20people.pdf.

⁹²⁹ Sasol 2017

http://www.sasol.com/extras/AIR_2015/sites/sasrep_live_sdr2015/files/Promotingpercent20thepercent20safetypercent20andpercent20healthpercent20andpercent20wellbeingpercent20ofpercent20ourpercent20people.pdf.

3.3.4.4 ArcelorMittal South Africa

ArcelorMittal is the largest steel producer in Africa with headquarters in Vanderbijlpark.⁹³⁰ It is the only company in South Africa with a comprehensive DM strategy, consisting of guidelines and procedures to: Identify disability; conduct investigations on medical incapacity; assess work capacity; identify and develop the essential functions of a job; determine unjustifiable hardship for the company; carry out medical examination procedures; and reasonable accommodation of ill or injured employees. The role of Occupational Medical Practitioners is also described. For instance, they must develop a suitable incapacity case management programme as well as an RTW programme, in consultation with a disability coordinator.⁹³¹

3.3.4.5 Workability

Another case study/initiative worth noting is that of the company, Workability, situated in Cape Town.⁹³² It is a business-to-business healthcare company that provides a wide range of services, through the use of innovative technology and tested clinical systems to *inter alia*, streamline the recovery and RTW process of injured employees. Through its revolutionary web-based IT system, the company can track claims accurately, identify underlying issues and trends and make strategic recommendations to its clients.⁹³³ A case management approach is employed to achieve market leading RTW outcomes through collaboration between different stakeholders. Certain key aspects of the company's case coordination approach include the following, to name but a few: An objective awareness of the value of best and appropriate treatment; using RTW case coordinators to assess employees and coordinate their care by overseeing the national network of different role-players involved in the RTW process; and the use of a web-based IT system to track the treatment of patients to ensure that evidence-based guidelines are used to reach

⁹³⁰ Arcelor Mittal 2017 <https://arcelormittalsa.com/>.

⁹³¹ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 46.

⁹³² Workability 2012 https://workability.co.za/site/about_us.

⁹³³ Workability 2012 <https://workability.co.za/site/services>.

outcomes. A case management approach facilitates a speedier return to work and a decrease in claims.⁹³⁴

Workability adheres to a procedure, which contributes to its success. First, a telephonic screening is conducted to identify and capture the necessary information for determining the most effective treatment. The second step is an "Immediate Medical Assessment", or optimum recovery. Barriers that may hinder recovery, are identified, the RTW plan is developed and treatment or intervention determined. The following step is the RTW Screening Assessment, also known as the Bio-Psychosocial Assessment, which can be processed either telephonically or face-to-face, but must be administered by specially trained clinicians who will investigate: The occurrence of possible contra-indications; factors affecting recovery; psychosocial impacts; and RTW assistance requirements as well as the development of rehabilitation goals to ensure the buy-in of the injured worker in his own recovery and RTW. Once the patient has achieved maximum functional ability but is still unable to RTW, a functional capacity evaluation is conducted. This entails fitness for work assessments, pre-employment screening; and ergonomic workplace and Job Demand analysis.⁹³⁵

Workability handles RTW Referrals for companies with employees suffering from medium- to long-term absence and chronic health conditions. Companies are often unaware whether employees do have the capacity to return to work. A detailed RTW telephone screening assessment is conducted by an RTW coordinator to obtain the necessary information to manage and report a case. A management report is compiled comprising of, *inter alia* the following: Steps that need to be taken to get a worker back to work as soon and safely as possible; feedback should be goal-orientated, time-focused and communicated in an appropriate manner; attention to barriers that hamper a return to work instead of the diagnosis they might have been "labelled with"; recommendations on whether medical treatment or inputs may be necessary in order for the worker to effectively recover and return to work; constant communication between the role-players involved in the RTW process (RTW

⁹³⁴ Workability 2012 <https://workability.co.za/site/services>.

⁹³⁵ Workability 2012 <https://workability.co.za/site/services>.

coordinator, medical professionals, HR, Line managers); and the management of referrals to specialists and ongoing case management until the case resolution has been approved.⁹³⁶

3.3.4.6 Workability RTW Rehabilitation Unit in Montague Gardens, Cape Town⁹³⁷

The RTW Rehabilitation Unit was established after it was discovered that traditional occupational therapy and medical physiotherapy were not sufficient for addressing the needs of patients with work-related injuries. This approach is in line with international research that emphasised the need to adopt a bio-psycho-social approach, which leads to more cost-effective outcomes. The Unit consists of physiotherapy services, treatment areas, lecture rooms for education and training as well as equipment to allow for practical work simulations, functional rehabilitation and exercise. Provision is also made for the transportation of patients from designated points to rehabilitation units. Operating and quality assurance procedures, manuals, methodology and structures for RTW management have been developed. A second rehabilitation unit was opened in March 2012 and major hubs are being rolled out nationally.⁹³⁸

The Unit supports the international notion of a bio-psycho-social approach coupled with work hardening activities, to achieve more cost-effective outcomes. Workability has specialised work rehabilitation centres in Montague and Brackenfell, where they address RTW barriers.⁹³⁹ The company has assisted more than a thousand companies to reduce sick leave and disability claims. A vital element of RTW is innovative IT systems and practices. Workability's technology and its "tried and tested" clinical practices and systems work well to manage claims and update the recovery and RTW processes of injured employees and to reduce absence due to illness. Workability makes use of case managers, through its web-based IT system, to allow for case tracking, in line with international practices of tracking the patient's

⁹³⁶ Workability 2012 <https://workability.co.za/site/services>.

⁹³⁷ Workability 2012 <https://workability.co.za/site/rehab-units>.

⁹³⁸ Workability 2012 <https://workability.co.za/site/rehab-units>.

⁹³⁹ Robin 2016 <http://www.cbn.co.za/services/safety-in-industry/a-solution-to-workforce-absenteeism-caused-by-injuries-in-the-workplace>.

treatment to ensure goal-orientated and consistent treatment.⁹⁴⁰ Assessments are usually targeted at employees at risk of long-term disability or absence. They ensure that all participants who are involved in the case all work towards the same goal, namely RTW.⁹⁴¹

3.3.4.7 "Fitness 4 work"

"Fitness 4 work" is a South African organisation based in Rustenburg, North-west Province, which provides several services to manage incapacity, for example, case management and the placement of PWDs in employment. The organisation's strategy is to "optimise the employee's performance at work while minimizing risk of injuries or illnesses".⁹⁴² Its aim is to integrate the employee gradually in employment after illness or injury, and to prevent further absences relating to illness. The organisation makes use of a comprehensive functional test, "Work well's FCE" which is an objective measure of an individual's optimal safe functional abilities. A variety of physical capabilities are tested to formulate recommendations to enable the person to return to work, either in the same or alternative position. The test is standardised but also flexible and can be customised. It is evidence-based, in line with international best practice⁹⁴³ that makes use of the case management approach.⁹⁴⁴

3.4 Summary

This chapter consisted of a discussion of the general legal and policy framework for the introduction of RTW arrangements in South Africa, in line with the Constitution. Even though the COIDA Amendment Bill, which was published for public comment last year, is indeed commendable, further amendments will be required to ensure that constitutional obligations are met. Programmes aimed at rehabilitating and returning disabled workers to work should guard against a "one-size fits all"

⁹⁴⁰ Robin 2016 <http://www.cbn.co.za/services/safety-in-industry/a-solution-to-workforce-absenteeism-caused-by-injuries-in-the-workplace>.

⁹⁴¹ Robin 2016 <http://www.cbn.co.za/services/safety-in-industry/a-solution-to-workforce-absenteeism-caused-by-injuries-in-the-workplace>.

⁹⁴² Anon 2017 <http://www.fitness4work.co.za/about-us>.

⁹⁴³ Anon 2017 <http://www.fitness4work.co.za>.

⁹⁴⁴ Anon 2017 <http://www.fitness4work.co.za/services/casemanagement>.

approach. All constitutional rights are inter-related when it comes to the duty to accommodate disabled employees. Work is inherent to an individual's human dignity and returning disabled workers to work will help restore their dignity. South African case law was discussed, which indicated that employers have a duty to accommodate disabled employees and to investigate alternatives to dismissal.

It was also indicated that although Codes and policies are in place to provide indirect support for the idea of RTW, there is very little focus on linking rehabilitation to RTW policies and programmes.⁹⁴⁵ Although institutional best practices exist, very few companies have RTW policies in place. It should be mandatory for all companies to implement RTW programmes. Legislation needs to be enacted so that all role-players involved in the rehabilitation and RTW process, have a clear understanding of their roles and responsibilities. One should guard against an approach where labour legislation deals with the rehabilitation and reintegration of workers in a fragmented manner especially in the light of all the proposed reforms in the social security agenda.

In view of this, it is relevant to assess how other countries, especially developing ones like South Africa, have advanced RTW arrangements. The next chapter explores the extent to which the Malaysian and Australian system could be an example for promoting the re-integration, rehabilitation and return-to-work programmes of disabled workers in South Africa.

⁹⁴⁵ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 48.

Chapter 4: Comparative analysis

4.1. Introduction

The previous chapter addressed the scant recognition afforded to RTW by the South African legislative and policy frameworks and concluded that the concept of disability management has not taken root in South Africa as yet and much still needs to be done regarding the re-integration and re-skilling of injured workers.

In the first part of the chapter, the execution of Malaysia's RTW Programme's execution will be examined. The background and rationale behind Malaysia's RTW programme are discussed, before dealing with the legislative foundation and key features of the RTW programme that contributed to its success. Lastly, the programme's shortcomings and the way forward are discussed briefly, as well as the general conclusions that may be drawn from this chapter.

In the second part of the chapter, the discussion will be devoted to Australia. It will commence with a discussion of the applicable Federal legislation and case law. The discussion will then focus on the how RTW is provided for in the Australian state of Victoria. It will be demonstrated that Victoria follows a decentralised approach to RTW, supported by a solid legislative framework.

It is important to bear in mind that there is a need to introduce additional measures to support the optimal implementation of RTW and disability systems in the developing world. Existing RTW systems in other countries are worth investigating, as they provide useful ideas on how South Africa can develop an early RTW system within its own context. Experts have warned that in imitating practices from other countries, the unique social, economic and political elements of the home country need to be considered, as rehabilitation practices successful in one country, may not necessarily work in another,⁹⁴⁶ owing to the fact, *inter alia*, that countries have different definitions of disability and diverse payment structures.⁹⁴⁷

⁹⁴⁶ Olivier et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

⁹⁴⁷ Sim Social Security Bulletin 41.

Despite this caution, the author will argue that South Africa can indeed glean valuable lessons from Malaysia and Australia, relevant for the implementation of a similar programme.

4.1.1 The Malaysian context

Malaysia is a small country in South East Asia and consists of thirteen states and thirteen federal territories with Kuala Lumpur as capital and Putrajaya as the federal government administrative centre.⁹⁴⁸

It is estimated that every day, 312 workers become disabled in Malaysia which may result in a loss of 284 million working hours per annum.⁹⁴⁹ The data about PWDs in Malaysia (like South Africa) does not necessarily reflect actual figures, since disability registration is not compulsory. Furthermore, the number of PWDs is also likely to increase owing to population ageing, chronic illnesses and better methodologies of measuring disability.⁹⁵⁰

4.2 Malaysia Social Security Organisation⁹⁵¹

On 1 January 1971, SOSCO⁹⁵² was established in terms of the Employees' Social Security Act 1969 as a department of the Ministry of Labour and Manpower. SOSCO administers two social security systems, the Employment Injury Scheme and the Invalidity Scheme. Its vision is to become "the Premier, Dynamic and Outstanding Leader in Social Security"⁹⁵³ with the following mission⁹⁵⁴:

To provide social security protection to Insured Person and their dependants through social security schemes, and to increase awareness of occupational safety and health that will ultimately improve the Insured Persons' social wellbeing.

⁹⁴⁸ Apec 2013 <https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Human-Resources-Development>.

⁹⁴⁹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 17.

⁹⁵⁰ Islam 2015 *International Journal of Social Science and Humanity* 171.

⁹⁵¹ Malaysia's Social Security Organisation, hereafter SOSCO.

⁹⁵² The Social Security Organisation, hereafter SOSCO.

⁹⁵³ PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/theme/profile>.

⁹⁵⁴ PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/theme/profile>.

SOSCO's corporate goal is to provide "comprehensive social security protection for Malaysians".⁹⁵⁵ Its corporate objective is to ensure and guarantee that benefits are provided in a timely, adequate and socially just manner and to promote occupational health and safety. The contribution schedule of the scheme is as follows: 2.25% of the average salary (1.25 % for the employment injury scheme funded by the employer and 1% for the Invalidity pension scheme, which is equally shared between the employer and employee).⁹⁵⁶ Thus, SOSCO was established by law to govern employment injury insurance and invalidity pensions in Malaysia. It strives towards providing timely and adequate provision of benefits "in a socially just manner, while promoting occupational health and safety".⁹⁵⁷

After spending a year in conducting a pilot scheme in 2005, SOSCO extended its RTW programme throughout the country. By combining physical and vocational rehabilitation with financial support via social security payments, workers with employment-related injuries and disease were able to return-to-work. The 2005 study demonstrated that 60% of injured employees were able to take up full employment again. The Malaysian RTW programme collaborates with rehabilitation service providers and has established connections with several large employers to offer employment for RTW participants. It is the responsibility of a case manager to coordinate the rehabilitation of an injured employee with his/her family members, employers, doctors and therapists etc, thus bringing together professionals from different disciplines.⁹⁵⁸ SOSCO's social security system provides a holistic network of services comprising the following services: Occupational health and safety programmes; healthy lifestyle campaigns; and rehabilitation centres which assist in the prevention of accidents and recurring diseases and in facilitating the reintegration of injured workers.⁹⁵⁹

⁹⁵⁵ PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/theme/profile>.

⁹⁵⁶ Mohammed "Return-to-Work and Disability Management under the auspices of the Social Security Organisation, Malaysia – applying the UN Disability Convention".

⁹⁵⁷ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 24.

⁹⁵⁸ World Health Organisation 2011 *World report on Disability* 245.

⁹⁵⁹ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>.

Until June 2015, 11 457 people who were involved in accidents and were permanently disabled, were successfully returned to work through SOSCO's RTW programme, with 74% of them accommodated by the same employer.⁹⁶⁰

4.2.1 Rationale behind the introduction of RTW in Malaysia

In 2014 the number of permanent disablement benefit recipients rose to 36 530 in 2014 compared to 29 914 in 2010. The number of invalidity pensions and grant recipients rose from 38 250 in 2010 to 49 959 in 2014.⁹⁶¹ Statistics from 2012 indicate that more than 912 million Malaysian Ringgits was paid out in temporary and permanent disablement and invalidity benefits. The rise in number of employment injuries and diseases had an impact on the sustainability of social security programmes and family life. Companies suffered loss of skills and the productivity of the entire country was compromised.⁹⁶²

SOSCO deemed it essential to investigate compensation trends in Malaysia, and in 2007 its RTW Programme was introduced.⁹⁶³

There are a number of benefits for the RTW of an individual. In 2006, the Department of Work and Pensions in the United Kingdom, Burton and Waddell opined that work is mostly good for mental and physical health as well as person's well-being. Being able to work does not allow individuals to secure satisfactory economic resources to increase their well-being, it also satisfies significant psychosocial needs. Being able to work is also central to individual identity as well as a person's social status. It can also reverse the negative health effects of being unemployed.⁹⁶⁴ The Malaysian experience supports the findings as set out in the Black Report.⁹⁶⁵

⁹⁶⁰ Bernama 2015 <http://www.theborneopost.com/2015/07/31/11457-socso-contributors-back-to-work-under-return-to-work-programme-riot/>.

⁹⁶¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 17.

⁹⁶² Awang, Mansor and Rodrigo 2015 Southeast Asian J Trop Med Public Health 1125.

⁹⁶³ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

⁹⁶⁴ ISSA Social Policy Highlight 22 2012 ISSN online 1818-5940 Return-to-work programmes.

⁹⁶⁵ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 18.

It would be fair to question the motivation behind the introduction of an RTW framework in a country such as Malaysia. A number of reasons can be cited, including *,inter alia,* the following: The long-term benefits relating to the social, physical, economical and psychological well-being; a positive influence on the morale of employees encouraging them not to become unnecessarily dependent on incapacity payments or disability pensions while remaining a productive member of society; the minimisation of costs for both employee and employer; and the early identification of occupational illness or injuries⁹⁶⁶ after which RTW will provide workers with the necessary rehabilitative equipment; promoting a speedier recovery to reduce the consequences disability may have on the quality of life; and providing the necessary psychological support via counselling and consultation.⁹⁶⁷

Employers also benefit from having a RTW framework in place, as they retain a skilled workforce and productivity keeping the workplace economically viable; working hours are reduced; and morale in the workplace is boosted, owing to improved relationships between employers and employees; ⁹⁶⁸ and last, but not least, training and hiring expenses incurred in replacing staff could be reduced.⁹⁶⁹

As for the government, it benefits from reduced costs relating to social security. Financial savings from RTW efforts can be re-invested to expand RTW systems or could be utilised for other social security schemes. Furthermore, re-integrated employees benefit the labour market, and thus the country.⁹⁷⁰

Overall, SOSCO's RTW programme extends the social security safety net by reducing the adverse effects of illness or injury and contributing towards long-term social

⁹⁶⁶ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 19.

⁹⁶⁷ PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/program-return-to-work>.

⁹⁶⁸ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 19.

⁹⁶⁹ <https://www.perkeso.gov.my/index.php/en/program-return-to-work>.

⁹⁷⁰ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 20.

security sustainability ⁹⁷¹, which should be of cardinal importance for South Africa too.

RTW is instrumental in better management of injuries or illnesses through coordinated treatment/rehabilitation which, in turn, leads to shorter disability downtime. Research has shown that DM benefits outweigh the costs by a ratio of 1 43:1. The average programme cost per insured person amounts to RM3 239.38 and the average possible returns are RM7 884.06. DM also brought about an improvement in independence, self-esteem, skills and career goals, with depression, anxiety and stress levels dropping.

The objective of this programme was to assist SOSCO's Insured Persons with employment injuries as well as those claiming invalidity pensions, enabling them to return these employees to work as timeously and safely as possible through a bio-psychosocial and multi-disciplinary case management approach.⁹⁷² In 2010, it took an average of 182 days to enable employees to return to work, compared to 105 days in 2015.⁹⁷³ SOSCO's RTW programme continues to grow⁹⁷⁴ and has received numerous awards.

4.3 Legislative Framework of the RTW system of Malaysia

4.3.1 Introduction

It is important to note that the legislative framework of Malaysia provides the foundation for SOSCO's RTW Programme and, as will be discussed in the paragraphs

⁹⁷¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 19.

⁹⁷² Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

⁹⁷³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 26.

⁹⁷⁴ By 2015, SOSCO has successfully returned 13114 insured persons back to work. They received a number of prizes, for instance the Human Rights Commission Award SUHAKAM 2013; ISSA Good Practice Awards Asia and the Pacific Competition for RTW Programme in 2014. They have also concluded Memorandums of Understanding with the University of Malaya on the Implementation of DM as well as a Memorandum of Understanding with the Malaysian Employers Federation and Malaysia's Trade Union Congress on the implementation of DM for employees (2015).

to follow, with an extensive structure in place, contributing to the success of the RTW system.⁹⁷⁵

4.3.2 Employee's Social Security Act 1969⁹⁷⁶

ESSA was implemented in 1971 with the purpose to provide protection to employees and their families against "economic and social distress" in cases of injury and death. Benefits are thus provided in instances of occupational illness or injury as well as invalidity. The schemes under this Act are administered by SOSCO and the system is financed by compulsory contribution by both employers and employees.⁹⁷⁷ Apart from compensation, the Act also focuses on improving the health, occupational safety and the welfare of disabled persons.⁹⁷⁸

ESSA applies to all private industry employers in Malaysia.⁹⁷⁹ Prior to 2016, only those who earned the equivalent of R4 000 per month⁹⁸⁰ qualified. From 2016 onwards, coverage has been extended to the informal sector, the self-employed, business owners as and the liberal professions.⁹⁸¹

Benefits of the Employment Injury scheme are classified into short- and long-term benefits. Short-term benefits comprise medical, rehabilitation, temporary disability and funeral benefits, while the long-term benefits refer to permanent disability and dependents' benefits usually provided for in the form of "pensions for life", but it may be converted partially or fully into a lump sum payment on certain conditions.

The amount will depend on the insured's salary, and in the case of permanent disability benefits, the degree of disability, irrespective of the past service period of

⁹⁷⁵ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 31.

⁹⁷⁶ Also referred to as Act 4, hereafter referred to ESSA.

⁹⁷⁷ Similar to COIDA in South Africa. Hence, COIDA should be able to fulfil similar RTW functions if the Act is correctly amended.

⁹⁷⁸ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 31.

⁹⁷⁹ Rooshida et al 2010 Journal of Politics and Law 25.

⁹⁸⁰ They may also qualify even if their monthly wages exceed MYR 4,000, in instances where they have previously contributed to the schemes or have a mutual agreement with their employer.

⁹⁸¹ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>.

the insured individual.⁹⁸² Both schemes provide certain complimentary benefits to promote overall health and safety to: Assist people to return to work; recover from accidents; and develop capacities and skills conforming to job allocations. Such complimentary services, including the RTW programme, are embedded in Malaysian legislation.⁹⁸³

4.3.2.1 Employment Injury Scheme

This was the first type of protection scheme offered by SOSCO and entails the provision of benefits to employees for any illness or injury arising during or because of duties performed during employment.⁹⁸⁴ The scheme was first implemented in 1972 in terms of the ESSA Act of 1969. In terms of this scheme, the following benefits are available: Education; funeral benefits; cost-attendance allowances; rehabilitation; medical treatment; and temporary and permanent disablement benefits. The actual amount of benefits depends on the extent as well as the nature of the injury and resulting disablement, as certified by a medical board.⁹⁸⁵

4.3.2.2 Invalidity Scheme

It provides for the payment of certain benefits where an employee becomes "invalid due to illness or any other reason". The claimant is entitled to receive benefits from SOSCO in the form of a fixed monthly pension. In terms of the Act, invalidity is defined as follows:

... a serious disablement or morbid condition of a permanent nature that is either incurable or not likely to be cured, as a result of which an employee is unable to earn at least one-third of what a normally able person could earn. For instance,

⁹⁸² ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>

⁹⁸³ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>

⁹⁸⁴ "This scheme provides an employee protection for industrial accidents that occurs at work or while traveling which include commuting on a route between his or her residence and his or her workplace or between his or her workplace to a place where he or she takes his or her meal during approved rest hours or during a journey that is directly connected to his or her employment. In addition, this scheme also protects employees from accidents arising out of and in the course of employment (Note 44). Finally, this scheme also provides an employee protection for accidents involving occupational diseases (Note 45), that is, diseases that result due to exposure at work to various hazards." - Rooshida et al 2010 Journal of Politics and Law 27.

⁹⁸⁵ Rooshida et al 2010 Journal of Politics and Law 27.

chronic ailments or diseases that could be considered for invalidity are heart attack, renal or kidney failure, cancer, mental illness, chronic asthma and other similar conditions.⁹⁸⁶

The invalidity scheme commenced in 1974, also in terms of ESSA of 1969, and has been modified to make provision for survivors' benefits. In terms of this scheme, there is a 24-hour coverage for employees for invalidity or death *not*⁹⁸⁷ associated with employment. Thus, coverage is provided, irrespective of where and how an event may have occurred. This scheme is also funded by employer and employee contributions, calculated according to a shared ratio, depending on whether the salary is below or above RM3 000.⁹⁸⁸ (RM 4 000 as of June 2016)⁹⁸⁹ In order to qualify for benefits, the employee would have had to make contributions, certified invalid and must be below the age of fifty at first entry. The following benefits are provided in terms of the invalidity scheme: Educational loans, funeral benefits, rehabilitation benefits; invalidity pension; a grant for constant attendance; and a survivor's pension.⁹⁹⁰

The applicable sections of ESSA will now be discussed. It must be noted that some sections are at times only applicable to one of the schemes, but this will be clarified as the discussion progresses.

To begin with, section 16 of ESSA, which deals with the invalidity pension scheme is important. It provides as follows:

When person considered as suffering from invalidity

16. (1) An insured person shall be considered as suffering from invalidity, if, by reason of a specific morbid condition of permanent nature, he is incapable of engaging in any substantially gainful activity.

(2) For the purposes of subsection (1)—

⁹⁸⁶ Rooshida et al 2010 Journal of Politics and Law 27.

⁹⁸⁷ Own emphasis.

⁹⁸⁸ "For example, for salaries below RM30 the employer is required to contribute 40 cent and the employee 10 cent, and for salaries above RM1,900, it is a maximum RM34.15 for the employer and RM9.75 for the employee" – Rooshida et al 2010 Journal of Politics and Law 27.

⁹⁸⁹ Awang et al 2017 Journal of Rehabilitative Medicine 520.

⁹⁹⁰ Rooshida et al 2010 Journal of Politics and Law 27.

(a) a morbid condition shall be deemed to be of permanent nature if it is either incurable or is not likely to be cured;

(b) a person shall be deemed to be incapable of engaging in substantially gainful activity, if in consequence of the specific morbid condition of sickness or infirmity, he is no longer capable of earning, by work corresponding to his strength and physical ability which, in view of his training and former occupation, might reasonably be assigned to him at the place of his employment or at a similar place in the neighbourhood or in the same

district, one-third of the customary earnings of a mentally and physically sound person with similar qualifications and training;

(c) in determining whether the claimant is suffering from invalidity, account shall be taken of any permanent improvement in the state of his invalidity which results or is expected to result from such measures of physical or vocational rehabilitation as may be offered to him free of charge by the Organisation.

Section 40 of ESSA is applicable to both the employment injury scheme and the invalidity pension scheme.⁹⁹¹ It provides that an organisation may, in addition to the scheme of benefits as set out in the Act, establish measures or work together with other existing institutions to improve the wealth, health and occupational safety of insured persons and to rehabilitate and re-employ those who have been injured or disabled. Such measures may include the following: The provision of artificial appliances and limbs; opportunities to allow for gainful employment under appropriate conditions; and the availability of convalescent homes.

Thus, employees suffering from either invalidity or permanent disablement can make use of the rehabilitation benefit provided by SOSCO (for both vocational and physical rehabilitation), free of charge. The main aim of this benefit is to enable employees to remain active, independent and productive members of society through the provision of fitted prosthetics or reconstructive surgery. Physical rehabilitation includes medical rehabilitation and the provision of prosthetic and orthotic appliances with the aim to develop the functional and psychological abilities of the disabled employee. SOSCO's RTW programme fall within this benefit feature.⁹⁹² The expenses

⁹⁹¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 31.

⁹⁹² Merican 2010 Journal of Politics and Law 30.

incurred for rehabilitation facilities are borne by SOCSO determined by stipulated rates, terms and conditions.⁹⁹³

Section 46 applies to the employment injury scheme, more specifically to recipients of disablement benefits (other than the benefit granted for permanent disablement). It provides further that the person shall continue with medical treatment at a dispensary, clinic, hospital or other institution as provided for in terms of ESSA and shall also continue to carry out instructions given to him/her by medical officers or attendants. Further, the person shall not, whilst undergoing treatment, engage in activities which may hinder recovery. Also, the person shall not leave an area of medical treatment, as set out in terms of ESSA, without the permission of medical attendants, officers or other authorised persons as provided for by the regulations. Lastly, the insured person shall allow him/herself to be examined by any officially appointed medical staff member or other authorised persons. The section also specifically states that (disablement) benefits for temporary disablement may be suspended if the person fails to comply with any of the above-mentioned requirements. The duration of the suspension will be determined by the organisation or other authorised persons.

Section 53 states that employers are not allowed to dismiss or punish employees during periods of temporary disablement, and it provides as follows:

No employer shall, except as provided under the regulations, dismiss, discharge, or reduce or otherwise punish an employee during the period he is in receipt of disablement benefit for temporary disablement.

(2) No notice of dismissal or discharge or reduction given to an employee during the period specified in subsection (1) shall be valid or operative.

Section 49 relates to the suspension of invalidity pensions. It stipulates that the organisation may suspend invalidity pensions for a period of no longer than twelve

⁹⁹³ PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/kemudahan-pemulihan-jasmani-atau-vokasional-dan-dialisis>

months, should the invalid pensioner have acted fraudulently towards the organisation.⁹⁹⁴

In terms of the Act, the following benefits are *inter alia* provided for: Medical treatment coverage; periodical payments to dependents of insured persons who died from an occupational injury; the supply of artificial limbs; periodic payments to an insured person who becomes severely incapacitated; and funeral benefits.⁹⁹⁵ The Act provides further for the rehabilitation and return-to-work for disabled employees, including the use of a case management approach.⁹⁹⁶

According to the Social Security Act, SOSCO can provide a scheme of benefits as set out in the Act. It may also promote collaboration with existing institutions for the improvement of health, occupational safety and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have either been disabled or injured. With reference to the last-mentioned, expenditure from the Funds of the Organisation will be allowed within the limits as set down by the Minister.⁹⁹⁷

Thus, from the discussion above, ESSA provides a clear legal mandate for SOSCO to provide the necessary services to insured members to enable them to remain productive and independent members of society. In the next paragraph, the relevant provisions of the Income Tax Act will be examined.

⁹⁹⁴ The section further prescribes, that the organisation can also suspend the pension so long the invalid pensioner engage in employment under which he is insured in terms of the Act and earns more than one third of his average salary before he became an invalidity pensioner. Subsection b and c provides as follow: "fails without good cause to appear, when directed, before the medical board or any other authority for verification of the existence or the continued existence of his invalidity; (c) refuses or neglects without good cause to comply with any directive issued to him by or on behalf of the organization in regard to any process of physical or vocational rehabilitation or vocational training which he is required to undergo free of charge". The section continues to prescribe that of the pensioner also fails or without good cause fails to appear before the medical board or other authority or refuses or neglects to comply with directives; to undergo physical or vocational rehabilitation (offered to him free of charge) or fails to submit himself to any of the free medical treatment, pensions may also be suspended.

⁹⁹⁵ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

⁹⁹⁶ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

⁹⁹⁷ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

4.3.3 The Income Tax Act 53 of 1967⁹⁹⁸

Section 17 of the Income Tax Act 1967 defines a disabled person as “any individual certified in writing by the Department of Social Welfare to be a disabled person”. The person will also be given an identity card.⁹⁹⁹

It is further important to see how employment is defined in the Income Tax Act. It is defined in section 2 as follows:

Employment¹⁰⁰⁰ means:

- (a) employment in which the relationship of master and servant subsists;
- (b) any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable.

The Malaysian Government initiated tax incentives to enhance the value of the concept of “caring society”¹⁰⁰¹ and such arrangements provide significant support to PWDs, including those who become disabled. They also serve as support measures to SOSCO’s RTW programme. The following is of relevance:¹⁰⁰²

Personal (individual) tax relief is provided to disabled individuals in the amount of RM9 000 with additional personal relief of RM 6 000, amounting to RM15 000.¹⁰⁰³

Support is also provided for disabled husbands/wives, with an annual deduction to RM3 500. Tax relief for disabled children amounts to RM 5 000 with an additional relief if the child is receiving tertiary education. Lastly, tax relief amounting to RM 5 000 is provided for any of the above persons for the purchase of basic supporting equipment and, assistive devices.¹⁰⁰⁴

⁹⁹⁸ *Income Tax Act, 1967 (Act 53 of 1967)*.

⁹⁹⁹ Shaari “Disability Management and the Malaysian Tax System”.

¹⁰⁰⁰ Hassim “Supporting Disability Employment: Tax incentives”.

¹⁰⁰¹ Hassim “Supporting Disability Employment: Tax incentives”.

¹⁰⁰² Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 34 from “Shaari “Disability Management and the Malaysian Tax system” (amount as per stats 2016).

¹⁰⁰³ Shaari “DM and the Malaysian Tax system”.

¹⁰⁰⁴ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 31 from Asriah Shaari Disability Management and the Malaysian Tax system Presentation at SOSCO RTW Conference 4-5 July 2011 Kuala Lumpur (amount as per stats 2016).

Those who employ PWDs are also entitled to the following tax relief: A double deduction of the remuneration paid to the disabled employee; and a double deduction for the expenses incurred in training non-employed disabled persons. Tax relief for expenditure relating to the buying of equipment to assist the disabled employee, or work alterations or renovations to the workplace is also provided for.¹⁰⁰⁵ Individuals who donate or contribute towards the provision of facilities in public places for the benefit of PWDs are also entitled to tax relief.¹⁰⁰⁶ The amount is determined by the relevant local authority.¹⁰⁰⁷

Training institutions offering programmes for income tax deductions need to be approved by the Minister of Finance. The purpose of such training is to improve the employment prospects of a disabled person¹⁰⁰⁸ Employers also need to provide evidence of an employee's disability (physical as well as mental) that prevents him/her from functioning normally. The employer will also need to register with the Department of Social Welfare or under the Self-Assessment system. Documents must be safeguarded for seven years for audit purposes.¹⁰⁰⁹

The provision of tax incentives promotes the employment and retainment of PWDs. It will also be recommended later in the thesis that South Africa will need to consider utilising tax incentives as a motivating measure to assist with the employment and return to work of disabled workers.

4.3.4 The Employees' Social Security (General) Regulations, 1971

The above regulations provide guidelines for the Foundation for SOSCO to direct Insured Persons to attend courses on physical or vocational rehabilitation provided by SOSCO.¹⁰¹⁰ Section 57(1) of the *Employee Social Security Act* provides that any Insured Person suffering or claiming to suffer from a permanent disablement or

¹⁰⁰⁵

https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx.

¹⁰⁰⁶ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 34 from "Shaari "Disability Management and the Malaysian Tax system" (amount as per stats 2016).

¹⁰⁰⁷ Shaari "DM and the Malaysian Tax system".

¹⁰⁰⁸ Who is not an employee of the company.

¹⁰⁰⁹ Shaari "DM and the Malaysian Tax system".

invalidity may be provided with facilities for physical rehabilitation by the Organisation, free of charge. If one considers sections 40 and 57(1) of the *Employee Social Security Act*, one may argue that these provisions provide SOSCO with a sufficient foundation to fulfil its RTW obligations as a social insurance provider, even though the Act contains no specific or technical definition of “return-to-work”.¹⁰¹¹

4.3.5 Federal Constitution of Malaysia

The Constitution of Malaysia is the supreme law of the country and any law inconsistent with it, is regarded as void.¹⁰¹² Even though there is no specific constitutional provision devoted to PWDs, there are two constitutional provisions that are of importance when considering the employment of PWDs. Section 5(1) provides that “No person shall be deprived of his life or personal liberty save in accordance with law”. A conclusion drawn from case law, is that the right to livelihood is inherent to the right to life. Malaysian courts have recognised that the right to earn a living is an integral part of the right to life.¹⁰¹³

They (Judges) should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression “life” in article 5(1) is given a broad and liberal meaning.

The right to life entails more than mere existence, and the right to seek lawful and gainful employment is an integral part of enhancing such existence.¹⁰¹⁴ Thus, PWDs, as citizens of Malaysia, have the constitutional right to employment.

Section 8 of the Constitution determines that all persons are equal before the law and entitled to equal protection of the law. However, concession must be made for realities and practicalities of life¹⁰¹⁵, when adopting a case management approach in

¹⁰¹¹ Olivier M et al “Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa”.

¹⁰¹² Section 4(1) of the Federal Constitution of Malaysia.

¹⁰¹³ Wahab and Ayub *International Journal of Economics and Financial Issues* 315. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* 1996 1 CLJ 771 (At par 195); *Hong Leong Equipment Sdn.Bhd v Liew Fook Chuan* 1996 1 CLJ 665. In the latter case, the court confirmed that the right to life also encompasses the right to livelihood.

¹⁰¹⁴ Wahab and Ayub *International Journal of Economics and Financial Issues* 315.

¹⁰¹⁵ Wahab and Ayub *International Journal of Economics and Financial Issues* 315.

managing disability. *The Persons with Disabilities Act*, which is discussed in the next paragraph, aims to give effect to the constitutional mandate of equality.

4.3.6 *Persons with Disabilities Act of 2008*

The *Persons with Disabilities Act of 2008* is important. Prior to 2008, Malaysia had no comprehensive legislation protecting the rights of PWDs, except for the benefits provided for by ESSA.¹⁰¹⁶

This Act closely resembles the requirements of the CRPD, which was ratified by Malaysia in 2010, thus¹⁰¹⁷ demonstrating its commitment to the CRPD by enacting the *Persons with Disabilities Act*.¹⁰¹⁸ The Act was enforced on 1 July 2008, with the full support and commitment of the numerous disabled persons' organisations. It recognises the rights of PWDs of "full participation, to equal opportunities and access to public buildings and elimination of discrimination against PWDs".¹⁰¹⁹

The aim of the Act is:

... to provide for the registration, protection, rehabilitation, development and wellbeing of persons with disabilities, the establishment of the National Council for Persons with Disabilities, and for matters connected therewith.¹⁰²⁰

The Act further recognises that PWDs make valued contributions to the overall well-being and diversity of the communities and society in general. The Act also embraces the social model of disability by stating that "disability results from interaction between persons with disabilities and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with persons without disabilities". The Act also makes another noteworthy recognition by stating that PWDs are entitled to equal protection, opportunity and

¹⁰¹⁶ International Bar Association date unknown
https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx.

¹⁰¹⁷ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 33.

¹⁰¹⁸ Wahab and Ayub *International Journal of Economics and Financial Issues* 314.

¹⁰¹⁹ Civil Society union 2011 http://www.icsw.org/images/docs/Regions/seasia/news/2011/2011-12_SEAPNewsletter_3.pdf.

¹⁰²⁰ The aim of the Act is thus widely defined, considering the fact that the words "well-being" is used. The fact that rehabilitation is specifically included in the aim, is indicative of the importance thereof for the Malaysian government.

assistance in all circumstances, and can only be limited by the Federal Constitution. The Preamble emphasises the importance of collaboration (one of the success factors of the Malaysia RTW programme, as will be discussed later), by stating that cooperation between the private sector; government and non-governmental organisations is important to ensure that PWDs can fully and effectively participate in and be included as part of society.

Section 2 of the Act defined People with Disabilities as follow:

...those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society.¹⁰²¹

Sections 29, 33 and 35 are of importance for this chapter. Section 29 deals with access to employment and states that PWDs shall have the right to access to employment on an equal basis as persons without disabilities.¹⁰²² Employers need to protect the rights of PWDs by ensuring just and favourable conditions of work, such as equal remuneration, equal opportunities, protection from harassment, a safe and healthy working environment *et cetera*. Employers¹⁰²³ also have a social obligation towards the promotion of stable employment for PWDs by carrying out a proper evaluation of an employee's abilities and providing appropriate placement and management. The Council, on the other hand, has the obligation to promote training, for example, self-employment opportunities.

Section 33 deals with habilitation and rehabilitation and provides as follows:

(1) The Council, the private healthcare service provider and non-governmental organization shall take effective and appropriate measures 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.

(2) For the purposes of subsection (1), the Council, the private healthcare service provider and non-governmental organization 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

¹⁰²¹ This definition is in line with the definition of PWDs as defined in the CRPD and subscribes to the social model of disability.

¹⁰²² One can argue that this section gives effect to the right to equality, as encompassed in the Malaysian Constitution, discussed later.

¹⁰²³ For purposes of this section, employer include the Government.

that these services and programmes begin at the earliest possible stage and are based on the multidisciplinary assessment of individual needs and strengths. (3) The Council, the private healthcare service provider and non-governmental organization shall promote the availability, knowledge, and use of assistive devices and technologies designed for persons with disabilities as they relate to habilitation and rehabilitation. (4) The Council, the private sector and non-governmental organization shall take appropriate measures to promote and strengthen community-based rehabilitation programme to provide early intervention, rehabilitation and training for persons with disabilities in their own community through active community participation.

This section thus makes provision for a multi-faceted approach to rehabilitation. There must be a collaborative effort between governmental and non-governmental stakeholders. Intervention is needed at the earliest possible stage and a multi-disciplinary sensitive approach is required. This section gives a clear mandate to SOSCO about how their RTW programme should be conducted.

Section 35 which is also of importance, prescribes that PWDs shall have the right to health on par with those without disabilities. Council, the private sector and non-governmental organisations must take appropriate measures to ensure that PWDs have access to health services, including gender-sensitive health-related rehabilitation.

Section 3 of the Act makes provision for the establishment of a National Council for Persons with Disabilities.¹⁰²⁴ The Act lists the functions of the Council, which entail the following:

- To oversee the implementation of national policies and plans of action relating to PWDs and to coordinate its implementation across different sectors such as ministers, the private sector and government agencies;
- To make recommendations to the Malaysian Government regarding all aspects of PWDs (including for instance rehabilitation);

¹⁰²⁴ Section 3(1) provides that the council have the following as its members: the Minister who shall be the Chairman; the Secretary General of the Ministry responsible for social welfare, who shall be the Deputy Chairman; the Attorney General of Malaysia, or his representative; the Secretary General of the Ministry responsible for finance; the Secretary General of the Ministry responsible for transport; the Secretary General of the Ministry responsible for human resources; the Director General of Education; the Director General of Health; the Chairman of the Commercial Vehicle Licensing Board. The Council is thus well diversified which will allow advice from different sectors when policies and programmes are planned and overseen.

- Enter into agreements, as it deems necessary, with relevant government agencies, bodies or organisations or the private sector, in order to monitor the impact of policies, activities or programmes to allow for the optimal and effective participation and monitoring of PWDs.
- The Council may further recommend the amendment of current laws or propose new legislation to allow for optimal and effective participation of PWDs in society.

One of its functions also relates to awareness-raising in that it is stated that they may develop strategies and programmes on, for instance, the capabilities and contributions PWDs can make. This mandate is also extended to the employment context, in that the Council may adopt appropriate and effective measures to 'promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market'. Other relevant functions to ensure quality of services, are contained in Section 3(l-m):

(l) to promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services;

(m) to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding or obtaining employment on equal basis with persons without disabilities.

This section makes provision for the Council to advise on international affairs and conduct research relating to PWDs. Lastly, it makes provision for the Council to perform "any other functions" as directed by the Minister.

Looking at the above section, it appears that these functions allow for an all-inclusive approach in promoting the participation of PWDs as members of society. Provision is made to ensure that quality; inter-sectoral services are delivered to assist with optimal participation of PWDs. The functions highlight the key features any RTW programme must incorporate, such as quality services, collaborative inter-sector service delivery and on-going research to build a database for future records. It is also important to keep abreast of international practices to inform and stimulate national legislative reform. The longevity of RTW programmes will depend on the involvement of all sectors as well as that of international role-players.

Government responsibility is a further aspect addressed by the Act. Section 14 states that the government must discharge its duties according to available financial and human resources. Section 15 determines that the relevant ministries, government agencies and bodies or organisations are obliged to co-operate with and assist the Council in the execution of its duties; to give due consideration to national plans of action and policies, relating to PWDs and to take the necessary action stipulated by legislation, or otherwise, as it may relate to PWDs. Section 16 imposes the same duty on private sector and non-governmental organisations. The Act thus imposes duties on all stakeholders involved in policies and programmes.

The Act contains a “follow up” provision, and all relevant parties, as were discussed above, may be required to submit reports to the Council on the measures taken to comply with the Act, since such reports may assist the Council to follow-up on matters that might cause concern. In turn, the Council also needs to submit annual reports to the authorities as prescribed.¹⁰²⁵

Section 21 of the Act makes provision for a Register of Persons with Disabilities to be kept.¹⁰²⁶ Another section is devoted to the prevention of further occurrence of disabilities, which should be one of the key features of social security. For instance, the Act prescribes that the Government, together with private healthcare service providers are obliged to make essential health services available to PWDs, including as follows:

(a) prevention of further occurrence of disabilities, immunization, nutrition, environmental protection and preservation and genetic counselling; and

(b) early detection of disabilities and timely intervention to arrest disabilities and treatment for rehabilitation.¹⁰²⁷

¹⁰²⁵ Section 19.

¹⁰²⁶ Proper record keeping is crucial to ensure that statistics related to PWDs are up to date. This may in turn assist with future programmes to either prevent further disabilities or to reintegrate PWDs successfully into employment or society.

¹⁰²⁷ The Act further determines by virtue of section 21(2)(a) also calls on the Government to conduct surveys, investigations and research to determine the concerning cause of occurrence of disabilities.

As will be argued later in this chapter, timely intervention facilitates a successful return to work.

The discussion above aims to demonstrate that Malaysia has a clear legal mandate to provide PWDs with the necessary assistance for them to remain independent and productive members of society. SOSCO's RTW programme is thus informed by these legislative provisions, which not only assist in providing structure to their programme, but also ensure that multi-faceted and quality services are delivered to insured persons.

4.4 Key features of the SOSCO's RTW programme

The discussion above aimed to highlight the legislative foundation upon which SOSCO's RTW programme is based and it was shown that several factors have contributed towards the success of SOSCO's RTW programme. I shall now focus on an analysis of the key features of SOSCO's RTW programme, which may be of assistance in the development of a proposed RTW system for South Africa, as will be proposed in Chapter 6 of the thesis.

4.4.1 The meaning of RTW and Rehabilitation in the SOSCO context

RTW aims to eliminate as many of the consequences of disability as possible (for instance loss of self-esteem, and productivity and high compensation costs) and to return employees to work, benefitting both employers and employees. Rehabilitation, on the other hand, forms part of a range of responses to disability, including strategies to improve physical and mental ability to enable people to avail themselves of education and social life and compete in the open labour market. Its outcome, *inter alia*, will have the following benefits: Preventing loss of function; reducing the rate of loss of function; improvement of function; maintenance of function; and compensating for loss of function. Rehabilitation and RTW come together at the point where different strategies are aligned (for instance those

relating to social; education, medical and work-related measures) to accommodate a person who had to leave the working environment because of illness or injury.¹⁰²⁸

The objectives of RTW can be described as follows¹⁰²⁹:

To assist Insured persons with injuries or diseases to return to work in a safe and fast manner; to carry out SOCSO's social responsibility towards employers and employees and to create a positive working environment through communication and support for employees with disabilities.

SOSCO's physical rehabilitation included the provision of the following services: Physiotherapy; Occupational therapy; Reconstructive surgery; Supply of prosthetics, orthotics and other appliances as well as the supply of orthopaedic apparatus such as wheelchairs, crutches, hearing aids, spectacles, special shoes and others. Vocational rehabilitation entails the training of insured members in courses, such as electrical or needlework training, to name a few. All the expenses for the rehabilitation facilities are borne by SOSCO, at specified rates, on terms and conditions.¹⁰³⁰

4.4.2 Who qualifies for protection?

It is important to note that SOSCO controls both the Employment Injury Scheme and the Invalidity Pension Scheme. As of June 2016, these schemes are provided to all workers in the private sector, earning a maximum salaried income of RM4 000.¹⁰³¹

SOSCO's RTW programme is available to all employees who sustained an employment injury¹⁰³² and those requiring access to invalidity pension. The Invalidity Scheme provides a twenty-four-hour coverage for treatment due to accidents and disease not related to employment.

¹⁰²⁸ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 18.

¹⁰²⁹ PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/program-return-to-work>.

¹⁰³⁰ PERKESO 2018 <https://www.perkeso.gov.my/index.php/en/kemudahan-pemulihan-jasmani-atau-vokasional>.

¹⁰³¹ Sabah 2016 <https://www.pressreader.com/malaysia/the-borneo-post-sabah/20160331/281513635290738>.

¹⁰³² Including workplace accidents, occupational diseases and commuting accidents.

4.4.3 Gradual roll-out of the RTW Programme

As far back as the 1970s Malaysia began with initiatives to reintegrate and rehabilitate workers after SOSCO appealed to employers to allow rehabilitated workers to return to work. A SOSCO Rehabilitation Unit was established to assist employees with job-placement services; correct medical advice; procedures relating to claims and treatments and vocational training programmes, among others.¹⁰³³

RTW was properly devised and planned before being launched in Malaysia. Notwithstanding the early RTW initiatives, plans for a formal RTW programme only commenced in 2004. The first pilot project was conceived in late 2004 when service providers were appointed in terms of section 57 of the *Employees Social Security Act of 1969*¹⁰³⁴. A pilot project officially commenced in 2005, with a multi-disciplinary approach and focusses on the appointment of rehabilitation service providers. A key feature that stood out was the need to adopt a case management approach (which will be discussed hereafter). To address the shortcomings, SOSCO consulted other countries to improve its RTW rates. The Commonwealth Rehabilitation Services of Australia (CRS) were then identified to assist with benchmarking the SOCOS's RTW system, after which a second pilot project was launched, with the involvement of case managers. In 2007 five case managers, trained by CRS in Malaysia, were appointed.

Thereafter, SOSCO developed certain protocols.¹⁰³⁵ The pilot project was initially restricted to a certain area, and gradually extended to other areas, with an increasing number of case managers, allowing for comparisons between as many different areas as possible. Quarterly reports had to be submitted to SOSCO's board ensuring accountability. A prominent feature emerging from the pilot projects, was the need for job placement officers, as case managers were becoming overburdened with rehabilitation-monitoring services. In 2008, a Job Placement and

¹⁰³³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 24.

¹⁰³⁴ *Employees Social Security Act of 1969, hereafter ESSA.*

¹⁰³⁵ The following protocols were adopted: Qualification Referral criteria; Information needed during Initial Assessment; Rehabilitation plan protocol; Worksite Assessments; Monitoring and RTW/Reintegration.

Employment Support Services (JPESS) Unit was established to assist with the placement of workers unable to return to a previous employer. Currently, the Job Placement Unit has ten dedicated officers concentrating on returning insured employees to work, in the case of their not being able to return.¹⁰³⁶

Malaysia requested assistance from the Commonwealth Rehabilitation Services¹⁰³⁷ in Australia, which introduced SOSCO to their process of RTW, including *inter alia* the following: Initial assessments; rehabilitation plans; vocational assessments; worksite assessments; and monitoring.¹⁰³⁸ These processes have now been adapted to fit the Organisation's needs.

SOSCO sent two case managers to the German Statutory Accident Insurance Organisation (DGUV) to seek further best-practice experience for possible adoption to SOSCO's RTW Programme. In 2010 SOSCO adopted a Canadian-based protocol¹⁰³⁹ to assist with the professional development of case managers. Malaysia has continued to improve its RTW programme to fit the country's specific needs and currently has 35 Case Managers.¹⁰⁴⁰

It is important to highlight that the roll-out of the RTW Programme has not occurred concurrently across the country. The positive results of the pilot project were used for a roll-out of the programme.¹⁰⁴¹

In 2009, Malaysia's Human Resource Minister visited Germany and was impressed with the RTW programme administered by the German Statutory Accident Insurance, upon which the Minister instructed SOSCO to implement the RTW programme nation-wide. Two case managers were subsequently sent to Germany to gain more experience. By the end of 2009, SOSCO appointed twenty-five case

¹⁰³⁶ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 25.

¹⁰³⁷ CRS.

¹⁰³⁸ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

¹⁰³⁹ This Protocol was adopted from the National Institute of Disability Management and Research (NIDMAR).

¹⁰⁴⁰ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

¹⁰⁴¹ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

managers, ensuring that all provinces were covered by the RTW programme. A Job Seeking Unit was also formally established to assist the RTW Unit. In 2010, the Minister of Human Resources announced that the RTW programme would be one of the Key Performance Indicators for the Ministerial Key Results Area.¹⁰⁴²

Malaysia also gained experience from the Japan International Cooperation Agency, which resulted in an expansion of the current RTW programme. Two specific components were added, namely "Fading" and "Natural support". "Natural support" entails a comprehensive, formal and systematic support system to provide the necessary support for the injured worker, once they have resumed employment. The rationale behind this type of support is that it is a natural response for workers to experience challenges adjusting to gainful employment, after illness or injury. Case managers provide support until such time as the person resumes work, because they may not have the capacity to continue providing prolonged support. Hence the initiative for a service provided by co-workers or supervisors in the workplace. Family members may also form part of the support network to motivate workers at home in a less formal setting. It is thus necessary to provide on-going support to ensure the general well-being of the worker, even after his duties have been resumed. Should the informal network be unable to provide support, the case manager or RTW coordinator services will still be accessible.¹⁰⁴³

"Fading" occurs during the phase after the worker has gone through the comprehensive rehabilitation programme, commenced work and finds him/herself in a relatively stable position, usually a few weeks before the case manager concludes his/her intervention. The motivation for this service is to ensure the retention of employees in the workplace and to assist case managers to focus on other caseloads.¹⁰⁴⁴

¹⁰⁴² Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 25.

¹⁰⁴³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 25.

¹⁰⁴⁴ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 25.

4.4.4 Overview of RTW process: A case management approach

The RTW programme makes use of a systematic case management system¹⁰⁴⁵ that can be described as a collaborative process which facilitates effective treatment plans, as recommended, to provide workers with the necessary medical care to ensure that they return to work. Disability planners are responsible for the coordination of the appropriate health care services to facilitate rehabilitation. Case management may include the following:¹⁰⁴⁶

- Care assessment, including personal interviews with the client;
- Assistance in developing, implementing and coordinating of a medical care plan in collaboration with health care providers, as well as the client's family, including assessment of treatment results while encouraging cost-effective health care.¹⁰⁴⁷
- It may also include an examination of the workplace, to determine whether interventions in the working environment, or modifications thereof, will be appropriate.¹⁰⁴⁸

The case manager has a wide variety of functions to ensure the consistent and systematic management of the entire rehabilitation process and, ultimately, that the disabled worker returns to work. The process begins with an initial assessment to determine the needs of the individual, followed by recommendations concerning specialised medical treatments or workplace modifications. Such modifications include adjustments to tasks, working hours, scope of employment or the workplace itself. Should the employee be unable to return to his/her former employer, the RTW programme also serves to render further assistance in the form of job matching and placement, including new skills and vocational training that may be a requirement for the new occupation. All participants are entitled to receive a rehabilitation allowance of MYR20 per day as an incentive to attend medical rehabilitation

¹⁰⁴⁵ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>.

¹⁰⁴⁶ This is not a closed list.

¹⁰⁴⁷ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

¹⁰⁴⁸ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

sessions. A part of an RTW monitoring mechanism consists of qualitative assessments regarding anxiety, stress or depression as well as self-perceived psycho-social outcomes that are conducted to assist with adjustments in the rehabilitation process.¹⁰⁴⁹

Case disability managers therefore play a vital role in the successful implementation of SOSCO's RTW programme, as they are responsible to design, coordinate and implement it. They also engage in discussion with employers to prevent accidents in future. Consequently, they fulfil a wide range of functions, including but not limited to: Administration of DM services; working with SOSCO or other service providers; developing procedures and policies; promoting RTW concepts by way of training and education; engaging with labour-management committees; and undertaking programme evaluations. They also serve as a link between employer, injured worker, unions and medical services. They are further tasked to oversee that all role-players know exactly what their roles and responsibilities are and that the affected worker receives the correct information and the necessary guidance through-out the RTW programme, relating to their rights, opportunities, obligations as well as the interplay between compensation and rehabilitation.¹⁰⁵⁰

Case managers need to establish whether an injured employee may remain at work (within the context of the injury). They must also assist them to return to work as soon as possible, in a safe manner and help the worker by liaising with SOSCO, to fill out documentation if necessary. Further tasks include liaison with professionals and service providers involved in the rehabilitation process, putting measures in place to prevent secondary accidents and the monitoring of progress of the affected worker through-out the RTW process. These tasks highlight the vital role case managers play in the successful outcome of the RTW programme.¹⁰⁵¹

Amir, one of the case workers in SOSCO's RTW programme stated the following:

¹⁰⁴⁹ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>

¹⁰⁵⁰ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 47-48.

¹⁰⁵¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 48.

...when we see a worker going back to work, when we see him able to provide for his family again and see the positive impact on their lives, for me, there is no better feeling". SOSCO's RTW Programme has been acknowledged by ISSA as a best practice model for countries who wished to follow suit.¹⁰⁵²

A pillar of the RTW programme is the work of case managers in close proximity with their clients through the process of rehabilitation, medical appointments and ultimately encouragement to return to work. After the insured person has resumed employment, they continue with their duties for a period of about six months to ensure a smooth transition to work and that the worker is able to cope with his/her tasks. Azrin¹⁰⁵³, one of SOSCO's case managers, states that "we are their support system". She explains their role as follows:

Our jobs start with an initial assessment. We meet them to see the extent of their problem and then go with them to meet with their doctor and physiotherapist to draw up a rehabilitation plan which often involves physiotherapy and vocational retraining, counselling and workplace intervention. We then meet with their employer to talk about the return to work programme and show them how they can support their employees rejoin the workforce. Sometimes, they may need to make adjustments to accommodate a returning worker.

She acknowledges that employers are often concerned about productivity, upon which they share past experience to demonstrate the success of hiring replacement labour. Even though the goal of the programme is RTW, case managers hope to change the mindsets of employers to remind them of the role they can play to support the worker.¹⁰⁵⁴

Rajamanikam¹⁰⁵⁵, also one of the case managers notes as follows:

We need to engage employers to support this programme. In Malaysia, awareness is low and many employees who have injuries or disabilities find difficulties getting jobs, even getting back their old jobs. As case managers, we act as the 'middle

¹⁰⁵² S Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715>.

¹⁰⁵³ S Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715>.

¹⁰⁵⁴ S Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715>.

¹⁰⁵⁵ S Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715>.

men' – we support them and facilitate discussion with their employers and try and make it work for both parties.¹⁰⁵⁶

At the Regional Return to Work Conference held in 2014, a resolution including mechanisms and strategies aligned with the *ISSA Guidelines* was adopted. This was discussed in Chapter 2. It has the following five key objective areas:

- To increase leadership and building capacity for RTW;
- To expand DM within the existing legal framework;
- To enhance awareness on DM amongst stakeholders;
- To strengthen inter-agency cooperation for economic empowerment; and lastly:
- To adopt intervention strategies for societal integration. This was formulated in such a manner that it makes provision for possible obstacles, actions, plans as well as the identification of key stakeholders.

SOSCO has integrated *ISSA Guidelines* on RTW and Reintegration as part of their case management approach to RTW. Malaysia's social security scheme expands disability management based on *ISSA Guidelines* and to train case managers through the ISSA's centre for excellence. Konkolewsky¹⁰⁵⁷, the Secretary-General of ISSA has stated as follows:

I am delighted that our new Guidelines will serve as a reference for the further development of rehabilitation policies and practices in Malaysia, and look forward to close collaboration with SOCSO and other member organizations in the region committed to the successful return to work of workers suffering from work accidents or occupational diseases.

In July 2011 Malaysia signed an agreement with the IDMSC for the use of their curriculum and professional certification standards. This was an attempt by SOSCO to build its human resources capacity and to ensure that they delivered DM practices of a high standard. Thus, SOSCO ensures that all case managers, state directors and

¹⁰⁵⁶ S Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715>.

¹⁰⁵⁷ Anon and date unknown <https://www.issa.int/-/malaysia-s-social-security-scheme-expands-disability-management-based-on-issa-guidelines>.

rehabilitation officers will be certified and undergo the necessary examinations. The IDMSC best practice standards were adopted for DM to become an essential part of the organisation's working culture, with dedicated officers to ensure that social justice is delivered to all insured persons.¹⁰⁵⁸

Finally, it must be noted that even though the focus of SOSCO's RTW Programme is on post-injury rehabilitation, it also takes cognisance of the prevention element, a key element in a DM system and the pillar of social protection. This, there needs to be ongoing emphasis on prevention of occupational hazards and injuries from occurring. Preventative worksite assessments thus form part of SOSCO's case management approach.¹⁰⁵⁹

The above shows that the SOSCO's Case Management approach contributed to the programme's success. The fact that cases are assigned to a specific manager, followed up with an initial assessment, allows for the RTW process to commence at the earliest stage possible. The design of a proper rehabilitation plan then serves as a roadmap for the rest of the RTW process and the appointment of a case manager who provides the necessary support, not only during rehabilitation but also after the employee has resumed duties, demonstrates best practice, which will be recommended by the author for the development of South Africa's RTW framework later in the thesis.

4.4.5 The invaluable role of technology

The Malaysian RTW programme is an excellent demonstration (for a developing country like South Africa) that "state of the art, internationally recognised RTW principles, practice and tools" are possible in the developing world. However, it must be emphasised that the unique socio-economic context of each country, demands innovative and original solutions and approaches and a systematic and gradual

¹⁰⁵⁸ IDMSC 2011
http://www.nidmar.ca/news/news_articles/IDMSC%20Communique%20Vol%205%20No%2018%20Malaysia%20December%202011.pdf.

¹⁰⁵⁹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 26.

development of the DM and RTW systems. The way in which Malaysia has employed technology is an example of the innovative approach adopted.¹⁰⁶⁰

When Malaysia began with RTW, it was with human-oriented manual processes. It soon became clear that it was a tedious process, since all approvals and processing of documentation were executed manually, resulting in delays. To counteract this, SOSCO's RTW Department developed its own online application process of which the following key features are highlighted:

- The system can be accessed remotely by case managers and acts as a "one stop resource";
- It allows for quick referrals since the system is integrated with SOSCO's medical and rehabilitation services;
- The system contains useful information of all previous cases;
- ESSA modification guidelines and rehabilitation plans;
- The system continuously generates information and the detailed "search feature" which can be utilised by case managers;
- Allows for access to valuable information, such as rehabilitation plans;
- The system is based on evidence. It can thus be described as a learning system, since data harvested from past cases could be of benefit to future ones. For example, case managers can extract information from previously successful rehabilitation plans, which could be useful in similar cases in future. Owing to the substantial number of cases with which case managers must deal (I also foresee this for South Africa), the IT system helps them to stay on track at all times. The system is a communication network for quick opinions

¹⁰⁶⁰ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 71.

and approvals¹⁰⁶¹ and enables SOSCO to make rapid responses if needs be.¹⁰⁶²

4.4.6 *The importance of buy-in from stakeholders and role clarification*

A topic that deserves attention is that of political and stakeholder buy-in and approval. This component has contributed towards the successful introduction and implementation of SOSCO's RTW Programme. Before the pilot project was launched in 2005, it was first presented to SOSCO's board, and again when it was extended. The RTW programme thus had the buy-in of all the stakeholders involved with the board.¹⁰⁶³ Introducing RTW programmes on such a platform is a measure that allows concerns to be raised and dealt with in an appropriate manner.

Another vital factor concerns the roles and responsibilities of trade unions, employees and employers. It must be remembered that the duty to ensure that a worker is re-integrated and productive again, is a duty shared equally between the employee, employer and trade unions. All have different obligations, roles and responsibilities. The specific role trade unions play is worthy of more discussion, and especially its relevance for South Africa. The Malaysian experience shows that trade unions are important stakeholders in the rehabilitation and RTW process, as their general role is to protect workers' rights and their quality of life, thus promoting equal opportunities for PWDs.¹⁰⁶⁴

Trade unions are often able to provide certain key information, based on knowledge of and experience in labour policies and matters related to rehabilitation, reasonable accommodation, health and safety *et cetera*. For instance:

¹⁰⁶¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 72.

¹⁰⁶² Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 75.

¹⁰⁶³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 31.

¹⁰⁶⁴ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 42.

- They may be able to provide practical information and support to case managers, for instance information on certain job descriptions within a specific industry.;
- They may be able to provide information on legislation as well as agreements concluded to safeguard the rights of PWDs;
- They can play a role in the wider context of the RTW process, for instance by providing information and assistance to family members of the insured worker.
- They must be involved in the design and operation of the RTW programme, as well preventative plans.¹⁰⁶⁵

Trade unions have additional responsibilities,¹⁰⁶⁶ such as the following:

- To reassure workers that rehabilitation and RTW programmes are in their best interest;
- To inform workers of all available options; trade unions are a useful source of information relating to collective agreements, health and safety legislation and employers' duties;
- Representing workers throughout the RTW process;
- To negotiate with other organisations regarding RTW programmes as set out in collective agreements;
- To assist workers with job placements or to even consult other unions on options for placing the worker who is unable to perform his/her duties under his/her current collective agreement;
- To assist with conflict resolution and communication with SOSCO;

¹⁰⁶⁵ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 42.

¹⁰⁶⁶ It will be important to properly brief and negotiate with South African trade unions as well, to ensure that they play a key role in the RTW process, as bargained in collective agreements. This will also require gradual roll-out, perhaps starting with one industry at a time, and then rolling it out to other industries.

- To support workplace accommodation barriers or challenges as set out in collective agreements (relating to the process of recovery).¹⁰⁶⁷ Collaboration with all actors involved in the RTW process is recommended in the ISSA RTW guidelines¹⁰⁶⁸, as was discussed in Chapter 2. It must be emphasised here that the roles and responsibilities of all parties must form part of the RTW strategy.

Under the current RTW system of SOSCO, the role and responsibilities of employers are limited, mainly because of the lack of a clear legislative basis for employers' obligations and because the present RTW programme is a SOSCO-initiated activity. It is a reality that employers often lack the necessary capacity to implement DM principles and RTW programmes. Thus, SOSCO coordinates DM, RTW and case management services. It must be noted that SOSCO has obtained the DM Curriculum from NIDMAR, which means that they will be able to create human capital to implement DM at an organisational level, for the potential roll-out of RTW programmes (including case management). Because RTW programmes are currently implemented by SOSCO as a public scheme, employer involvement is restricted to cooperating with SOSCO, within the parameters of the RTW programme. They are also obliged to give the employees job protection, as set out in legislation. Details are important here, and employers need to work closely together with the case managers to make a success of RTW arrangements. Employers have a specific role to play in the vocational rehabilitation of the affected worker. This entails the following: Workplace modification; process re-engineering; worksite assessments; assistive devices; job coaching; and placement in suitable jobs. To assist employers in this regard, provision is made for tax deductions as mentioned earlier in the chapter.

Employers need to motivate employees by reminding them of the valuable role they play in the company, and that participation in the RTW programme is one of the options available to them with post-occupational illness or injury. To encourage employers to participate in the RTW programmes, their contribution is seen as part

¹⁰⁶⁷ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 42-43.

¹⁰⁶⁸ Specifically, Guidelines 23 "Working with Workplace actors".

of their corporate social responsibility (CSR). Case managers do worksite assessments as part of RTW. It is usually during such visits that RTW is then suggested as CSR to employers. Their cooperation is acknowledged by the issue of certificates of recognition by SOSCO.¹⁰⁶⁹

The affected employee has a key role to play in the entire RTW programme. For instance, he/she needs to ensure early notification to the employer of any illness or injury. Furthermore, they must participate actively in the RTW programme, which entails participation in the development of the rehabilitation plan, in cooperation with the case/disability manager. They must also attend rehabilitation and therapy sessions and communicate and interact with their employer and SOSCO on a continual basis.¹⁰⁷⁰ SOSCO's RTW hierarchy may assist in motivating workers to participate in the RTW programme. The hierarchy provides for the aim of SOSCO being to return the worker to the job, while adhering to the following order of priority as far as possible: 1) Same job with the same employer; 2) similar job with the same employer; 3) a different job but still with the same employer; 4) same job but with a different employer; 5) similar job with a different employer; 5) Different job with a different employer; and 6) as a last resort, being self-employed.¹⁰⁷¹ The author is of the opinion that, in order to secure the buy-in of employees, organisations (SOSCO as well as employers) need to raise RTW awareness, even before a worker is injured or becomes disabled. The options offered by RTW need to be integrated into induction courses, which make it easier to secure the buy-in of employees to participate in return to work if they are introduced to what the programme offers.

As noted earlier, in 2015 SOSCO signed a Memorandum of Understanding with the Malaysian Employers Federation and Malaysia's Trade Union Congress on the implementation of DM for employees. The vision of the MOU is to "guide employers, employees and union members in integrating DM" in their respective organisational

¹⁰⁶⁹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 43.

¹⁰⁷⁰ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 44.

¹⁰⁷¹ Bakti-Mind 2018 <https://mind.org.my/employment/return-to-work-programme/>.

policies, HR and other practices. The terms to which they agreed are, *inter alia*: Create a more inclusive workforce; assist employers by providing DM support to allow for an early and safe return to work; enable workers to RTW to contribute to the country's economy; and ensuring a sustainable social system.¹⁰⁷²

As part of SOSCO's strategy to involve more stakeholders and to minimise the negative impact of disability on employees, they have conducted training sessions at organisations that understand the importance of RTW. SOSCO, in conjunction with NGO's and the Malaysian Social Welfare Department also offer Disability Equality Training to organisations (based on the social model of disability). This entails awareness- raising on matters related to the causes of disability as well as what organisations can do to become agents of change.¹⁰⁷³

It is important to note that the Malaysian government is a key stakeholder in the successful re-integration of workers. As a member of the SOSCO board it has also been involved in both the formulation¹⁰⁷⁴ and implementation of DM and rehabilitation programmes, to ensure that workers are adequately protected.¹⁰⁷⁵

The Persons of the Disability Act of 2008, discussed earlier in the chapter, also makes provision for the establishment of a National Council for PWDs. As was described earlier, the Council is multi-disciplinary and has extensive functions to assist with the integration of PWDs. The fact that SOSCO's RTW was made a ministerial key performance indicator is indicative of the Malaysian government's commitment to comprehensive social security.¹⁰⁷⁶

SOSCO hosted its first RTW conference on 26 and 27 July 2010 In Kuala Lumpur, with more than 1 200 delegates. One of the central themes of the conference was "Engaging stakeholders". It is part of SOSCO's vision that ultimately, organisations

¹⁰⁷² Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 45.

¹⁰⁷³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 46.

¹⁰⁷⁴ They were involved with the approval in 2005, expansion and extension of the programme, 78.

¹⁰⁷⁵ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 77.

¹⁰⁷⁶ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 78.

from both the public and private sectors, will be committed to have a healthier workforce in place. Employers are thus encouraged (in my view as part of SOSCO's attempt to follow a more decentralised approach to RTW) to start focusing on the abilities of workers, rather than solely on their disabilities. Employers are also encouraged to continue supporting the government in achieving "a better non-discriminatory working environment for all Malaysians".¹⁰⁷⁷ One of the objectives of the conference was that all employers and organisation representatives would incorporate DM into their respective organisational practices. By adopting such an approach, it was hoped that Malaysia would achieve a higher rate of recovery, since the injured worker will be able to retain employment and return to the labour market, uphold independence, financial stability and still contribute towards the economic and social development of Malaysia.¹⁰⁷⁸ SOSCO urges stakeholders as follows:

To achieve the vision, we need everyone involved to recognize the importance of the relationship between work and health, families, communities, organizations, employers, unions and society as a whole. It is a team effort, and a change of mindset is needed to break away from the traditional ways and approach of social security, which has been to depend solely on compensation. Social security is not only about compensating for the loss of income, but to provide a "total replacement of income" through rehabilitation and return to work strategies. With this system in place, the Malaysian social security system will continue to remain sustainable and affordable to enable our country to compete in this competitive environment.¹⁰⁷⁹

Konkolewsky, ISSA Secretary-General highlights that DM "not only is a moral imperative but also pays off for all parties involved", unlike work injury insurance which focuses mainly on providing medical treatment and financial compensation. He also emphasises that employers have a significant role to play in maximising job retention, however their efforts need to be supported by a social security system. Konkolewsky further asserts that there has been an increase in the number of employers who are willing to provide proper motivation and support, especially in

¹⁰⁷⁷ IDMSC 2010 <https://www.cspdm.ca/wp-content/uploads/2014/10/IDMSC-Newsletter-Vol-4-No-14-Malaysia-Oct-2010.pdf>.

¹⁰⁷⁸ IDMSC 2010 <https://www.cspdm.ca/wp-content/uploads/2014/10/IDMSC-Newsletter-Vol-4-No-14-Malaysia-Oct-2010.pdf>.

¹⁰⁷⁹ IDMSC 2010 <https://www.cspdm.ca/wp-content/uploads/2014/10/IDMSC-Newsletter-Vol-4-No-14-Malaysia-Oct-2010.pdf>.

the initial phases of the programme. There has also been heightened interest in DM from Malaysian employers.¹⁰⁸⁰

For instance, *Brahim's SATS Food Services Sdn Bhd* is a Malaysian company which has participated in the RTW programme since 2010 and received gold at the SOSCO-organised Disability Management Excellence Awards in 2016. The company appointed the RTW committee¹⁰⁸¹ to implement the programme.¹⁰⁸²

One of the aspects of the programme was the opening of a gymnasium, in-house physiotherapy and a rehabilitation programme for staff and participants. The services of a third-party service provider to offer treatments from Mondays to Saturdays were outsourced. This centre has a wide variety of services, such as ultrasound therapy and interferential therapy at its disposal. It further embarked on an ergonomic programme, comprising the screening of employees by a Joint Functional Test, staff profiling and job assessment, and reporting on risks and recommendations. Their RTW programme has assisted the company to identify staff members with injuries that require monitoring. This has led to a reduction in sick leave and medical costs. The issuing of medical certificates was reduced by 2-3% as was hospital admissions caused by injury.¹⁰⁸³

Konkolewsky opined that although Malaysia has had impressive results with their RTW programme, it is "far from accomplished".

More needs to be done in order to ensure that everyone with disabilities in Malaysia has access to the programme and a successful RTW rate of 100% is reached. To achieve these objectives, SOSCO should further extend its capacities and outreach, in particular the number of disability managers and rehabilitation facilities. Solutions need to be found at enterprise level, especially for smaller companies, to run a successful disability management, adding that this could be done through campaigns and incentive programmes.

¹⁰⁸⁰ Sivanandam 2017 <https://www.thestar.com.my/news/nation/2017/05/02/disability-management-is-paying-off-expert-malaysias-efforts-are-inclusive-and-integrative-but-more/>.

¹⁰⁸¹ The committee comprise of personnel from human resources, operational department, safety, in-house doctor as well as a union president.

¹⁰⁸² Sivanandam 2017 <https://www.thestar.com.my/news/nation/2017/05/02/disability-management-is-paying-off-expert-malaysias-efforts-are-inclusive-and-integrative-but-more/>.

¹⁰⁸³ Sivanandam 2017 <https://www.thestar.com.my/news/nation/2017/05/02/disability-management-is-paying-off-expert-malaysias-efforts-are-inclusive-and-integrative-but-more/>.

Konkolewsky further calls for the medical profession, education and training to be strengthened to allow for an early diagnosis of injuries and illnesses so that appropriate medical and vocational measures and care can be provided to the patient. Preventative measures also need to be enhanced to reduce the number of disability cases.¹⁰⁸⁴

By adopting the NIDMAR Protocol, SOSCO aims to move towards a decentralised model and will then offer the so-called "NIDMAR" certification to employers. The question that comes to mind is whether innovative, country-specific strategies may assist in securing a stakeholder buy-in and the success of RTW programmes in the developing world. In Malaysia, the establishment of a tripartite body immediately secured an element of stakeholder buy-in.¹⁰⁸⁵ Occupational health and safety standards were improved by integrating RTW, with an obligation on the part of the employer to improve occupational safety and health standards. Case managers have also played a vital part in preventing workplace accidents by advising employers about health and safety measures. Employers' involvement is further enhanced by linking the RTW system to the notion of corporate social responsibility, through SOSCO issuing recognition certificates.¹⁰⁸⁶

Creativity and deliberation are essential in addressing critical concerns about funding. In Malaysia, contracts were closed with several service providers. Private hospitals play an essential role in the RTW programme and they must comply with the criteria as prescribed by SOSCO and must be fully accredited. Payments are made to these providers in accordance to a fixed tariff. The Malaysian RTW system is fully electronic, simplifying the gathering of statistics. An interactive model¹⁰⁸⁷

¹⁰⁸⁴ Sivanandam 2017 <https://www.thestar.com.my/news/nation/2017/05/02/disability-management-is-paying-off-expert-malaysias-efforts-are-inclusive-and-integrative-but-more/>.

¹⁰⁸⁵ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

¹⁰⁸⁶ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

¹⁰⁸⁷ This interactive model is similar to the model used in the Australian and German system.

containing information such as clients' profiles; case notes, initial assessments; rehabilitation plans *et cetera* is used.¹⁰⁸⁸

4.4.7 The importance of providing quality rehabilitation services and adopting a multi-disciplinary/multi-skilled RTW approach

The provision of quality rehabilitation services is essential and in Malaysia, such services are either provided by SOSCO's Rehabilitation Centre, outsourced to private rehabilitation centres specifically appointed by SOSCO, as well as government hospitals (with or without RTW intervention clinics). An RTW programme must have the necessary technological support to allow for seamless processing as well as a structured data collection system which is vital for the dynamic management of disability.¹⁰⁸⁹

MacEachen¹⁰⁹⁰ states as follows:

It is important to recognise that work rehabilitation occurs within a network of workplaces, policies, programs and professionals, which each play a role in worker outcomes. Therefore, a focus on environments in which worker ability can be enacted might be as important as a focus on improving characteristics of the workers themselves.

It is important to highlight that SOSCO's RTW programme places an integrated variety of professional service providers at the disposal of the affected worker. Services include: Medical rehabilitation (treatment); vocational rehabilitation to assist the worker to be re-integrated into the workplace; social rehabilitation; and the provision of assistive devices or personal support services, where necessary. A diagnosis is made, followed by effective medical treatment. This requires an assessment, not only of the physical and mental capacities of individuals, but also the demands of the job. Counselling, training and selective work placement may be

¹⁰⁸⁸ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

¹⁰⁸⁹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 41.

¹⁰⁹⁰ Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa" from MacEachen et al *2012 Journal of Occupational Rehabilitation* 115.

necessary in some instances. Re-training and workplace adaptations may be required from time to time, to allow for successful RTW.¹⁰⁹¹

Malaysia had to make use of private health professionals and service providers¹⁰⁹² because not all public facilities are suitable for RTW purposes. Privately contracted service providers are all accredited and they meet the criteria stipulated by SOSCO.¹⁰⁹³ The legislative mandates, as was earlier discussed, allows for collaboration with, *inter alia*, private sector institutions to assist with the provision of rehabilitation services.

The role medical professionals play in the RTW process needs clarification. They are involved in the various stages of RTW and injury management, but they also play a leading role in supporting the worker towards pre-injury level of functioning. They need to provide timely information relating to medical status and functionality, and assist with RTW decisions, which determine what medical professional will be called upon. The overall goal, irrespective of the type of medical professional used, is to get the worker back into gainful employment. Training is currently being offered to medical professionals, highlighting the key role they can play in early intervention in DM. They are also trained to identify cases that comply with the criteria for referral to SOSCO's RTW programme.¹⁰⁹⁴

Physical rehabilitation service providers are important in this regard. They need to ensure that the functional requirements needed to return to work are met. These targets are set when case managers carry out worksite assessments. They also assist in the mental development of workers, where RTW is set as a goal.¹⁰⁹⁵

¹⁰⁹¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 51.

¹⁰⁹² For instance, medical professionals, vocational rehabilitation professionals, social rehabilitation professionals as well as personal support service providers.

¹⁰⁹³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 51.

¹⁰⁹⁴ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 52.

¹⁰⁹⁵ Vocational/occupational Rehabilitation professionals also play in a role in the RTW of injured workers. They are for instance, vocational guidance psychologists, rehabilitation advisors and labour force advisors. Currently in Malaysia, these roles are portrayed by SOSCO's case managers and social workers in NGO's. This entails the provision of personal guidance,

Social rehabilitation professionals may be involved in the RTW process to ensure that the injured/disabled worker is able to function in society. This service can entail the installation of ramps, wide doors and lifts and specially equipped vehicles.¹⁰⁹⁶

Personal support service providers render employment support and rehabilitation services to workers who are either suffering from ill health and need prevention to avoid further disability, or to recover work skills and capacities to re-adjust to work. In some instances, it may be necessary to adjust the working environment. At times, it may also be necessary to make use of orthopaedic providers to provide appropriate prosthetic equipment to assist workers to return to work.¹⁰⁹⁷

Involving the larger disability community¹⁰⁹⁸ is important to consider the tripartite machinery as set out in the relevant ILO instruments. For Malaysia to implement international labour standards, stakeholders need to be involved.¹⁰⁹⁹ The *ISSA Guidelines*, calls for the involvement of the larger community, to facilitate the person's return to work.

Research has shown that a lack of knowledge as well as low awareness of RTW are modifiable barriers that need attention during the development of an RTW intervention.¹¹⁰⁰ The RTW process can also be better coordinated through early contact with the employer, effective communication between employers and occupational health officers as well as collaborative efforts towards RTW planning.¹¹⁰¹

1096 counselling and individual support measures - Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 52.
Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 52.

1097 Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 52.

1098 In Malaysia this community is known as "Disability Movement", and consists of many organisations, for instance the Malaysian Association for the Blind; Malaysian Federation for the Deaf etc.

1099 Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 55.

1100 Chow, Lo and Tin Journal of UOEH 135.

1101 Chow, Lo and Tin Journal of UOEH 135.

Participants would be motivated from knowing that their employers are keen to have them back; at the same time, employers would be interested in reemploying motivated workers while on the RTW. Thus, it is important to recognise the employer-worker relationships at the onset of any work-related injury.¹¹¹³

The same research study has proven that employee participants with injuries affecting the upper-limbs are more likely to return to work compared to those with lower-limb injuries.¹¹¹⁴ This is an indication of the type of intervention required at the workplace for lower-limb injuries¹¹¹⁵ and showed that more technical support must be provided to employers by SOSCO in such instances, to ensure that the workplace is adjusted, which in turn provides better prospects for those injured to return to work. An interesting conclusion of this study was that male participants were about 1.2 times more likely to return to employment compared to female participants.¹¹¹⁶

In 1988 an employment quota policy of one per cent was introduced for PWDs in the public sector, through the introduction of Government Service Circular No. 10/1988. It was also extended to the private sector in 1990 with the establishment of a National Committee for the Promotion of Employment Opportunities for PWDs. In 1999 the Code of Practice for the Employment of PWDs in the private sector was introduced as well as the introduction of an electronic labour exchange system for PWDs namely *Sistem Pendaftaran dan Penempatan OKU (SPOKU)* or Registration and Placement System for Persons with Disabilities in 2005. SPOKU is a platform that assists PWDs in finding equivalent jobs. In 2007 the National Policy on PWDs was introduced as a positive measure to assist PWDs, prior to the introduction of the *Persons with Disabilities Act* of 2008. In 2008 a National Plan of Action for PWDs for the term 2008-2012 was introduced and the Social Welfare Department of Malaysia was established in 2009. The Malaysian Government also provides financial

¹¹¹³ Awang, Shahabudin and Mansor *Asia Pacific Journal of Public Health* 4.

¹¹¹⁴ Awang, Shahabudin and Mansor *Asia Pacific Journal of Public Health* 4.

¹¹¹⁵ Awang, Shahabudin and Mansor *Asia Pacific Journal of Public Health* 4.

¹¹¹⁶ Awang, Shahabudin and Mansor *Asia Pacific Journal of Public Health* 4.

incentives for both employees and employers, as was discussed earlier in the chapter.¹¹¹⁷

The RTW programme was introduced as a national social protection strategy that is part of the government's Transformation Programme, addressing key areas of concern of Malaysian citizens, but also supporting Malaysia's transformation to become a high- income and developed nation by 2020.¹¹¹⁸ The country has also adopted the so-called Incheon Strategy which contains ten specific goals, for instance to: Reduce poverty by enhancing work and employment prospects; accelerate implementation of the CRPD; and strengthen social protection.¹¹¹⁹ The Incheon strategy was incorporated into Malaysia's Plan of Action for PWDs for the term 2016-2022 by formulating ten strategic goals, for instance to increase the mobility and quality of life for an inclusive and productive community.¹¹²⁰ Every objective has an impact on short- term and long-term planning, stipulating who will be responsible for what tasks.¹¹²¹ The plan of action aims to consolidate and continue with the achievement of the first two Asian and Pacific Decades of Disabled Persons, and to accelerate the realisation of rights of PWDs in the region.¹¹²²

The Incheon Strategy was adopted by a Ministerial Declaration on the Asian and Pacific Decade of PWDs 2013-2022, the aim of which is to ensure that targets are met by 2022. The role of the government in ensuring, upholding and promoting the rights of PWDs is highlighted.¹¹²³

¹¹¹⁷ Hinga "Country Report: Human Resources Development for People with Disabilities: Improvement of Employability in Malaysia".

¹¹¹⁸ Hinga "Country Report: Human Resources Development for People with Disabilities: Improvement of Employability in Malaysia".

¹¹¹⁹ Hassan date unknown <https://mind.org.my/wp-content/uploads/2017/09/P3-Incheon-Strategy-Implementation-in-Malaysia-Puan-Hamidah.pdf>.

¹¹²⁰ Rahim et al "Malaysian Plan of Action for People with Disabilities 2016-2022: Way Forward".

¹¹²¹ Rahim et al "Malaysian Plan of Action for People with Disabilities 2016-2022: Way Forward".

¹¹²² Anon 2012 <http://www.unescap.org/news/asia-pacific-governments-launch-new-decade-disability-inclusive-development>.

¹¹²³ Escap 2014 <http://www.maketherightreal.net/incheon-strategy/ministerial-declaration-asian-and-pacific-decade-persons-disabilities-2013-2022>.

The Biwako Millennium Framework for Action ¹¹²⁴ contains certain principles and policy directions, worthy of note for instance:

Vocational training and employment issues must be considered within the context of the full participation of persons with disabilities in community life and within the macro context of changing demographics and workplaces. Responses to issues such as globalization, job security, poverty reduction and unemployment among youth and older workers must also consider how these issues and responses affect persons with disabilities.

It is emphasised that community-based approaches in the prevention of disability, rehabilitation and equalisation of opportunities for PWDs need to be strengthened. Governments are furthermore urged to develop and implement employer incentives and strategies to assist with the employment of PWDs. Government, as the major employer (as is the case in most countries), should lead by example regarding the appointment, retention and advancement of employees with disabilities. It is also stressed that an integrated approach is needed for connecting prevention and rehabilitation with empowerment strategies as well as a change in attitudes. The Framework for Action once again highlights the role of government can play as follows:¹¹²⁵

Preventive measures aimed at minimising the causes of disability and the provision of rehabilitation services should be an integral part of the normal business of Governments, the private sector and NGOs. Programmes aimed at disability prevention and rehabilitation should be included in national plans, policies and budgets. Governments should design and adopt a national strategy on prevention of causes of disabilities and rehabilitation for persons with disabilities. The national strategy should acknowledge the role of all three approaches, institutional, outreach and community-based, in the rehabilitation of persons with disabilities. Community-based approaches, in particular, should be emphasised to achieve maximum coverage and outreach of services as well as to maximise their cost-effectiveness.

Malaysia hosted the International Forum on Disability Management in 2016, a first for the country and the continent. It involved multiple stakeholders from across the world and was a platform for sharing ideas and best practices on Disability Management world-wide.¹¹²⁶ SOSCO's Rehabilitation Centre was opened on 1

¹¹²⁴ Escap 2011 <http://www.unescap.org/resources/biwako-millennium-framework-action-towards-inclusive-barrier-free-and-rights-based-society>.

¹¹²⁵ Anon and date unknown <http://undocs.org/E/ESCAP/APDDP/4/REV.1>.

¹¹²⁶ Tey 2016 <https://www.thestar.com.my/metro/community/2016/11/26/helping-the-injured-and-sick-to-return-to-work-international-forum-offers-sharing-of-info-on-systema/>.

October 2014 and is the first of its kind in South-East Asia. The size of the site is 22.3 hectare and consists of a staff of 110. The Centre's aim is to provide quality physical and vocational rehabilitation. The Centre can accommodate around 1 448 patients a year.¹¹²⁷ The principal focus of the Centre is described as follows:

To provide the best rehabilitation treatments for SOCSO/PERKESO's insured persons and workers from all over Malaysia, while at the same time, accomplishing the mission of returning them to work and improving their overall well-being.¹¹²⁸

As was discussed above, SOSCO's RTW programme contains certain key factors that have contributed towards the success of its RTW programme. Case managers play a vital role in the successful implementation of SOSCO's RTW programme. The fact that they remain in close contact with insured members as well as other stakeholders assists in the rehabilitation process and the transition in returning to work. The use of a systematic case management system was discussed, and a similar system will be proposed for South Africa. The use of an online system allows for quick referrals and access to valuable information that could be utilised for future cases. The importance of political and stakeholder buy-in and approval was highlighted and the importance of active participation by employees in high quality rehabilitation services provided by SOSCO explained. The RTW programme of SOSCO is thus an integrational process comprising several components, with a variety of interventions, all with the aim of returning injured persons to work.

4.5 Areas in need of improvement and the way forward

SOSCO needs to be commended for the successes of its programme thus far and the efficiency of the case management process. This can be attributed mainly to high levels of commitment by role-players, such as rehabilitation practitioners based at

¹¹²⁷ Bernama 2015 <http://www.theborneopost.com/2015/07/31/11457-socso-contributors-back-to-work-under-return-to-work-programme-riot/>.

¹¹²⁸ IDMSC 2011 Communique volume 9 no 27
http://www.nidmar.ca/news/news_articles/IDMSC%20Communique%20Vol%209%20No%2027%20PERKESO%20Rehabilitation%20Centre%20January%202015.pdf.

government hospitals and the establishment of RTW clinics all to ensure early intervention of SOSCO's RTW participants.¹¹²⁹

Even though the organisation saw a reduction in the number of days required to return a person to work, the international benchmark of 59.4 days remains a target for the programme.¹¹³⁰ To achieve this, earlier intervention programmes will be introduced as well as more awareness-raising campaigns amongst stakeholders.¹¹³¹ It will be easier to achieve the buy-in from stakeholders if they are properly briefed in advance, instead of compelling them to participate in the RTW process only after the injury has occurred and emergency assistance is needed.

Even though employers are not directly liable for RTW programmes, section 53 of ESSA prohibits employers from dismissing or discharging an employee while on medical leave after an occupational injury. This encourages employers to participate in the RTW programme, albeit indirectly, and affords case managers with a sufficient timeframe to assist the employee to return-to-work. The *Income Tax Act* provides for tax incentives for employers when it comes to hiring disabled persons. It became clear that while the legislative framework provides overall support to the RTW system, some changes will be necessary. Thus, a law should be enacted to protect employees disabled because of an occupational injury or illness, but who qualify to participate in an RTW programme and disability management from dismissal. Currently such protection is extended to disabled employees only.¹¹³²

Thus, workers who are participating in a rehabilitation programme with the aim of being reintegrated back to work, should not be exposed to losing their jobs. Secondly, the scope and duties of health and safety officers (in terms of the *Occupational Safety and Health Act of 1994*) need to be extended to make provision

¹¹²⁹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 83.

¹¹³⁰ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 87.

¹¹³¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 86.

¹¹³² Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa".

for disability management.¹¹³³ If one considers the Act in its current format, it only makes provision for occupational health and safety in general. Section 31 for instance, provides that the safety and health committee must review the measures for the safety and health of people in the workplace and investigate and resolve disputes that arise. Thus, there are no direct disability management obligations, such as the establishment of collaborative networks to assist with disability management functions, for instance. The duties of employees as well as those of employers will need to be extended to ensure that disability management obligations are adhered to. The obligations of employers and employees, as currently embodied in the Act will need to be amended to ensure that all parties work towards effective disability management practices.

In the first few years, SOSCO focused on the functioning of the programme itself, and on improving the infrastructure, processes, quality and engagement. It can now focus on stabilising the programme and extending the disability management scope. To do so, SOSCO will identify new areas that need enhancing for instance for disability management to become a professional industry.¹¹³⁴

Currently, there is no legislation that provides for a decentralised approach to disability management in Malaysia. However, with the conclusion of Memoranda of Understandings with the Malaysian Employers Federation as well as the Malaysian Trade Union Congress on the implementation of DM in 2016, it is estimated that over the next five years employers will continue to gain more knowledge, which in turn will lead to a greater “handholding approach”, to allow proper implementation. Decentralising will need to be reviewed and monitored to improve service delivery in this regard, because owing to the current centralised system in Malaysia, SOSCO still remains focused on its case-targeting model, rather than having an employer-liability model. Because of human resource constraints, the focus is placed on more serious

¹¹³³ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 87.

¹¹³⁴ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 89.

injuries and diseases, especially if one considers that there are only 35 case managers in Malaysia.¹¹³⁵

However, a so-called “smart predictive modelling system” has assisted SOSCO to have a standardised case targeting and referral system. Malaysia should enact legislation to compel employers, especially the bigger ones, to appoint disability managers. Furthermore, larger employers need to be compelled to adopt “Reintegration Management Policies”, which will entail several processes that need to be adhered to. Employers will need to have well-defined roles and responsibilities in place for all role-players involved. Such a policy needs to be communicated to all levels of the organisation since awareness is important for successful reintegration. Employers need to remain in close contact with service providers of medical and vocational services. Companies should avoid a “one size fits all” approach, and rather adopt a systematic case management approach. To do so, they will need to identify and design suitable employment for the worker; collaborate with line managers; monitor the rehabilitation process *et cetera*. Assessment of costs and benefits of reintegration programmes should form part of companies’ agendas. Thus, reintegration policies should be properly planned, managed, monitored and resourced.¹¹³⁶ Larger companies in Malaysia should have the capital to make use of their established HR departments to embark on Disability Management processes. All organisations, irrespective of size, need to have policies or programmes in place to deal with the prevention of illness, injury or disability.

Smaller and medium-sized organisations would still be supported by the SOSCO Disability Managers. This may lead to several advantages, such as relieving the burden of SOSCO; and making disability management and RTW available for all workers.¹¹³⁷ The smaller organisations in Malaysia should perhaps consider following

¹¹³⁵ Olivier M et al “Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa”.

¹¹³⁶ Return to Work for Long Term Absent Employees Employers Good Practice Guide RETURN Project Work Research Centre Dublin February 2002.

¹¹³⁷ Olivier M et al “Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa”.

the German example, whereby regional networks are established between companies and social security institutions.¹¹³⁸

Currently, SOSCO is the primary organisation concerned with the welfare of workers with occupational illness or injuries, whilst the Malaysian Department of Welfare is mainly concerned with congenital disabilities. There is a misconception that a person suffering from a congenital disability and has undergone rehabilitation processes earlier in life, is unemployable and should be treated differently to a person who has, for instance, lost a limb/s in an occupational accident. These are issues that may lead to exclusion. Hence, there is a need for a disability management council where issues pertaining to disability management could be discussed. For instance, such a council could discuss: The direction in which disability management policies are heading; disability management legislation; an incentivisation system for employers; and measures to overcome bridges between stakeholders.¹¹³⁹

SOSCO has highlighted the importance of benchmarking its disability management standards¹¹⁴⁰ and would like to see a Malaysian Occupational Disability Guideline for Disability Managers where more realistic methods could be applied. SOSCO thus would further want to share its experiences with other countries with similar cultural and geographic features, through its IT infrastructure and database management. Another future directive SOSCO would wish to embark on is to determine how its Programme Benchmarks compare to programmes in other countries.¹¹⁴¹

Disability management legislation is also called for, which will allow all workers the opportunity to “maximize their function through a disability management programme”, attending prior medical board sessions. There is a need for a specific Act or regulations in terms of which disability management can be defined and governed. Having such clarity will allow all role-players to “be on the same page” so

¹¹³⁸ Hinrichs and Bromberg Safer and healthier work at any age: Workshop report: GERMANY No. EUOSHA-PRU/2013/C/02 June 2014.

¹¹³⁹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 90.

¹¹⁴⁰ For instance the ISSA Key Performance Indicators on RTW and Reintegration, which contains certain important parameters. This was already discussed in Chapter 2.

¹¹⁴¹ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 90-91.

to speak, and work towards the goal of restoring the functions of specific persons.¹¹⁴² Legislative provisions on disability management will not only determine the extent of the responsibilities which will be imposed on different stakeholders but will also assist to clarify roles and responsibilities of the parties involved in the disability management process. Until such legislation is enacted, larger organisations should investigate implementing disability management initiatives and adopt policies on disability management, which should be a multi-party collaborative effort, and this should be taken into consideration when legislation is planned and drafted. Still relevant today, is the submission made by Shrey and Hursh in 1999, that disability management comprises two main components to be successful, namely that it needs to be managed and coordinated by someone with the necessary skills to deal with complex issues, such as dispute resolution; service delivery; contracts and negotiations and information management systems. Furthermore, these components need to function within the context of workplace-best practices and by way of joint-labour management collaboration.¹¹⁴³

In 2016 the Deputy Prime Minister, Datuk Seri Dr Ahmad Zahid Hamidi, confirmed that Malaysia needs to enhance its disability management by streamlining and connecting all of its facilities. He further stated as follows:

We already have a comprehensive and extensive safety net provided through various agencies and organisations. However, we need to look into enhancing disability management in this country. We need to ensure better coordination between all agencies for disabled workers.¹¹⁴⁴

Further, The Minister tasked SOSCO to take the leading role in this regard and to connect all the services required as part of a disability management reform.¹¹⁴⁵ It was further suggested that a Centre of Excellence for Rehabilitation and Prevention, where knowledge could be shared, and more rehabilitation services integrated, be

¹¹⁴² Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 91.

¹¹⁴³ Shrey and Hursh *Journal of Occupational Rehabilitation* 59.

¹¹⁴⁴ Ansa 2016 <https://www.nst.com.my/news/2016/11/190813/zahid-tasks-socso-enhancing-disability-management-msia>.

¹¹⁴⁵ Ansa 2016 <https://www.nst.com.my/news/2016/11/190813/zahid-tasks-socso-enhancing-disability-management-msia>.

established. Another important recommendation was to strengthen partnerships and bilateral cooperation's with universities and with disability management practitioners globally.¹¹⁴⁶

Other reforms SOSCO is suggesting are concerned with addressing disability at grassroots level, thus cultivating a barrier-free mindset as part of school curricula. The ratio of case managers to insured persons is another aspect that needs to be addressed. Currently, the ratio is 1:70, thus highlighting the need to have more case managers, which in turn will allow for more effective case management.¹¹⁴⁷ SOSCO is also looking into establishing more rehabilitation centres and working closely with stakeholders (such as hospitals, transportation providers and private rehabilitation providers) by adopting initiatives to ensure that logistical challenges are overcome, and that participants' financial burdens are alleviated.¹¹⁴⁸ SOSCO has also developed a step by step guide for RTW coordinators for those organisations who wish to implement internal disability management or RTW programmes.¹¹⁴⁹

It must be borne in mind that health promotion can never be classified as a one-time event and is an ongoing process. Schmidt states as follows:

Malaysia has been successful in building a comprehensive EII and IP system over the past decades by providing a wide range of benefits, complemented by support services that promote health and safety and the reintegration and rehabilitation of insured members.

Malaysia should consider extending coverage to foreign workers, so as to render the system truly comprehensive. Currently foreign workers are insured under the Workmen's Compensation Act, with fewer benefits than those provided for in terms

¹¹⁴⁶ Fadzell 2016 <http://www.thesundaily.my/node/410000>.

¹¹⁴⁷ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 92.

¹¹⁴⁸ Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 91.

¹¹⁴⁹ This can be of relevance for South Africa once our DM is decentralized to larger employees. For more detail on this guide, see Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 93.

of SOSCO's scheme. The fact that protection was extended to other workers as well, as discussed earlier, will bring its own challenges.¹¹⁵⁰

With reference to SOSCO's New Rehabilitation Centre, the ILO submitted that the average number of days needed to manage a case needs to be reduced. Additional efforts must be made to improve the stigma around disability, while addressing other cultural factors which may hinder a successful RTW.¹¹⁵¹ Attention also needs to be paid to members who are not motivated to participate or those who have left the RTW programme prematurely.¹¹⁵²

In 2012, the ILO reached an agreement with the government of Malaysia to assist them with technical expertise on the Design of an Unemployment Insurance System.¹¹⁵³ With reference to SOSCO's RTW programme, their success is commended for being based on the case-management approach to assist workers suffering from disability to return to work as soon as possible. It thus involves the allocation of case managers to all individual cases, being involved in the entire process, ensuring that an objective and systematic approach is adopted to meet the objectives of rehabilitation and RTW. Compensation for the loss of income of job seekers who do accept RTW on a part-time basis, as practiced in countries such as Germany, France and Canada, could be considered. ILO recommends that a legal provision needs to be included to make provision for beneficiaries who return to work on a part-time basis and exempt a percentage of their earnings from deduction for unemployment insurance benefits. Thus, jobseekers must continue searching for full-time employment.¹¹⁵⁴

Mohammed states that there have also been weaknesses in SOSCO's RTW programme. For instance, the education of employers needs to improve insofar as

¹¹⁵⁰ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>.

¹¹⁵¹ ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>.

¹¹⁵² ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>.

¹¹⁵³ Keys, Carter and Bédard Design of an employment insurance system for Malaysia 15. After further reports were released by the ILO, the new system was introduced. Also see <http://sea-globe.com/malaysia-unemployment-insurance-scheme/>. The new employment insurance scheme commenced January 2018.

¹¹⁵⁴ Keys, Carter and Bédard Design of an employment insurance system for Malaysia 67-68.

that they recognise and validate a disability. Capacity building must be addressed so that more disability managers can be trained and more Quality Rehabilitation Centres established. A legal mandate should be in place for addressing the retention of employees who have a lifestyle disease, and not limit it to workplace injuries. SOSCO has learnt certain crucial lessons in the RTW journey. For instance, all parties need to be involved, from the worker and his family to employers; co-employees; health services etc. and it is important to remember that the implementation of an RTW programme may vary from one jurisdiction to another. Mohammed further emphasises that RTW programmes must not be regarded as a 100 m sprint, but rather a marathon, since it takes time for a programme to generate results.¹¹⁵⁵

Olivier's¹¹⁵⁶ submits that Malaysia needs to strengthen its legal framework for a more robust approach to employment protection. There is also a need to have more enhanced employer and employee benefits, in the form of rebates or levies on non-participating employers. Job-seekers' allowances should also be considered. Perhaps Malaysia should consider implementing legislation for long-term disability benefits once it has been proven that a worker's earning capacity cannot be restored through RTW interventions.¹¹⁵⁷

4.6 Malaysia's compliance with the Convention on the Rights of Persons with Disabilities

Malaysia signed the CRPD on 8 April 2008 and ratified it on 19 July 2010.¹¹⁵⁸ The obligations arising from the CRPD were discussed in Chapter 3 of the study. It would have added value to the study to reflect on the state party's report of Malaysia, to reach a conclusion on the standing of the country's international compliance to the CRPD. However, Malaysia has not yet submitted its state party report.¹¹⁵⁹

¹¹⁵⁵ Mohammed 2013 "*Malaysia: Returning successfully to work*".

¹¹⁵⁶ Olivier and Govindjee "Critical factors in implementing the ISSA Guidelines on Return-to-Work in developing world contexts".

¹¹⁵⁷ Olivier and Govindjee "Critical factors in implementing the ISSA Guidelines on Return-to-Work in developing world contexts".

¹¹⁵⁸ https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx.

¹¹⁵⁹ OHCHR 2019

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=MYS&Lang=EN

As it was argued in Chapter 3, Section 27 of the CRPD requires States Parties to promote employment opportunities and career advancement of PWDs, including assistance with finding, obtaining, maintaining of and returning to employment. Section 27 further places a duty on States Parties to ensure that PWDs are reasonably accommodated at the workplace. They must also promote vocational and professional rehabilitation, job retention and RTW programmes. Article 26 of the CRPD determines that States Parties need to, *inter alia*, take effective and appropriate measures to assist PWDs to attain and maintain optimal independence, physical and mental health; social and vocational abilities to be fully integrated in all spheres of life. States Parties need to have comprehensive habilitation and rehabilitation services and programmes. Article 26 also calls on States Parties to assist PWDs by providing aids and devices relevant for rehabilitation or habilitation. Training as well as ongoing training of staff associated with these services must form part of the States Parties agenda.

Considering the above principles, standards and obligations imposed by the CRPD on States Parties, Malaysia has indeed made excellent strides meeting its international obligations. Even though Malaysia does not have one specific Act devoted to RTW, there are various Acts which provide support for SOSCO's to have introduced their programmes.

Considering the legislative obligations imposed by both ESSA as well as the *Person's with Disabilities Act*, as was earlier discussed in the chapter, it is possible to draw the conclusion that Malaysia's RTW programme is certainly in line with the standards imposed by the CRPD. The aim is to assist employees to remain active members of society, with the necessary support system to do so. The provision of assistive devices as well as adaptations to the workplace are all factors that contribute to the success of Malaysia's programme, aiming to create a benchmark for international standards.

Malaysia signed the CRPD on the 8th of April 2008 and ratified same on 19 July 2010.¹¹⁶⁰ Malaysia's first periodic report was due on 19 August 2012¹¹⁶¹ however they have failed to submit any of its reports in terms of the CRPD. Malaysia also did not sign the Optional Protocol which allows individuals or groups to file complaints to the Committee for possible breaches.¹¹⁶²

The next part of the chapter explores RTW the Australian jurisdiction of Victoria which might be of assistance in developing a framework to promote the integration, rehabilitation and return-to-work programmes of disabled workers in the South African labour market.

4.7 Australia

4.7.1 General introduction

The participants in the Australian RTW process are selected in terms of the jurisdiction of each State. Role-players include employers, employees, workplace rehabilitation coordinators and providers, medical and other health professionals and insurers. A successful RTW programme depends on the following factors: Early intervention; an effective workplace-based rehabilitation program; effective claims management and cooperation; and collaboration and consultation between stakeholders.¹¹⁶³

Australia's workers' compensation schemes were developed in the 19th century to provide benefits for employees who were injured in the course of employment¹¹⁶⁴ and could not succeed in suing their employers. In the period of 1882 to 1895 the *Employment Liability Act of 1880* proved to be ineffective. By 1926, New South Wales introduced a compulsory workers' compensation insurance, which was the benchmark for other Australian schemes. As time went by, more schemes were developed to include eligibility, improve compensation benefits, limit costs and

¹¹⁶⁰ OCHCHR 2019 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en.

¹¹⁶¹ OHCHR 2019 https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx.

¹¹⁶² Mokhtar and Hisham 2016 *International Journal of Business, Economics and Law* 83.

¹¹⁶³ Safe Work Australia Comparison of workers compensation arrangements Australia and New Zealand 131.

¹¹⁶⁴ Mobrepsi date unknown www.fom.ac.uk/wp-content/uploads/mobrepsi.doc.

improve health and efficiency outcomes.¹¹⁶⁵ Currently each of the States and Territories preside over their own schemes, with the Commonwealth over three, namely for government employees, seafarers and defence force personnel. Every scheme has individual funding requirements, entitlement levels and RTW programme coverage, owing to different industry profiles and legislation. In 2007 all State and Territory Governments adopted a more uniform approach in terms of their scheme designs, benefits and legislation.¹¹⁶⁶

In the following sections federal legislation and case law, that support the duty to make reasonable adjustments for ill or injured employees, are examined.

4.8 Federal legislation:

4.8.1 Disability Discrimination Act 135 of 1992

The *Disability Discrimination Act 135 of 1992*¹¹⁶⁷ stipulates the elimination of discrimination against PWDs in the workplace on the grounds of disability. Section 3 specifies that PWDs are entitled to the same fundamental right to equality before the law as every other citizen. Section 5 of the Act defines reasonable adjustment as follows:

...an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

Section 15 of the DDA deals specifically with discrimination in employment and it reads as follows:

(1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:

(a) in the arrangements made for the purpose of determining who should be offered employment; or

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

¹¹⁶⁵ Mobrepsi date unknown www.fom.ac.uk/wp-content/uploads/mobrepsi.doc.

¹¹⁶⁶ Mobrepsi date unknown www.fom.ac.uk/wp-content/uploads/mobrepsi.doc.

¹¹⁶⁷ *Disability Discrimination Act 135 of 1992*, hereafter DDA.

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:

(a) in the terms or conditions of employment that the employer affords the employee; or

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or

(c) by dismissing the employee; or

(d) by subjecting the employee to any other

(3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

The Act contains very little guidance or specification as to what amounts to a reasonable adjustment and the respondent's obligation to provide such.¹¹⁶⁸ Section 11(1) of the Act does, however, contain a set of relevant circumstances that must be considered to determine whether a hardship could possibly amount to an unjustifiable hardship. The factors are set out in Section 11(1) as follows:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;

(b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

Section 11(2) states that the onus of proof rests on the person claiming the unjustifiable hardship. Smith acknowledges that it will not be possible for the DDA to

¹¹⁶⁸ Smith 2012 *The International Journal of Law & Education* 11.

contain a set list applicable to every case, which makes it difficult to determine when such duty should be discharged.¹¹⁶⁹

Sections 21 A and B of the DDA use the terms “unjustifiable hardship” and “inherent requirements” when referring to unlawful discrimination, both relevant when considering the duties employers may have in accommodating disabled employees. With reference to inherent requirements, it is stated that discrimination on the grounds of disability is not unlawful when such discrimination relates to a particular job a disabled person is incapable of and “would be unable to carry out the inherent requirements of the particular work” even should the relevant employer make a reasonable adjustment for the disabled person. The section also sets out factors that must be taken into consideration when determining whether a worker would be able to carry out the inherent requirements of the job, including qualification, training and experience for the work. For persons already in employment, performance and any other reasonable factors must be considered.

Although the DDA does not define “inherent requirements”, case law suggests that it should be determined by the facts of each case and that “inherent requirements” are not limited to the mechanical performance of tasks, but should also recognise the social skills needed to perform the job effectively. Factors which should be considered when determining what constitutes inherent requirements, may include whether: The employee has the ability to perform the tasks required of the particular job; has the ability to work safely; his/her productivity and quality of work; the employee has the ability to work in a team.¹¹⁷⁰

Wilson explains that employers in both the public and private spheres must adhere to the provisions of the DDA, as cases reach the courts because managers do not understand their duties in terms of the Act.¹¹⁷¹ Wilson further submits that the DDA requires employers to make all reasonable adjustments possible, up until the point where it may cause the employer unjustifiable hardship. In circumstances where an

¹¹⁶⁹ Smith 2012 *The International Journal of Law & Education* 11.

¹¹⁷⁰ Bassier and Jones *Melbourne University Law Review* 273.

¹¹⁷¹ BAL Lawyers 2016 <https://www.lexology.com/library/detail.aspx?g=eb836c81-291d-4577-966d-t6930257bf536>.

employee has disability that may affect his/her performance, Wilson further advises managers to acquaint themselves with the inherent requirement of the pre-adjusted position, before determining what adjustments may be required for the employee to be able to perform.¹¹⁷²

Tyler describes the introduction of the DDA "as one of the most important of the many legislative and administrative reforms initiated by the government since 1983".¹¹⁷³ It is seen as a major step towards the development of anti-discrimination law. to advocating for the cause of Australian PWDs.¹¹⁷⁴ The DDA places an obligation on Australian employers to reasonably accommodate employees with disabilities. Failing to do so, it will amount to discrimination.¹¹⁷⁵

Handley submits that the DDA is psychologically significant for the disabled, since it contains not only a general prohibition against discrimination, but also requires a degree of positive action to for adjustments to materialise.¹¹⁷⁶

4.8.2 Disability Services Act 129 of 1986

The *Disability Services Act 129 of 1986*¹¹⁷⁷ stipulates that PWDs receive the services necessary to ensure optimal participation as members of the community. Section 3(1)(f) provides as follows:

(f) to assist in achieving positive outcomes, such as increased independence, employment opportunities and integration in the community, for persons with disabilities who are of working age by the provision of comprehensive rehabilitation services.

Section 3 further determines that these services should be provided in an innovative manner with due regard to limited resources and by taking equity and merit into account when such resources are accessed.

¹¹⁷² BAL Lawyers 2016 <https://www.lexology.com/library/detail.aspx?g=eb836c81-291d-4577-966d-6930257bf536>.

¹¹⁷³ Tyler 1993 *Melbourne University Law Review* 228.

¹¹⁷⁴ Tyler 1993 *Melbourne University Law Review* 228.

¹¹⁷⁵ Allen 2018 *University of New South Wales Law Journal* 869.

¹¹⁷⁶ Handley 2010 *Australian Journal of Political Science* 517.

¹¹⁷⁷ *Disability Services Act 129 of 1986*, hereafter DSA.

Part 3 of the DSA deals with the provision of rehabilitation services by the Commonwealth. Section 20 makes provision for a range of services and devices, including, *inter alia*, vocational and employment training, educational programmes and courses, mobility or other independent living training,¹¹⁷⁸ home and workplace modifications¹¹⁷⁹ and books, specialised trade tools and other equipment and appliances.¹¹⁸⁰

Stancliff calls this Act as a key piece of legislation for Australia's past twenty-five years.¹¹⁸¹ The integration and inclusion of PWDs are further facilitated by the Act, in that provision is made for government-funded services at disability facilities as well as support in workers' own homes.¹¹⁸²

4.8.3 Fair Work Act 28 of 2009

Another piece of legislation that could benefit PWDs is *The Fair Work Act 28 of 2009*, which aims¹¹⁸³ to assist employees in balancing their work and family responsibilities by way of flexible working arrangements. This is set out in section 65 of the Act, which determines that an employee may request flexible working arrangements¹¹⁸⁴ under the following circumstances:

- (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
- (c) the employee has a *disability*¹¹⁸⁵;
- (d) the employee is 55 or older;
- (e) the employee is experiencing violence from a member of the employee's family;
- (f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

1178 Subsection a.

1179 Sub-section i.

1180 Sub-section f.

1181 Stancliffe 2014 *International Journal of Inclusive Education* 1054.

1182 Stancliffe 2014 *International Journal of Inclusive Education* 1054.

1183 Division 2, section 3(d) of the Act.

1184 Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work (Note in the Act itself).

1185 Own emphasis.

However, this request can only be considered if the employee submits it in writing, specifying reasons, after he/she has completed at least 12 months uninterrupted service. The employer must also respond to the request in writing within 21 days and may be entitled to refuse the request on reasonable business grounds¹¹⁸⁶ providing details and reasons for the refusal.

With reference to the above eligibility criteria, Smith¹¹⁸⁷ explains his concerns as follows:

The *Fair Work Act* reflects a continuation of this trend and possibly a significant step forward, but the inclusion of rights alone will not transform norms. The inclusion in the Act of a right to request flexible working arrangements could encourage employers to better accommodate the needs of workers with caring responsibilities, but the tight eligibility requirements for this right and its fundamental lack of enforceability are severe constraints on its transformative potential.

Pagura describes the *Fair Work Act* as “a safety net of enforceable minimum employment terms and conditions”.¹¹⁸⁸ The request for flexible working arrangements forms part of the ten National Employment Standards, that set out in minimum standards for the employment.¹¹⁸⁹

4.8.4 *Safe Work Australia Act 84 of 2009*

The *Safe Work Australia Act* provides for the establishment of Safe Work Australia, a representative body responsible for the improvement of occupational health and safety as well as workers 'compensation in Australia.¹¹⁹⁰ It comprises representatives

¹¹⁸⁶ The sub-section read as follows: Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following: (a) that the new working arrangements requested by the employee would be too costly for the employer; (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee; (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee; (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

¹¹⁸⁷ Smith 2011 Melbourne University Law Review, 35(2), 577.

¹¹⁸⁸ Pagura 2011 Journal of the Australian Traditional-Medicine Society 161.

¹¹⁸⁹ Pagura 2011 Journal of the Australian Traditional-Medicine Society 161.

¹¹⁹⁰ Section 3 of the Act.

from the Commonwealth, States, Territories, employers and employees.¹¹⁹¹ Its functions are set out in section 6 as follows: To develop, and assess models of occupational health and safety; to develop and evaluate national strategies and policies related to occupational health and safety and workers' compensation; and to conduct research and report on findings and to monitor compliance with reference to RTW specifically. It is submitted that the successful return of a worker after an injury usually depend on four factors: Early as and positive contact by the employee's manager or supervisors; an effective workplace rehabilitation programme; supportive and effective claims management practices; and coordination and cooperation amongst stakeholders.¹¹⁹²

Safe Work Australia published an RTW survey¹¹⁹³ in September 2018, with the purpose of measuring the RTW outcomes of workers receiving workers' compensation and secondly, to gain a better understanding of the experiences, attitudes and perceptions of the workers and the factors affecting their RTW. Furthermore, it aimed at determining the aspects which may have a positive effect on the illness or injury recovery, RTW and workers' experience with compensation arrangements. Lastly, the survey serves as evidence that could help to inform and evaluate programme and policy initiatives. All Australian jurisdictions, except South Australia, participated in the survey.¹¹⁹⁴ Some of the findings related to how the workplace¹¹⁹⁵ and healthcare spheres influence RTW, are important for this study. It revealed that 65,3% of the 2018 respondents had an RTW plan. Almost a third of the respondents did, however, have a concern that they would be treated differently by colleagues. Among workers with mental illness, 72, 4% agreed with this. More than half of the respondents (56,9%) indicated that they had been contacted by an RTW coordinator.

¹¹⁹¹ Section 10 of the Act.

¹¹⁹² Safe work Australia 2018 <https://www.safeworkaustralia.gov.au/workers-compensation/return-work>.

¹¹⁹³ National Return to Work Survey 2018- Summary Report - <https://www.safeworkaustralia.gov.au/collection/national-return-work-survey-2018>.

¹¹⁹⁴ National Return to Work Survey 2018- Summary Report - <https://www.safeworkaustralia.gov.au/collection/national-return-work-survey-2018>.

¹¹⁹⁵ Section 5 of the Report.

With reference to healthcare, 87,5 % of the workers indicated that they were able to assess the necessary medical treatment or services, with the majority of respondents further indicating that they had consulted at least one health care provider. Only 11% of the respondents reported that their inter-action with health care providers had been regarded as stressful. However, the percentage was higher (25,4%) among those suffering from mental illness.¹¹⁹⁶

Safe Work Australia, ¹¹⁹⁷ together with other stakeholders, is in the process of developing a strategy to improve RTW outcomes. This will, *inter alia*, address aspects such as “systematic barriers and enablers”, that could affect RTW outcomes. Further, a framework of agreed priorities will help to measure national RTW efforts and identify policy and practice shortages to facilitate targeted action when required. This will complement the Australian Work and Health Strategy 2012-2022.¹¹⁹⁸

Safe Work Australia is collaborating with WorkSafe Victoria by funding a project, “Compensation Policy and Return to Work Effectiveness (COMPARE)”, led by the Insurance Work and Health Group at Monash University. The aim of this project is to determine how workers’ compensation scheme policies influence RTW outcomes. In December 2017, Safe Work Australia published *Taking Action: A best practice framework for the management of psychological claims in the Australian workers’ compensation sector*.¹¹⁹⁹ It provides evidence-based practical guidance for workers’ compensation insurers and claims managers to improve support of workers with psychological illnesses and those at risk.

¹¹⁹⁶ National Return to Work Survey 2018- Summary Report - <https://www.safeworkaustralia.gov.au/collection/national-return-work-survey-2018>.

¹¹⁹⁷ SafeWork Australia Annual report, 66.

¹¹⁹⁸ Last mentioned strategy, is also worth noting. The purpose of this Strategy, is to promote the vision of “healthy, safe and productive working lives”. The Strategy is undescrbed by two leading principles: All workers, irrespective of their occupation have the right to a health and safe working environment and secondly, the right to a safe, well designed and healthy workplace which in turn will promote more productive working lives. It also sets outcomes and key action areas to achieve outcomes related to health and safety. For instance, Leaders in communities must be utilised to promote a positive culture for health and safety. As such, there needs to be a commitment to: appropriate training; supervisor support; positive leadership style *et cetera*.

¹¹⁹⁹ SafeWork Australia Annual report, page 67.

4.9 Federal case law: The duty to provide reasonable adjustments

In *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827,¹²⁰⁰ the complainant was a probation and parole officer who had been employed with the Department of Corrective Services since 2001. In mid-2009, she was diagnosed with Crohn's disease after she underwent surgery and in 2011, she was diagnosed with idiopathic hypersomnolence. These conditions qualified as disabilities in terms of the ADA and prevented the patient from driving longer than thirty minutes without regular breaks. The Department informally agreed to modify her duties by cancelling her home visits and limiting her duties to assist walk-in clients and attend to administrative tasks *et cetera*. It was argued that the Department failed to carry out an appropriate workplace assessment and that no plan for reasonable adjustment had been put in place. This continued until March 2010 when the complainant was told that the informal arrangements could no longer continue, since it hampered the operations of the department. However, it is important to note that before termination, no constraints had been identified, no complaints were received, and the department did not conduct a formal workplace assessment. Although she was referred for medical assessment, it was alleged that the Department had not informed the medical practitioner regarding the inherent requirements of her occupational role nor was he requested to identify the reasonable adjustments the Department could make to assist the complainant. The Department then asked the complainant whether she preferred to be medically retired or redeployed, and the complainant chose the latter. She was advised that two alternative positions were available, but that both required meetings with inmates in secure areas. The complainant declined both positions because they were incompatible with her physical needs.

In July 2010 the complainant applied successfully for an Expression of Interest position with the Corrections Intelligence Group. In late 2010 as well as in 2011, she began to experience extreme fatigue and day-time sleepiness, being unable to stay awake. On 29 July 2011 she was diagnosed with IH Disability. During the diagnostic

¹²⁰⁰ *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827, hereafter *Huntley case*.

process, the complainant took several periods of sick leave. In early 2011 she sought permission to work from home, but this was denied, with no reasons provided. On 10 May 2011, before she was diagnosed in July 2011, the complainant was informed that she had two choices: Medical retirement (which she declined); or a second medical assessment. At a meeting on 20 May 2011 it was decided that she be put on leave and she was informed that the Department would be guided by the results of the medical assessment on whether to reinstate her. During this meeting, the complainant inquired about the Department's ability to assist her in securing the alternative position she had applied for earlier but was informed that an inter-agency transfer was not possible and that any position she applied for needed to be obtained on merit. After this meeting, the complainant was left in a distressed and anxious state and was declared unfit to work from 11 May-20 May 2011. On 27 July 2011 she underwent a second medical assessment and the doctor found that she was permanently unfit for her substantive duties.

Once again, the Department did not provide the "inherent requirements" of her position nor was the doctor asked to consider what reasonable adjustments could be made to enable the complainant to continue in that position. From June 2010-May 2011 the complainant sought alternative positions to which she could be transferred, but she was unsuccessful. On 3 December 2012 her application for a position with NSW Police was successful although she had already applied for the position in September 2011. The delays were caused by the Department's failure to supply leave and performance records. She then had to apply for a transfer to the new position but was confronted with "non-action" again. The Department was of the opinion that the new position would be too arduous, and the complainant was later informed that the Department was no longer required to secure an alternate position or to provide any adjustments.

The complainant filed a discrimination application claiming that the Department had failed to perform an appropriate workplace assessment when she initially returned to work in July 2009 and that no plan was made to put reasonable adjustments in place. The Department defended the application and stated that they attempted to reasonably accommodate the complainant, but that they were not obliged to put

reasonable adjustments in place since the complainant could not meet the inherent requirements of her substantive role.

After conducting an in-depth analysis of the facts, Nicholls J found that the HR manager misinterpreted the medical practitioner's advice, since it was initially stated that the complainant could take trips exceeding thirty minutes if she could take breaks. Further, there was no evidence that any of the Department's managers considered the inherent requirements of the complainant's position nor did they identify the reasonable adjustments that could have been made to keep her in the previous position. The complainant was thus treated less favourably on the basis of her disability and the Department acted in contravention of the DDA. The Federal Circuit Court found the employer in breach of the DDA since he dismissed the complainant on medical grounds (Crohn's Disease and idiopathic hypersomnolence) by failing to consider the inherent requirements of the complainant's role in the organisation and what reasonable adjustments could have been made to accommodate the complainant's disability. She was awarded \$75 000 compensation for loss and damages as well as breach of contract in addition to a sum of \$98 863, plus interest, for loss of wages and other entitlements.¹²⁰¹

Chandler emphasises that this case demonstrated that employers should acquaint themselves thoroughly with the federal and state anti-discrimination laws before dismissing sick or injured employees.¹²⁰²

The unjustifiable hardship principle was demonstrated in the case of *Watts v Australian Postal Group*¹²⁰³ in which the facts are as follows: The applicant (Watts) was employed by the respondent as a bid manager. After not being selected for a leadership training programme, she suffered a psychological setback, and was absent from work for some time. When she eventually returned, her duties were restricted in terms of an RTW programme. The respondent requested her to provide

¹²⁰¹ Chandler 2016 <https://www.hcamag.com/opinion/opinion-reasonable-adjustments--a-key-element-in-avoiding-workplace-discrimination-213096.aspx>.

¹²⁰² Chandler 2016 <https://www.hcamag.com/opinion/opinion-reasonable-adjustments--a-key-element-in-avoiding-workplace-discrimination-213096.aspx>.

¹²⁰³ *Watts v Australian Postal Corporation* [2014] FCA 370.

evidence on whether she was fit to return to her pre-injury duties as bid manager, in order to determine what adjustments might be required to allow the applicant to do so. The applicant obeyed and submitted a report from her psychologist. However, the respondent was not satisfied with the report and ordered the applicant to take sick leave. The respondent argued that they were not convinced that the applicant was fit to perform the duties expected of a bid manager and that there were no modifications or restrictions in place to allow her to do so.

The applicant submitted that in terms of section 5(2) of the DDA, the respondent had discriminated against her, by not making reasonable adjustments to assist her to remain at work or enable her to return to her pre-employment position. She contended that section 5(2) imposed a positive obligation on an employer to make reasonable adjustments. She submitted that the respondent failed to discharge this obligation, since they requested a report from her, instead of undertaking their own enquiries. She also contended that the discrimination was unlawful, since it was prohibited under either or both sections 15(2)(b)¹²⁰⁴ and 15(2)(d)¹²⁰⁵. The respondent argued that they had done all they reasonably could to acquire information from the applicant about reasonable adjustments and this implied that at all relevant times, they had been proposing to make the adjustments, as stipulated in section 5(2)(a) of the Act. It was further submitted that even had there been discrimination in terms of section 5(2), it was not unlawful, since there was no loss of benefit to, or imposition of a detriment on the applicant, as argued by her.

In interpreting “reasonable adjustments”, the court stated as follows:

...There is, in my opinion, no reason in the text, context or purpose of section 5(2), read with section 4 and within the DDA as a whole, to construe the word “adjustment” in a way which might arbitrarily limit the kinds of modifications or alterations required to enable a disabled worker to perform his or her work. Technology changes and advances at an increasing pace and disabled people can be the beneficiaries of such changes and advances. The technological advance which enables Professor Stephen Hawking to compose text and communicate orally through cheek movements detected by an infrared switch mounted on his

¹²⁰⁴ She argued this since the respondent denied her access to some of her non-pecuniary benefits associated with her employment, such as the right to exercise her skills; her ability to attend work and the right to take leave at a time of her choosing.

¹²⁰⁵ The respondent argued discrimination under this sub-section since the respondent subjected her to detriment in her employment.

spectacles is but one well-publicised example of an “adjustment” that, a decade or two ago, may have been little more than a theory.

The court held that in terms of section 5(2), reasonable adjustments could be simple or complex, the latter because of technical or technological requirements and staff and workplace adjustments, that could take time. The shortcomings could have been of a practical nature, or the alleged discriminator had not intended to make such adjustments.¹²⁰⁶

Mortimer J held that in some instances it may be necessary to make several adjustments that may change over time, owing to changing circumstances and technology. She further confirmed that Section 5(2) of the DDA was concerned with substantive equality or put differently, equality of outcomes. One therefore needs to investigate the effect of failure to be able to propose or bring about the required adjustments. Failure to make reasonable adjustments under section 5(2) (a) amounts to discrimination, which renders the disabled person being treated less favourably than the one without a disability.¹²⁰⁷

The court also suggested adjustments that could have been made (without causing an unjustifiable hardship for the employer) such as: Limiting working hours, then gradually increasing them; amending deadlines which were too strict; making changes in the kind of work; limiting conflict situations; and adjusting supervision arrangements.¹²⁰⁸

The Federal Court found that the employer, by not making reasonable adjustments for the applicant to perform her work as bid manager, contravened section 15 (2) (b) of the DDA.

Granger¹²⁰⁹ submits that this case emphasised that it is not for the court or the alleged discriminator to determine what constitutes a reasonable adjustment. An adjustment will be considered reasonable unless it causes an unjustifiable hardship.

¹²⁰⁶ Para 32.

¹²⁰⁷ Australian Human Rights Commission Federal Discrimination Law 2016, 20.

¹²⁰⁸ Para 229.

¹²⁰⁹ Granger 2015 <https://www.claytonutz.com/knowledge/2015/october/critical-developments-in-managing-ill-and-injured-employees>.

He further submits that the only limitation on adjustments that may be necessary is that the adjustments must be adequately identifiable to enable the court or the alleged discriminator to establish whether the proposed adjustments constitute an unjustifiable hardship.

This case also confirmed the principle that an adjustment will be deemed reasonable unless the employer could prove that it would impose an unjustifiable hardship. This case acts as a reminder to government organisations that all requests relating to adjustment must be considered, and in failing to do so, organisations need to furnish sound reasons why an adjustment would have been regarded as unjustifiable.¹²¹⁰ Smith observes that this case demonstrates that employers need to be pro-active in identifying reasonable adjustments, but it is equally important for employees to cooperate, by providing, for instance, medical evidence that will allow employers to consider the reasonable adjustments.¹²¹¹

In the case of *Hilditch v AHG Services (NSW) Trading As Lansvale Holden [2017] FCCA 1086*, the applicant injured his left hand on 13 January 2009, while on duty. He had to be hospitalised and underwent post-operative treatment. The applicant returned to his pre-injury duties but suffered from pain and was advised to seek medical advice. In July 2010 the company was restructured, and the applicant started working as a fitter, with core duties of mechanical work and the fitting of accessories. He claimed that he had made self-imposed reasonable adjustments during this period. In the months to follow, the applicant suffered several other health complications, including a stroke and stage three throat cancer. He produced medical certificates stating that he was unfit for work in his current position and only fit for permanently modified duties such as “performing office duties, driving duties and or other similar duties”. Since he was unfit for his previous duties, his services were terminated after a medical examination revealed that there was no other option. In terms of the DDA the applicant then turned to the Australian Human

¹²¹⁰ Mondaq 2018
<http://www.mondaq.com/australia/x/366606/Constitutional+Administrative+Law/Workplace+Relations+discrimination+in+NSW>.

Rights Commission, initially claiming that the company had directly discriminated against him on the basis of disability, by failing to transfer him to suitable alternative employment and also failing to consider reasonable adjustments. He also claimed that the company had indirectly discriminated against him by imposing his pre-injury employment on him – while being aware that he was incapable. The court found that the employer was not in breach of his DDA obligations, mainly because of the following reasons: In the period between the applicant's return to his full time pre-injury duties and his new position after restructuring, the company had no reason to consider or provide any reasonable adjustments, since the applicant was able to perform the duties required of him, in line with the evidence at the trial. Secondly, the company was only obliged to provide reasonable adjustments to enable the applicant to perform the duties he was employed for, and the medical evidence suggested that he could no longer perform that role or RTW for the company at all. No reasonable adjustments could thus be made. It became clear that the applicant accepted the position as a fitter solely because he believed that he would undergo a medical examination that would result in a finding that he was not fit to fulfil that role and that he would subsequently receive a redundancy package.¹²¹² This case highlights the fact that the adjustments are limited and only apply to those that will enable an employee to perform the duties he or she is employed, and do not infer that employers are obliged to transfer injured workers to more suitable positions.¹²¹³

MacDermott poses an interesting question about the length of time that employers will be expected to provide suitable duties to employees whilst recovering from injuries. Often employers feel pressured to accommodate workers in an alternative role even after all the minimum requirements of worker compensation laws have been met and after it had become clear that the employee will not be able to return to the duties he occupied before he got injured.¹²¹⁴ I agree with the concerns raised

¹²¹² Pratt 2017 <https://hallandwilcox.com.au/reasonable-impact-federal-discrimination-laws-managing-injured-workers/>.

¹²¹³ Pratt 2017 <https://hallandwilcox.com.au/reasonable-impact-federal-discrimination-laws-managing-injured-workers/>.

¹²¹⁴ MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>.

by McDermott that these issues must be agreed upon in RTW arrangements concluded between employers and employees.

In terms of current legislation in Australia, employers are not required to retain injured workers permanently in a re-assigned role.¹²¹⁵ However, there is one exception – if it had been past practice for injured workers to remain in alternative roles in the long term. Employers must therefore remain vigilant and should not leave matters unresolved. It is advisable that all parties enter into a properly negotiated contract that regulates employment in alternative positions.¹²¹⁶

Employers need to make the necessary inquiries to determine whether an employee has the capacity to perform the inherent requirements of the position he was employed for. This information can be gleaned from medical or other reports. This will assist employers to consider their options, for instance the feasibility of RTW, perhaps in a reduced form for a short period, with the aim to return the worker to his pre-injury position in the foreseeable future. Should such reports not enable the employer to make an informed decision, he would need to obtain the consent of the employee to gain access to the doctor's medical records. Employees must understand that they also have a duty to cooperate with their employers, especially if the employer offers to arrange and pay for an alternative medical assessment.¹²¹⁷

It is vital that employers communicate with their employees. If an employee could have the opportunity to consider proposed adjustments before employment can be terminated, it will have an impact on how the court or tribunal will view the assessment of the capacity of the employee.¹²¹⁸

¹²¹⁵ MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>.

¹²¹⁶ MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>.

¹²¹⁷ MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>.

¹²¹⁸ MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>.

MacDermott¹²¹⁹ further asserts that employers must be aware of the most appropriate time when evaluating an employee's ability to perform his pre-injury duties. They should be guided by medical reports that must indicate when the person is likely to return to his full capacity. Employers need to be accommodating, by allowing several types of leave, even unpaid. Should the reports indicate that the chances of full recovery in the foreseeable future are poor, it may strengthen the employer's argument that the employee is no longer able to perform the inherent requirements of the job. Thus, as part of RTW considerations and arrangements, employers need to consult with different role-players and consider different avenues.

Employees are also reminded of the principles crystallising from case law,¹²²⁰ namely that employers can reasonably instruct employees to provide information pertaining to medical evidence. Should they then refuse, disciplinary action could follow, in terms of due process.¹²²¹

4.10 Reports submitted in terms of the CRPD

Australia ratified the CRPD and the Optimal Protocol on 17 July 2008 and it was entered into force on 16 August 2008.¹²²² It is important to reflect on how Australia has domesticated the provisions of the CRPD, especially those that relate to the rehabilitation, re-integration and RWT of disabled workers. As was discussed in chapter 2, section 27 is the key provision relating to the RTW and employment of PWDs. Section 26 must also be considered, as it deals with habilitation and rehabilitation. By ratifying the Convention, Australia has committed itself to take appropriate and effective measures to enable PWDs to attain and maintain maximum independence, in all spheres of life. Aspects that were highlighted were: Multi-disciplinary assessment of strengths and weaknesses of employees; proper

¹²¹⁹ MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>.

¹²²⁰ This was demonstrated by case law such as *Grant v BHP Coal Pty Ltd [2014] FWCFB 3027* and *Australian and International Pilots Association v Qantas Airways Ltd (2014) 240 IR 342; [2014] FCA32*.

¹²²¹ Granger 2015 <https://www.claytonutz.com/knowledge/2015/october/critical-developments-in-managing-ill-and-injured-employees>.

¹²²² UN Treaty Collection date unknown https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en.

training of staff; and the use of assistive devices. Section 27, which was unpacked in Chapter 2, *inter alia* determines that governments need to promote vocational and professional rehabilitation, job retention and RTW programmes for PWDs.¹²²³

As was explained in Chapter two, all State Parties are required to report on the progress they have made in implementing the CRPD. Australia submitted its report, dated 7 June 2012, and the following observations are significant. With reference to Article 26 and specifically to Rehabilitation in Employment, States and Territories have their own compensation schemes and RTW programmes. In relation to Article 27, the Australian government acknowledges the fact that much still needs to be done to ensure that PWDs enjoy the right to work, earn a living, participate in the labour market and work in an environment that should be open and accessible. With reference to reasonable accommodation in the workplace, mention must be made of the Employment Assistance Fund that provides financial assistance for PWDs and individuals with mental health conditions, thereby facilitating the purchase of a work-related modification. No reference was made to the specific RTW measures in the respective Australian states.

On 13 May 2013 the Committee on the Rights of Persons with Disabilities published a list in respect of the initial report submitted by Australia and the relevant issues at hand, which will be reflected on shortly. With reference to Article 26, no declaration was made regarding rehabilitation in connection with employment. The government was, however, requested to provide information pertaining to the measures taken to move from the medical model of disabilities to the human-rights based approach in the area of habilitation and rehabilitation, especially for those with intellectual or mental and/or psycho-social disabilities. In relation to Article 27, it must be pointed out that the Committee required information on the number of workers in the open labour market, compared to those in Australian Disability Enterprises. Furthermore, the government was required to indicate whether PWDs could work, free from discrimination. Information was also required about the assessment of pro rata wages for those unable to work at optimal capacity.

¹²²³ Section 27(1)(k) of the CRPD.

It is important to reflect on the Committee on the Rights of PWDs' reaction to the report submitted by Australia. In its report dated 21 October 2013, and in relation to Article 26, the Committee was of the opinion that the habilitation and rehabilitation model is based on the medical model and not the human rights model and that the Government needs to ensure that rehabilitation services are not imposed on PWDs without their free and informed consent.

In relation to Article 27, the Committee only drew an observation to the wages paid under the Australian Disability Enterprises and accordingly recommends that Australia needs to continue the Business Services Wage Assessment tool to ensure a correct assessment of the wages for persons in Supported Employment. Australia was further urged to increase the employment participation of women with disabilities by adopting initiatives that address the structural barriers hindering them. The report does not make specific mention of RTW programmes.

Australia submitted its combined second and third periodic reports,¹²²⁴ which were published on 4 February 2019, and reflect its commitment to the respect of the rights of PWDs and the considerable effort by the government to ensure that PWDs enjoy fundamental rights and freedoms on an equal basis with others.¹²²⁵ As they did in their initial report, reference is drawn to Article 26: "Access to habilitation and rehabilitation" and it was highlighted that Australia offers a range of services with the objective of addressing the needs of PWDs and to assisting them in attaining optimal independence in all areas of their lives, including the employment sphere. It is specifically mentioned that Australia adopts a human rights-based approach, by way of its Commonwealth and State and Territory legislation, to protect the rights of individuals. The Australian government's Disability Employment Service for PWDs, helps them to acquire the skills, education and rehabilitation required for employment.

¹²²⁴ OHCHR 2019
https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=AUS&Lang=EN.

¹²²⁵ Second and Third Period Report CRPD/C/Aus/2-3; page 2.

The importance of flexible working arrangements, to which all employees are entitled, is highlighted. These are stipulated in Section 65 of the *Fair Work Act of 2009*. The Australian government has demonstrated its commitment to the benefits of flexible arrangements. The FWO and Workplace Gender Equality Agency provide employers with the tools and information on how flexible working arrangements could be adopted. In terms of the National Employment Standards, employers are obliged to comply with section 6 of the *Fair Work Act of 2009*, which sets out the circumstances under which an employee is entitled to such. The Australian government reviewed the functionality of this section in 2015, and the 2015 Productivity Commission Inquiry into the Workplace Relations Framework, recommended no changes. In 2016 and 2017, the Australian government raised awareness among employers about the employment of PWDs, and funding was set aside for the development and implementation of a communication strategy as well as training materials.

The so-called "Accessibility Day" was introduced as a platform to encourage employers to host PWD's for a day. This serves to showcase the potential of PWDs and promote support systems and networking. Australia's Job Access Advice Service and website is a helpful source of information for PWDs seeking employment. Proposed amendments to the system include improved resources, training for employers as well as good practices in disability management. Of importance, is the fact that the Australian government provides financial support to employers for workplace modifications, services and equipment. As from December 2017, employers can avail themselves of a new Wage Start subsidy of \$6 000 as an incentive to provide employment.

With reference to Article 28 and specifically income support, the Australian government provides funding in the form of a Pharmaceutical Allowance for PWDs who are unable to work the minimum of 30 hours per week. The unemployed and those seeking employment, may be eligible for a New Start Allowance if over the age of 22, and those who are between the ages of 16 and 22 may be eligible for a Youth Allowance. Mobility Allowances are also awarded to PWDs who are unable to use public transport.

Considering the fact that Australia has accepted the Optional Protocol of the CRPD, it is important to consider the jurisprudence which emerged from this. Seven communications from the Australian jurisdiction were heard by the Committee. None of these communications deal with employment and will thus not be analysed here.

The next part of the chapter the provision for ill or injured workers in Victoria to return to work is examined. The rationale for the comparison is that Victoria's prescribed RTW obligations are firmly rooted in legislation.

4.11 Victoria

4.11.1 Introduction

Victoria, with Melbourne as capital, is Australia's second largest state. It is estimated that the population will reach 6,38 million by the end of June 2019.¹²²⁶ Its main services and industries are: 11.6% health care and social assistance; 10.8% retail trade; 10.7% manufacturing; 8.3% construction; 8.0% education and training; 7.8% professional, scientific and technical services; 6.1% accommodation and food services; 5.3% public administration and safety; and 4.7% transport, postal and warehousing services.¹²²⁷

Victoria introduced the *Workers' Compensation Act 1914* and the *Workers' Compensation Act 1946* to provide benefits to workers who sustained injuries: "out of and in the course of employment". The *Accident Compensation Act 1985* brought extensive changes to the system, including *inter alia*: Vocational rehabilitation, work, health and safety reforms as well as a new dispute resolution system. The Act is being amended on a regular basis and the following major reforms, with reference to RTW¹²²⁸, are worth noting. In 2004, measures to facilitate early and sustainable

¹²²⁶ Population Australia 2019 <http://www.population.net.au/population-of-victoria/>.

¹²²⁷ Population Australia 2019 <http://www.population.net.au/population-of-victoria/>.

¹²²⁸ There were many other major reforms, such as For instance in 1992, a non-adversarial dispute resolution system was introduced; in 1993 premium system was introduced and in 2000 access to common law damages for workers who are seriously with a new threshold for economic loss, was reinstated. For more information, see 233-234 of Comparison of workers compensation arrangements Australia and New Zealand 2017, 25th edition 2017 Safe Work Australia.

RTW were introduced.¹²²⁹ On 5 April 2010 the *Accident Compensation Amendment Act 2010* was passed containing major reforms relating to compensation benefits, but RTW rights and obligations only commenced on 1 July 2010. Reforms included a limit on the further weekly payments of workers who do return to work but require surgery for a work-related injury.

From 1 July 2010, the prescriptive RTW requirements were replaced with a performance-based regulatory framework as well as the appointment of an RTW Inspectorate with the authority to enter workplaces and issue RTW improvement notices in instances where employers are in contravention of RTW provisions, as stipulated in the Act.¹²³⁰

On 1 July the Victorian government enacted the *Workplace Injury Rehabilitation and Compensation Act 2013*¹²³¹ on 1 July 2014, which merged *the Accident Compensation Act 1985* and the *Accident Compensation (WorkCover Insurance) Act 1993* into a single Act.¹²³² Before the provisions of the Act can be scrutinised, it is important to discuss the role of WorkSafe.

4.11.2 WorkSafe Australia

WorkSafe is responsible for managing Victoria's workers' compensation scheme as well as regulating the health and safety of workers in the State. Its objective is to keep workplaces safe and deliver high quality treatment and care to workers who have sustained injuries. In the past thirty years, more than one million injured workers have been assisted by the scheme which offers compensation, rehabilitation and medical services.¹²³³ WorkSafe's mission is: "actively working with the community to deliver outstanding workplace safety and return to work, together with insurance protection" with the vision to ensure that all workers return home

¹²²⁹ Comparison of workers compensation arrangements Australia and New Zealand 2017, 25th edition 2017 Safe Work Australia, 232.

¹²³⁰ Comparison of workers compensation arrangements Australia and New Zealand 2017, 25th edition 2017 Safe Work Australia, 233.

¹²³¹ *Workplace Injury Rehabilitation and Compensation Act 2013*, hereafter the WIRC Act.

¹²³² Comparison of workers compensation arrangements Australia and New Zealand 2017, 25th edition 2017 Safe Work Australia, 234.

safely every day.¹²³⁴ They also strive towards preventing workplace injuries; illness and fatalities. Their purpose is to: Assist workers to return to work; manage the Victorian Workers Compensation Scheme; enforce the occupational health and safety and accident compensation laws applicable in Victoria; provide workplace injury insurance to employers at a reasonable fee; and to provide emergency response services.

They further have statutory obligations arising from the following Acts of parliament: *Occupational Health and Safety Act 2004* (health, safety and welfare in the workplace); the *Workplace Injury Rehabilitation and Compensation Act 2013* (workers compensation and the rehabilitation of injured workers); the *Accident Compensation Act 1985* (provisions relating to workers compensation and the rehabilitation of injured workers); the *Dangerous Goods Act 1985* (explosives and other dangerous goods); the *Equipment (Public Safety) Act 1994* (high-risk equipment used in non-work-related situations); and the *Workers Compensation Act 1958* (workers compensation prior to 1985).¹²³⁵

It is important to consider the progress that WorkSafe has made in returning workers to work, as well as the challenges it still faces. WorkSafe is funded by premiums contributed by Victorian employers. In order to achieve their aims, they have developed a Stakeholder Engagement Framework that prescribes principles and methods. These stakeholders are employer and employee representatives, medical and related health providers, legal practitioners and industry representatives. This inter-connected and collaborative expertise helps to inform the scheme's strategies, policies and programme development. Legislation also mandates stakeholder committees, such as the Occupational Health and Safety Advisory Committee¹²³⁶ and

¹²³⁴ Worksafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

¹²³⁵ WorkSafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf, 2.

¹²³⁶ This committee is established under the *Occupational Health and Safety Act 2004* and advice the WorkSafe Board on matters such as promoting healthy and safe working environments and the operation and administration of the OHS Act and regulations. https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf, 3.

the WorkCover Advisory Committee¹²³⁷ as well as an RTW working group.¹²³⁸ WorkSafe’s scheme is financially sound and in the last five years there has been a considerable decrease in the number of workers injured while on duty.¹²³⁹ They did not meet their five-year RTW target, which could be due to the increase in the number of mental injuries in the workplace.¹²⁴⁰

WorkSafe is currently in the process of rewriting certain communications to employers and injured workers to shed more light on mental injury claims management. Further training is also offered to Case Managers on mental injury claims management. Partnerships across mental health bodies and government are also being strengthened.¹²⁴¹ WorkSafe views RTW as a team effort and acknowledges that all role-players such as employers and health practitioners have a crucial role to play to support the worker during the recovery process and to RTW. They also run an RTW campaign to make employees mindful of the fact that returning to work is a positive step towards the recovery process.¹²⁴²

In 2017, WorkSafe reported that it had developed new tools to support workers during the recovery and RTW processes, for example, improvements to the

¹²³⁷ This committee is established under the *Workplace Injury Rehabilitation and Compensation Act 2013* to advise the WorkSafe Board about workers’ entitlement to compensation, RTW, rehabilitation, and the operation and administration of the WIRC Act and relevant regulations https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf, 3.

¹²³⁸ WorkSafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

¹²³⁹ WorkSafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

¹²⁴⁰ Six months after a claim was lodged, 45% of workers suffering from a mental injury are not yet back at work compared to the 18% rate of workers who have a physical injury approximately. They still have a very successful RTW rate.¹²⁴⁰ What is important to note is that Worksafe has put initiatives in place to address the complexity of returning those with a mental injury back to work. For instance, the “Getting Back” campaign (which was launched in 2014), which is focused on the social assistance and health care industry and equipping RTW coordinators with information to place them in a better position to effectively support these workers.¹²⁴⁰ The campaign also aims to support practitioners and physiotherapists in applying the health benefits of good work evidence in their clinical practice. The use of a new certificate of capacity which focusses on what a worker can do is also now consistently being used by providers – from https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf, 3-5.

¹²⁴¹ Worksafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf, 25.

¹²⁴² Worksafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

WorkSafe Incentive Scheme for Employers (which provides for a six-month wage subsidy of up to \$26 000) as incentive for employing injured workers. To improve the capability of Victoria’s occupational rehabilitation providers, it provides digital training and a knowledge management platform. A Worksite Assessment Initiative was developed to assist workers to find alternative duties after an injury, by granting occupational physicians access to the workplace to assess suitability. A worker assistance programme will pay for incidental costs to assist injured workers to overcome barriers to RTW. Further, WorkSafe is also conducting a research project “Victorian Injured Workers Outcomes Study” on how to improve long term outcomes and satisfaction for injured workers, which.¹²⁴³ aims to gain an understanding of the impact of being booked off because of a workplace injury. It will assist to identify factors, such as social, health, medical and demographic management which negatively influence recovery and RTW. Preliminary results indicate several processes and turning points that may affect recovery and RTW. The results and findings of the study will be incorporated into Work Safe’s 2030 strategy. WorkSafe also has an RTW Inspectorate that works in collaboration with the OHS inspectorate to ensure that employers and workers are meeting their legal obligations pertaining to RTW. Pro-active follow ups are done at the workplace when new claims are instituted to see how early intervention can make a difference to ensure a safe return to work.¹²⁴⁴

WorkSafe is collaborating with general practitioners to improve early diagnostic rates to ensure that appropriate treatment is given.¹²⁴⁵ In 2017 and 2018, the RTW inspectorate conducted 1 999 workplace visits and intervened in 2 511 claims. The inspectorate issued 133 improvement notices to employers for breaches of the law and managed to achieve 396 voluntary compliances.¹²⁴⁶

WorkSafe further acknowledges the importance of fair treatment of all its workers and there is a range of initiatives being developed to improve service delivery. For

¹²⁴³ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁴⁴ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁴⁵ WorkSafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

¹²⁴⁶ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

instance, agent claims managers received training on how to reinforce suitable standards of communication, timely decision-making, all of which are evidence based. Furthermore, WorkSafe is also in the process of implementing a best practice framework for complaints management.¹²⁴⁷ It values the integrity of its scheme and prosecutions are instigated when necessary.¹²⁴⁸

In its 2018 report, WorkSafe reported that from 2017 to 2018, 77.74% of workers were back at work within 6 months; 81.16% workers suffering from physical injury were back within six months; and 53,26% suffering from mental injury were back. The number of RTW Inspectorate visits increased from 1 901 in 2016/2017 to 1 999 in 2016/2017, with 2 900 mobile case management visits to support return to work.¹²⁴⁹

WorkSafe emphasised repeatedly that returning workers to work is a team effort and further emphasised that “returning to safe work is a critical milestone in the recovery process”.¹²⁵⁰ In 2017, WorkSafe announced that they aimed to set a new standard for RTW, whereby a “return to work that can be sustained”. This would allow a more accurate picture of workers’ recovery and their transition, that will have a better outcome for both employers and employees.

4.11.2.1 Mobile case management

The mobile case management pilot programme supports injured workers. Face-to-face mobile case management is being conducted by WorkSafe agents. It aims to bring parties together in order to provide individual support to workers in the first six months after the injury has occurred.¹²⁵¹ The Case Manager is thus mobile, meeting face-to-face with the different parties to remove some of the obstructions hampering

¹²⁴⁷ WorkSafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

¹²⁴⁸ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁴⁹ Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf> .

¹²⁵⁰ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁵¹ Worksafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf.

a successful RTW. During 2017/2018, more than 2900 Mobile Case Management services have been delivered.¹²⁵²

4.11.2.2 Functional assessments

WorkSafe launched a Functional Assessment programme in November 2017 that it explains as follows:

We have expanded the questions we ask Independent Medical Examiners to focus on the functional capacity of an injured worker with a mental injury. Requests now focus on identifying what the injured worker can do within the limitations of their current symptoms. The assessment is used by the treating health practitioner to determine appropriate treatment pathways and certification, and in return to work planning.¹²⁵³

4.11.2.3 Facilitated Discussions

Since inter-personal conflict may hinder successful RTW, WorkSafe launched this initiative in August 2017, which involves qualified occupational rehabilitation consultants to facilitate agreement on future behaviours and actions. The programme has demonstrated positive results for far.¹²⁵⁴

4.11.2.4 Building industry capability around work-related mental injury

WorkSafe, in conjunction with the Australian Psychological Society has further developed a new Mental Injury Mastery Skill Set, comprising six eLearning assets. It aims to raise awareness and generate knowledge on mental injury, but also with a best practice approach, which allows for holistic claims management.¹²⁵⁵

4.11.2.5 Victorian Injured Workers Outcome Study

For workers who have been off work for more than 130 weeks or workers receiving workers' compensation for more than 130 weeks, Victoria has piloted several initiatives to examine the personal, social, economic and psychological effects of the

¹²⁵² WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁵³ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁵⁴ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/worksafe-annual-report-2018>.

¹²⁵⁵ Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf> 55.

worker's injuries. ¹²⁵⁶ To further curb this phenomenon, WorkSafe's Innovation Centre is carrying out tests regarding "prevention, treatment and recovery pathways for injured workers who have been off work long term". These workers often suffer from health and psychosocial issues and the programmes aim to shed light on the factors influencing health outcomes. For instance, small interventions are proposed to provide additional support for workers in their everyday lives, to increase their mobility, activity, and engagement within the community.¹²⁵⁷

4.11.2.6 Occupational rehabilitation ¹²⁵⁸

During 2017 and 2018 WorkSafe revised its approach to occupation rehabilitation services, and it now focuses on more "targeted and defined interventions which more accurately meet the needs of injured workers and their workplaces".¹²⁵⁹

The discussion above demonstrated that WorkSafe has a clear direction on how to improve the recovery and RTW of injured workers. When challenges are experienced, they identify solutions on how to deal with them in an appropriate manner.

The legal obligations of Victorian employers and employees in the RTW process will be discussed in the paragraphs to follow.

4.12 Legislative framework of Victoria

4.12.1 Workplace Injury Rehabilitation and Compensation Act 67 of 2013¹²⁶⁰

In section 1 of WIRA, its purposes are described as follows:

- (a) simplify the provisions applying to the rehabilitation of injured workers and compensation in relation to injuries or deaths arising out of accidents and diseases in the workplace on or after 1 July 2014; and

¹²⁵⁶ Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf>.

¹²⁵⁷ Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf>.

¹²⁵⁸ Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf>.

¹²⁵⁹ Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf>.

¹²⁶⁰ *Workplace Injury Rehabilitation and Compensation Act 67 of 2013*, hereafter WIRA.

(b) streamline the provisions of the Accident Compensation Act 1985 which continue to apply in respect of injuries or deaths arising out of accidents and diseases in the workplace before 1 July 2014; and

(c) provide a single gateway for claims for compensation whether under this Act or the Accident Compensation Act 1985; and

(d) provide for the registration of employers and the payment of WorkCover premiums; and

(e) repeal the Accident Compensation (WorkCover Insurance) Act 1993; and

(f) make consequential amendments to the Accident Compensation Act 1985, the Workers Compensation Act 1958 and certain other Acts.

Section 10 contains the objectives of the Act and that can be summarised as follows: Reduce the number of accidents and illnesses in the workplace; provide for effective occupational rehabilitation of injured workers and their early RTW; increase the provision of suitable employment to workers who have been injured and assist them with an early RTW; ensure that appropriate compensation in terms of the Act or the *Accident Compensation Act 1985* is paid to workers who have been injured in the most "socially and economically appropriate manner" and as efficiently as possible; ensure that workers' compensation costs are kept to a minimum to lighten the burden on Victorian businesses; make provision for incentives which are conducive to efficiency and discourage abuse; maintain a fully-funded scheme; allow for flexibility and adaptation for particular needs and work circumstances; and improve the overall health and safety of persons at work and reduce the economic and social cost of accident compensation.

Part 4 of WIRA contains designated RTW provisions, and Section 97 of WIRA describes its purpose as follows:

(a) that employers, workers and other persons involved in the return to work process co-operate to ensure that workers successfully return to work;

(b) that employers are responsible for providing pre-injury employment or suitable employment to enable workers to return to work;

(c) that workers are responsible for participating in the return to work process consistently with their capacity for work;

(d) for workers to be represented, assisted and supported in the return to work process; (e) for effective occupational rehabilitation for workers to facilitate their early and sustainable return to work.

Employers must understand that supporting injured workers is a legal obligation and by returning them to work will benefit the worker and the organisation in general, it will boost productivity and ensure that Work Safe's Insurance premiums are kept as low as possible. Employers must also realise that their RTW obligations start before a claim has been accepted by the WorkSafe agent because they should be planning in advance for the workers' RTW. This requires that they obtain relevant information about the worker's working capacity; investigate workplace support, modifications or aids to assist with RTW and investigate and propose the different options for suitable pre-injury employment for the injured worker. Employers are also obliged to provide workers with accurate and clear details of RTW arrangements and subsequently monitor their progress. Employers need to consult directly with the worker, health practitioners and occupational rehabilitation provider about RTW, with the worker's consent.¹²⁶¹

4.12.1.1 The duty to provide suitable employment opportunities

Employers are obliged to provide injured and incapacitated workers with suitable employment for a 52-week period after the injury has occurred. Once they have returned to full capacity, employers need to provide workers with pre-injury employment or its equivalent.¹²⁶² Suitable employment is defined in Section 3 of the Act, and it denotes work that fits the worker's current abilities, also taking certain factors into account, as set out in the Act¹²⁶³:

- (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, the certificate of capacity supplied by the worker;
- (ii) the nature of the worker's pre-injury employment;
- (iii) the worker's age, education, skills and work experience;

¹²⁶¹ Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations>.

¹²⁶² Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations>.

¹²⁶³ Section 3 of WIRA.

- (iv) the worker's place of residence;
- (v) any plan or document prepared as part of the return to work planning process;
- (vi) any occupational rehabilitation services that are being, or have been, provided to or for the worker; regardless of whether—
 - (i) the work or the employment is available; or
 - (ii) the work or the employment is of a type or nature that is generally available in the employment market;

Pre-injury employment means either employment that is the same, or equivalent to the position the worker had occupied prior to injury or illness, as defined in section 96 of WIRA. Thus, a time limit of 52 weeks applies to the provision of suitable employment with the employer thus obliged to keep the position vacant for 52 weeks while the worker is incapacitated. However, in the event of the worker still having capacity, suitable employment during this period should be provided until he/she is able to resume normal work. An exemption to this is listed in section 101 of WIRA.¹²⁶⁴ Victorian legislation places no requirement on the employer to notify the authority before dismissing an injured worker.¹²⁶⁵ Once the employer has determined what the suitable employment options are, they must be set out in writing, using the WorkSafe template. WorkSafe¹²⁶⁶ also assists employers to identify suitable employment options and service providers such as occupational rehabilitation providers. However, this does not exempt employers to plan for RTW and provide suitable or pre-injury employment. Employers must be aware of the

¹²⁶⁴ Section 101 determines that this Part does not apply to an employer of a worker who: (a) at the time of the injury is a student at a school within the meaning of Part 5.4 of the Education and Training Reform Act 2006; and (b) is employed under a work experience arrangement under that Part. (2) The following classes of employers, to the extent indicated, are not required to comply with any obligation under this Part other than the obligation specified in section 103— (a) employers (including owners corporations within the meaning of the Owners Corporations Act 2006) who employ domestic or similar workers otherwise than for the purposes of the employer's trade or business (but only to the extent that such workers are concerned); (b) employers who hold owner-builders' permits under the Building Act 1993 (but only to the extent that the workers employed for the purposes of the work to which the permits relate are concerned); (c) employers (being corporations) who only employ workers who are directors of the corporation; (d) employers who only employ workers who are members of the employer's family; (e) employers who only employ workers who only perform work while outside Victoria.

¹²⁶⁵ Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 145.

¹²⁶⁶ WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/suitable-employment-injured-workers-step-step-guide-assessing-suitable-employment>.

extent of the employee's capacity and the expected duration of the incapacity. This can be established by engaging in consultation with the employee, reviewing the Certificate of Incapacity and reviewing occupational rehabilitation reports. The next step is to assess the pre-injury duties and to determine whether they could be modified. The aim is to provide suitable employment as similar as possible to the pre-injury employment. Certain questions need to be asked, for instance: What the workers normal duties were; what part of the normal duties they are still able to do; and what duties they will they be capable of, if modified (such as assistance from colleagues; support tools; rest breaks; and reduced working hours). Thirdly, employers must determine whether there are any other duties that the employee could perform safely, either in the immediate work area or another section of the organisation. Fourthly, the employee's individual circumstances need to be reviewed, such as age, experience and personal circumstances. Questions, such as whether it would be possible for the worker to perform other duties not associated with his pre-injury employment or get time off to attend treatment, and difficulty travelling to and from work must be raised. Fifthly, the employer should document the suitable employment options, proposed to the worker by the health care provider. employers must appoint RTW coordinators who can assist them with RTW obligations. They must remain in contact with their workers, to enquire about their wellbeing and offer support, as this is crucial for workers while recovering and returning to work. WorkSafe has identified certain key actions employers can take early in the process. Employees must be provided with relevant RTW information and must also know that the organisation values health and safety and the steps it is planning to avoid future risks. Workers must know the RTW coordinator and when they could expect to be contacted. Employers need to provide the worker with the WorkSafe's brochure and must be prepared to make the necessary changes to assist the worker with RTW. Co-workers must also be consulted about lending support to the injured colleague upon their return to work. Employers are urged to gain information from WorkSafe's website.¹²⁶⁷ The following information must be included in an RTW plan: Suitable employment which includes: Modified or alternative duties that can

¹²⁶⁷ Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations>

accommodate restrictions as medically identified in the Certificates' of Capacity; date and time when duties will commence; details of duties or tasks the worker need to avoid; place of work and office hours; other important information pertaining to the office such as work breaks; and rotations and exercise breaks. Information pertaining to support, aid and modifications to the workplace also needs to be addressed. The contact details of the RTW coordinator as well that of the supervisor must be included. and a review date must be set.¹²⁶⁸ WorkSafe has issued an RTW Compliance Code¹²⁶⁹ to assist employers to meet their obligations as stipulated in WIRA. It contains examples of documentation that need to be submitted as well as informative case studies for employers to assist other workers in future. WorkSafe provides specific guidelines on the insurance and RTW for employment agencies and host employers.¹²⁷⁰

4.12.1.2 Employers are required to have a workplace rehabilitation/RTW programme or policy

In terms of OHS legislation employers are obliged to provide a safe working environment. Further, employers need to familiarise themselves with the requirements relating to privacy and confidentiality, when managing RTW. Legislation that prohibits employers from engaging in discriminatory conduct towards a worker pursuing a claim for compensation or for notifying WorkSafe or his employer of his injury prescribes: To dismiss or threaten to dismiss an employee from employment; altering or threatening to alter the position of the worker to the worker's detriment or treating the worker less favourably than other workers in instances of promotion or re-employment, not permissible. Further Commonwealth and State laws that oblige employers to make the necessary reasonable adjustments to conditions, equipment and working hours in order to accommodate the worker's

¹²⁶⁸ Comparison of workers compensation arrangements Australia and New Zealand 2017, 25th edition 2017 Safe Work Australia 140.

¹²⁶⁹ https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/212268/ISBN-Compliance-code-1-of-4-providing-employment-planning-consultation-rtw-2014-07.pdf. For more information, please see <https://www.worksafe.vic.gov.au/insurance/types-of-Workers>.

injury or illness, irrespective of its nature, cause or permanency exist. It applies to all workers, whether full-time, part-time, casual, permanent or temporary.¹²⁷¹

Employers are aware of the fact that WorkSafe actively monitors and enforces employers' compliance with legislation. Improvement notices may be issued to require employers to comply with their RTW obligations. Employers who breach RTW obligations may face prosecution and financial fines of up to 180 penalty units for a natural person and up to 900 penalty units for a body corporate for each offence.¹²⁷² Employers must be mindful of the fact that workers need not be fully recovered before returning to work and that RTW should be seen as part of the recovery process.¹²⁷³ Employers and employees need to engage in with one another to address expectations, determine the employee's capacity to work and plan for the period that they will be away from work.¹²⁷⁴

The chart below provides a summary of the RTW obligations of employers in Victoria.

¹²⁷¹ Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations>.

¹²⁷² Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations>.

¹²⁷³ Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/employers>

¹²⁷⁴ Gordon et al 2014 *BMC Public Health* 10.

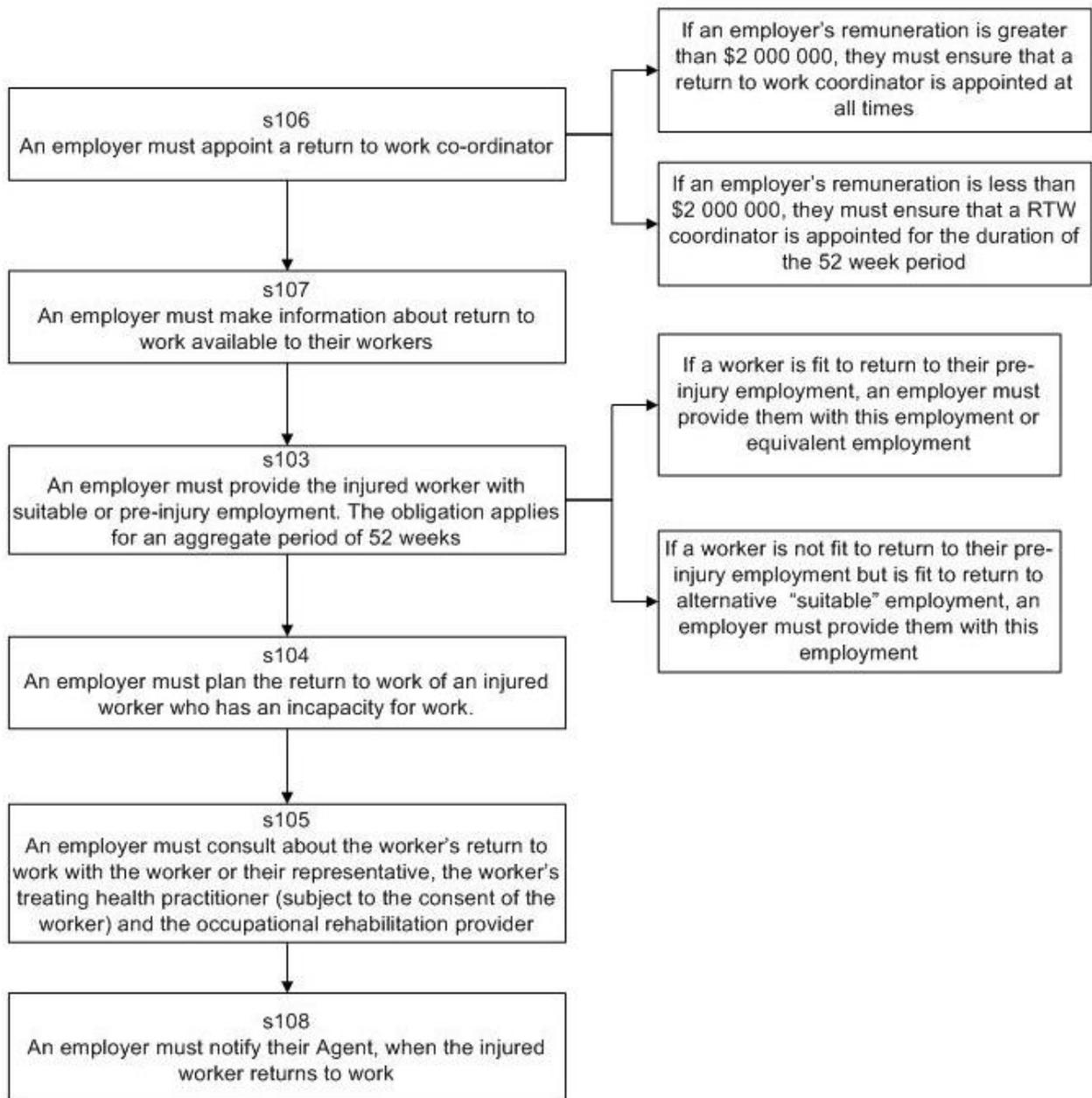


Figure 1: Summary of the RTW obligations of employers in Victoria Source: Section 102 of WIRA¹²⁷⁵

To summarise, Sections 103-07 of WIRA determines that employers are required to plan for RTW and to engage in consultation. An RTW coordinator needs to be appointed for the duration of the RTW obligations at all times if the organisation has a \$2 000 000 rateable remuneration. Information pertaining to RTW also needs to be made available to all workers, irrespective the size of the organisation. No employers are exempt from RTW programmes. Employers are obliged to make the RTW information available to all workers, but the Act does not specify how, as it is

¹²⁷⁵ Flow chart as displayed in section 102 of WIRA "102 Flow chart 4—return to work obligation of employers".

stated that only workers must be consulted in this regard. The RTW information should include the following specified information: Obligations of the employer in terms of WIRA as well as a declaration on how the employer will meet its obligations; rights and obligations of workers, also as described in WIRA, and lastly it needs to contain information about where workers can obtain further information about their rights and obligations. The RTW plan must contain details of authorised agents selected by the employer, as well as the details of the RTW coordinator (if applicable). Finally, the procedure that must be followed in resolving RTW disputes, as set out in Section 118 of WIRA, will be discussed in more detail later in the chapter.

4.12.1.3 The role of the health professional

Health professionals play a significant role in the recovery as well as the RTW of injured workers. Long-term absences from work have negative effects on a person's mental and physical health. Victoria's legislation encourages health professionals to realise that early intervention is crucial for RTW and that they should support their patients to stay at work or to RTW in order to reduce the effects an injury may have, whether socially, financially or emotionally. Research has shown that workers are three times more likely to RTW after an injury when they have been given a fixed date. WorkSafe has also developed guides for general practitioners for lending to support their RTW patients more effectively.¹²⁷⁶

Patients rely on general practitioners for advice, coordination of medical treatment and the services that play a general role in overall recovery, rehabilitation and RTW. Some of their functions may include the following: To monitor and review the patient's progress; prescribe medicine in accordance with WorkSafe's pharmacy policy; make referrals to other service providers; reassure patients that work is an integral part of recovery; discuss the health benefits of safe work; assess and certify

¹²⁷⁶ For instance, it contains important contact details; information relating to the completion of the required documentation and ways to ensure ongoing contact between the different role-players involved. WorkSafe 2019
https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0009/193797/FINAL-WORKSAFE.pdf

the workers' capacity and complete certificates of capacity; overcome identity barriers to RTW; and communicate the patient's work capacity to their employer.¹²⁷⁷

In Australia, research has shown that nearly 96% of all injured employee claims are medical.¹²⁷⁸ It is therefore important to address problems such as: A lack of communication between the general practitioner and the patient; high administration fees; conflicting medial opinions; high rate of "unfit" certificates; and long-term unemployment. To this end, general practitioners may need guidance regarding the compensation system its health benefits for RTW.¹²⁷⁹

4.12.1.4 The role of RTW coordinators

RTW coordinators assist employers to meet their RTW obligations under Victorian Workers Compensation Legislation. They have a wide range of responsibilities. They must assist the injured worker when remaining on the job and when returning while still recovering. They plan the worker's RTW should the worker have to spend time away from work and make decisions to expedite their return. They must consult with all the different stakeholders (worker, health professional, occupational rehabilitation provider, WorkSafe agent; worker representative if applicable). They also need to monitor the worker's recovery progress and take the necessary steps to prevent a recurrence or aggravation of the injury. RTW coordinators are the connection to the WorkSafe Return to Work Inspectors and will further assist in resolving RTW disputes.¹²⁸⁰

In Victoria, the availability of an RTW coordinator is dependent on the rateable remuneration of the organisation. Section 106 of WIRA determines that an employer who has a rateable income of \$2 000 000 is obliged to have an RTW coordinator for the duration of the employer's RTW obligations towards an injured worker. The employer must thus appoint a person who has an appropriate level of seniority and

¹²⁷⁷ WorkSafe 2019 <https://www.worksafe.vic.gov.au/general-practitioners-gps-your-role-return-work>.

¹²⁷⁸ Mazza et al "Fit to Work: General Practitioners Facilitating Injured Workers to Return to Work" 2013 30.

¹²⁷⁹ Mazza et al "Fit to Work: General Practitioners Facilitating Injured Workers to Return to Work" 2013 30.

¹²⁸⁰ Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/coordinators>.

who will be competent to assist the employer to meet his RTW obligations as set out in Part 4 of the Act. An RTW coordinator must have the necessary knowledge, skills and experience relevant for the planning of RTW. This would include knowledge on employer RTW obligations, as prescribed in legislation, as well as knowledge about the compensation scheme as provided for in terms of WIRA, the *Accident Compensation Act of 1985*; WorkSafe's functions in terms of the Act as well as its self-insurers in terms of Part 4 of the Act. Coordinators can avail themselves of RTW facts sheets published by WorkSafe,¹²⁸¹ and other relevant information from time to time.¹²⁸²

Although RTW coordinator training is not mandatory, WorkSafe strongly recommends that coordinators complete the WorkSafe endorsed RTW two-day Coordinator training, which was developed by WorkSafe in consultation with other external stakeholders. It is further recommended that RTW coordinators remain up to date with current RTW news, events and information.¹²⁸³ Bohatko-Naismith et al emphasise that it is important to acknowledge the valuable role RTW coordinators play in the workplace and to ensure that only the most suitable are selected for these roles.¹²⁸⁴

Research has shown that workplace- to based RTW coordinators do improve RTW outcomes.¹²⁸⁵ However coordinator training needs to be revised to make provision for training in counselling skills. Coordinator selection criteria are also in need of revision, to include qualities like competence, and personality traits such as well as experience, and wisdom and seniority.¹²⁸⁶

¹²⁸¹ Worksafe 2019
http://www.worksafe.vic.gov.au/info/home?query=information+for+employers&collection=worksafe-knowledge-centre-web&meta_docAssetID=10548&temp=landing.

¹²⁸² Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 163.

¹²⁸³ Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 163.

¹²⁸⁴ *Bohatko-Naismith J et al 2015 Journal of Occupational Rehabilitation 66.*

¹²⁸⁵ Lane et al 2018 *Journal of Occupational Rehabilitation 305.*

¹²⁸⁶ Lane et al 2018 *Journal of Occupational Rehabilitation 305.*

A research study¹²⁸⁷ of Australian RTW coordinators from various backgrounds revealed several essential qualities and attributes essential for RTW coordinators. During group interviews it came to light that successful RTW outcomes rely largely on coordinators' intrinsic inter-personal skills, such as: Assertiveness; empathy; compassion; patience; leadership; communication; and multi-tasking. Over and above, the ideal coordinator is supportive, non-judgmental and organised. Of further importance are mediation and problem-solving skills. Coordinators will further benefit from a fundamental understanding of medical terminology for the interpretation of medical reports and communication between doctors and employees. It was emphasised that workers need to be made aware of the key role RTW coordinators play.¹²⁸⁸

In another research study by Shaw et al¹²⁸⁹, researchers have identified six areas of competence required by RTW coordinators: Knowledge of medical conditions;¹²⁹⁰ knowledge of the legal and business aspects of disability;¹²⁹¹ clinical interviewing;¹²⁹² social problem solving;¹²⁹³ workplace mediation;¹²⁹⁴ and ergonomic and workplace assessment.¹²⁹⁵

4.12.1.5 The role of the injured worker in the RTW process

Awareness must be cultivated among workers that returning to work after an injury could be beneficial to health and well-being, and the sooner employees start

¹²⁸⁷ Bohatko-Naismith J et al 2015 *Journal of Occupational Rehabilitation* 72.

¹²⁸⁸ Bohatko-Naismith J et al 2015 *Journal of Occupational Rehabilitation* 72.

¹²⁸⁹ Shaw et al 2008 *Journal of Occupational Rehabilitation* 10.

¹²⁹⁰ For instance, knowledge of common disabling conditions.

¹²⁹¹ This domain requires for instance that RTW coordinators have knowledge in legislative aspects of accommodation; knowledge regarding the roles and responsibilities of employers and employees' incentives to enable them to work better within legal and business constraints as to contribute towards their credibility.

¹²⁹² For example, it is required that a face to face interview be conducted and as such, effective interviewing skills may assist the RTW coordinator to establish a relationship; to follow collaborative problem solving in order to overcome RTW barriers.

¹²⁹³ It is expected of RTW coordinators to facilitate communication between a diverse group of stakeholders, and to remain fair, pragmatic and non-judgmental, hence it is important for them to have social problem skills.

¹²⁹⁴ Should disputes arise, RTW coordinators will need to be able to mediate such differences in a fair manner, and remain impartial.

¹²⁹⁵ This domain, requires that RTW coordinators have skills in workplace assessment as well as ergonomics in order for them to perform certain tasks, such as the identification of problem tasks and the formulation of alternatives for transitional work.

planning for RTW, the better their chances of returning to work sooner. Employees must engage with occupational rehabilitation providers as well as other stakeholders involved. Injured workers need to take a pro-active approach in the RTW process and WorkSafe encourages them to consult with their health practitioners about their abilities in terms of the Certificate of Capacity. They must also take the initiative to engage with their employers about their progress, capability and performance. Workers must request that health practitioners and employers communicate with another on RTW plans and identify suitable duties that may be performed by the injured worker. Workers are entitled to representation for assistance and support (excluding legal practitioners). WorkSafe is available to assist the worker at any stage during the RTW process.¹²⁹⁶

¹²⁹⁶ Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/workers>.

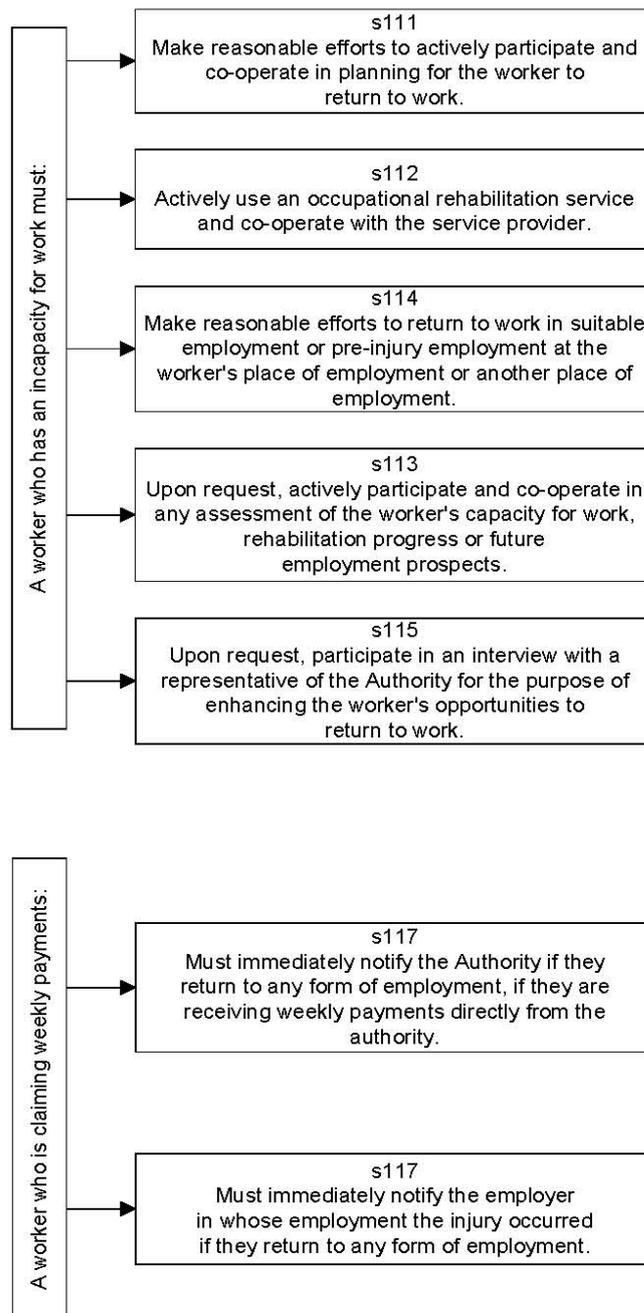


Figure 2: RTW duties prescribed in section 110 of WIRA

The Flowchart above displays the RTW duties prescribed in section 110 of WIRA. I am of the opinion that flow charts are informative aids for legislation and could lead to a better understanding of compliance with RTW duties.

Section 116 of the Act falls within the ambit of this thesis since it applies to workers who fail to comply with RTW obligations. Should this be the case, the Authority or self-insurer may suspend or terminate the weekly compensation payouts. The insurance could also be terminated before determining the worker's

entitlement to compensation in the form of weekly payments. Before that can be effected, written notice must be given plus reasons for such notice. It should also contain a provision, as quoted from subsection 116(2)(b) and 116(2)(c):

...unless the worker complies with the obligation under Division 3 specified in the notice, weekly payments to the worker will be suspended from the date specified in the notice which must be a date at least 14 days, but no more than 60 days, after notice is given; and (c) the consequences of failing to comply as specified in the notice.

If the worker fails to comply with such notice, the Authority or self-insurer may then suspend weekly payments for a duration of 28 days after the specified date, as set out in the notice. If the worker does comply with the obligation during the period in which payments are suspended, the Authority or self-insurer is obliged in terms of the *Accident Compensation Act of 1985* to resume paying the weekly benefits from the date that the worker has resumed his obligations. It must be noted that the worker will forfeit any compensation in the form of weekly payments that would otherwise have been made in the period of suspension. This period will be considered when entitlements are calculated. Should the worker fail to comply with his obligation for the entire period during which payments are suspended, he/she will forfeit any compensation in the form of weekly payments that would otherwise have been made during the period of suspension, after having been given notice as set out in 116(8)(b). The Authority or self-insurer may terminate the benefits by giving written notice, also stating the reasons for such notice.

4.12.1.6 Responsibility of the Authority or insurer in the RTW process

It must be noted that WorkSafe's agents or insurers do not have RTW obligations under WIRA, as these are the responsibility of employers and workers. However, agents can assist employers and workers to meet their RTW obligations, but they cannot fulfil any of these obligations on their behalf. They can, for instance, assist with the planning and developing of RTW arrangements on condition that the

employer controls such arrangements, ensuring that other role-players are aware of them¹²⁹⁷ This, the State of Victoria follows a decentralised approach to RTW.

4.12.1.7 Resolving disputes in the RTW process

Section 118 of WIRA stipulates a specific protocol for dispute resolution. First, the worker should attempt to resolve the dispute as was agreed upon and if no agreement existed, the worker should follow the procedure “specified in directions given by the Minister in accordance with section 609¹²⁹⁸ for the purposes of this section”.

Since RTW is a team effort workers and employers must strive to communicate regularly, which is the most effective way to avoid RTW disputes. However, should a dispute arise, WorkSafe encourages parties to work together to attempt to resolve the matter. WorkSafe has also published guidelines¹²⁹⁹ in this regard as well as a Ministerial Direction¹³⁰⁰ on dispute resolution in terms of the *Workplace Injury Rehabilitation and Compensation Act 2013*, which encourage all parties to resolve the issue among themselves. This can be achieved by using the agreed dispute resolution procedure of the workplace, or where none exists, the procedure as contained in the Ministerial Direction mentioned above. Causes of RTW issues include instances where an employer has not made adequate plans for injury and RTW or when the RTW coordinator is not appointed timeously. Firstly, guidance is given about what an agreed resolution procedure should entail the steps that must be followed to resolve an RTW issue. It is emphasised that the general grievance procedure cannot be followed for this purpose, unless it has been agreed upon. WorkSafe recommends that the resolution procedure should be in writing and accessible to all parties involved. The procedure should be based on genuine

¹²⁹⁷ Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 160.

¹²⁹⁸ Section 609, *inter alia*, contains the directions and guidelines the Minister’s directions must meet.

¹²⁹⁹ Worksafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-Steps-to-resolving-return-to-work-issues-2016-07.pdf.

¹³⁰⁰ Worksafe 2019 https://www.worksafe.vic.gov.au/documents/search?queries_title_query=return+to+work+direction.

consultation and consensus as agreed upon by the employer and all workers. If this is not the case, RTW Issues Resolution procedure will apply.¹³⁰¹

Should an RTW issue come up, the worker, employer and RTW coordinator must aim to resolve it in not more than twenty days. If another party is involved (for example the health practitioner, occupational rehabilitation service provider, worker's representative or supervisor) the employer may invite them to be part of the resolution process, which must be conducted in a language and manner agreed to by the person who had raised the issue. It is important to make use of the relevant WorkSafe material that could provide guidance. The worker may request the employer to record the details and progression of the RWT issue. A resolution and outcome should be reached within fourteen days of the submission of the request and a copy supplied to all role-players involved.¹³⁰²

Should an employee be unable to return to work with his or her pre-injury employer, WorkSafe may assist him/her by way of their "New Employer Services" (NES). This may involve the retraining of the worker to acquire new skills or extend his/her skills to find new employment. Further, should the employee find new employment, his/her employer can make use of WorkSafe Incentive Scheme for Employers (WISE) to a maximum of \$26 000.by providing the individual with further employment.

4.12.1.8 WorkSafe Incentive Scheme for Employers¹³⁰³

WISE is a financial incentive of up to \$26 000 for a period of six months, to new employers who offer ongoing employment of at least fifteen hours per week to injured workers who cannot RTW to their pre-injury employer. In instances where a worker stops working because of a new injury, employers are offered premium exemption. Also, the cost of that claim is excluded from the employer's injury insurance premium calculation. However, the employer is still responsible to pay an

¹³⁰¹ Worksafe 2019 https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-Steps-to-resolving-return-to-work-issues-2016-07.pdf.

¹³⁰² https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-Steps-to-resolving-return-to-work-issues-2016-07.pdf.

¹³⁰³ WorkSafe Incentive Scheme for Employers, hereafter WISE.

excess for the first ten days of weekly payments as well as indexed medical expenses.¹³⁰⁴

If a worker, who is on WISE payment obtains a further injury during his/her placement, the WISE Employer agent will have to establish whether such an injury is new, or part of the original claim. If it is a continuation of the original, then any weekly payments and medical and related expenses will be paid from the original employer's policy.¹³⁰⁵ Funding for equipment to be used for workplace modifications is not part of the WISE scheme but such funding may be provided to workers as part of an occupational rehabilitation service depending on the claim circumstances. The same applies to training costs.¹³⁰⁶

Workers are assisted by a WorkSafe Agent must approve the services of an occupational rehabilitation provider, who will: Review the worker's qualifications, skill and experience that could enable them to find a new job; meet with the health practitioner to identify the support required; and assist the worker to find suitable jobs through the WISE scheme.¹³⁰⁷

It must be noted that workers who are self-employed or act as directors or board members of a companies, are not eligible for WISE and neither are labour hire companies, group training organisations or employment agencies. WISE may also not be used for the purposes of traineeships and apprenticeships.¹³⁰⁸

It is further worth noting that WorkSafe extends annual awards to honour companies with innovative and leading Health and Safety and RTW practices. WorkSafe uses the following criteria to determine how organisations' approaches to RTW have impacted on RTW policies and practices; whether they can be transferred to other organisations or jurisdictions; and whether they go beyond what is required.

¹³⁰⁴ Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 157-158.

¹³⁰⁵ Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 157-158.

¹³⁰⁶ Comparison of workers compensation arrangements Australia and new Zealand 2017, 25th edition 2017 Safe Work Australia 157-158.

¹³⁰⁷ Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/wise>.

¹³⁰⁸ Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/wise>.

They also reward the excellence of RTW coordinators for the way their work has affected the outcomes for workers and their organisations and judge whether their practices are suited to other workplaces. A Worker RTW Achievement award is goes to workers who have shown RTW motivation, overcame barriers and were determined to remain focused on returning to work.¹³⁰⁹

4.12.2 The Equal Opportunity Act 16 of 2010

The *Equal Opportunity Act 16 of 2010* is worthy of discussion in this context. The objectives of the Act are set out in Section 3. Of particular importance is the objective listed in section 3 (iii) which determines that, in order to achieve substantive equality, reasonable adjustments, accommodation and specific measures may be required.

Impairment is broadly defined in the Act¹³¹⁰ as follows:

(a) total or partial loss of a bodily function; or (b) the presence in the body of organisms that may cause disease; or (c) total or partial loss of a part of the body; or (d) malfunction of a part of the body, including— (i) a mental or psychological disease or disorder;(ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or (e) malformation or disfigurement of a part of the body—and includes an impairment that may exist in the future (including because of a genetic predisposition to that impairment) and, to avoid doubt, behaviour that is a symptom or manifestation of an impairment;

Discrimination is defined in Part 2 of the Act, and impairment as defined above is a condition against which discrimination is prohibited. Section 8 specifically describes the meaning of direct discrimination, which occurs “if a person treats, or proposes to treat a person with an attribute unfavourably because of that attribute”. The section continues to stipulate that when determining whether a person is being directly discriminated against, it is irrelevant whether or not the person was aware of the discrimination or considers the treatment to be unfavourable; and further whether or not the attribute is the “only or dominant reason for the treatment, provided that it is a substantial reason”. Section 9 discusses the meaning of indirect discrimination as follows:

¹³⁰⁹ Worksafe 2019 <https://www.worksafeawards.com.au/judging-criteria/>.

¹³¹⁰ Section 4 of the *Equal Opportunity Act 16 of 2010*.

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice— (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and (b) that is not reasonable. (2) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.

Sub-section 3 describes, that the quest of determining whether a practice, condition or requirement is reasonable, will depend on the applicable circumstances of the case but also by considering the following factors:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice; (b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice; (c) the cost of any alternative requirement, condition or practice; (d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice; (e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

Sub-section 4 stipulates that it is irrelevant whether the person was aware of the discrimination.

Section 20 states that employers must make reasonable adjustments when employing an individual who is impaired. This section is applicable to persons with impairments, who are either offered employment or are currently employees and require “adjustments in order to perform the genuine and reasonable requirements of the employment”. Sub-section 2 states that the employer is obliged to make reasonable adjustments, unless the person or employee “could not or cannot adequately perform” the reasonable and genuine requirements of his or her job, after the necessary amendments were made”.¹³¹¹

The Act goes further to provide a practical example of reasonable adjustment.¹³¹² This section also provides that, in order to determine whether an adjustment is

¹³¹¹ Sub-section 4 provides that, in the quest of determining whether the person can adequately perform the reasonable and genuine requirements of the job, the employee’s training, experience and qualifications as well as the employee’s performance in his current position of employment.

¹³¹² For instance, reasonable accommodation may entail the provision of reference manuals or changing work instructions; allowing employees time off from work in order for them to

reasonable, all relevant facts and circumstances need to be considered, which include the following: The employee's circumstances, and the nature of his impairment; the nature of his role in the organisation; the nature of the adjustment which will be necessary to accommodate the employee's disability; the employer's financial circumstances; the nature and the size of the workplace and the business; the effect the impairment will have on the workplace, the business and especially the financial impact of making the adjustment; the number of persons who may benefit from or be disadvantaged by it; the effect it will have on efficiency and productivity, and customer services, if applicable; and the consequences of the adjustments on the employer versus the consequences of not making the adjustments on the employee.

However it must be noted that the employer will not be required to make a reasonable adjustment if he/she has already complied with, or has been exempted from compliance with, a relevant disability standard made under the *Commonwealth Disability Discrimination Act*, or where the employer has made an adjustment in accordance with the terms set out section 160 B of the *Building Act*.¹³¹³

Section 23 states that an employer may discriminate against a person because of disability, in the following circumstances:

...if the person requires adjustments in order to perform the genuine and reasonable requirements of the employment and the adjustments are not reasonable, or the person could not perform the genuine and reasonable requirements of the employment even if the adjustments were made. The employer must first consider if there is a duty under section 20 to make reasonable adjustments for the person before taking any further action that could otherwise amount to unlawful discrimination, such as dismissing the person or limiting their access to training.¹³¹⁴

¹³¹³ participate in rehabilitation, treatment or assessment; allowing more regular breaks; installing computer software; adjustments to the environment such as the installation of a ramp.
Guide to the *Equal Opportunity Act 2010* August 2011, 16.

¹³¹⁴ Guide to the *Equal Opportunity Act 2010* August 2011 page 16.

It must be emphasised that a contravention of any of the “reasonable adjustments obligations” imposed by the provisions of the Act, constitutes unlawful discrimination, and that these obligations function as stand-alone provisions.¹³¹⁵

The guideline for the recruitment industry and employers: Complying with the Equal Opportunity Act 2010¹³¹⁶ needs to be considered in conjunction with *the Equal Opportunity Act*. Even though it is not legally binding, a tribunal or court can still refer to it when in the event of complaints of discrimination or any other unlawful conduct in terms of the *Equal Opportunity Act*.

Item 3.1.3 deals with practical suggestions for making reasonable adjustments to accommodate PWDs. For instance, employers could: Review the performance requirements of the job; approve flexible working arrangements such as a variation in working hours; provided employees with hearing or speech impairments with telephonic typewriters; provide screen- reading software for visually impaired employees; and provide adjustable desks for employees using wheelchairs. The Guideline continue to stipulate that open lines of communication should be maintained to allow for discussions relating to temporary or on-going adjustments in order to accommodate disability.

The Act thus requires that reasonable adjustments would mean balancing the need for the adjustment against the consequences of the adjustment not being effected. In this context the effort and/or expense involved must be considered.¹³¹⁷ The duties set out in the Act are thus consistent with the obligations imposed by the Commonwealth *Disability Discrimination Act of 1992*. The test of reasonableness in the new Act is parallel to unjustifiable hardship in terms of the Commonwealth Act has.¹³¹⁸

¹³¹⁵ Anon and date unknown file:///C:/Users/NWUUser/Downloads/Chapter_5-9.pdf p 54.

¹³¹⁶ This practice guideline, developed by the Victorian Equal Opportunity and Human Rights Commission (the Commission), is all about making sure everyone gives and gets a fair go in the recruitment process. Under section 148 of the Equal Opportunity Act 2010 (Vic) the Commission may issue practice guidelines on any matter relating to the Act.

¹³¹⁷ Guide to the Equal Opportunity Act 2010 August 2011.

¹³¹⁸ Guide to the *Equal Opportunity Act 2010* August 2011.

In the case of *Davies v State of Victoria*¹³¹⁹ the Tribunal had the opportunity to interpret the phrase “genuine and reasonable requirements” and stated that these requirements are often wider than the inherent or essential requirements. The genuine and reasonable requirements of employment may also include certain abilities and skills that are relevant to the duties of the employment.

In the case of *Secretary, Department of Foreign Affairs and Trade v Styles*¹³²⁰ the Tribunal explained the requirements as follows:

The requirements of the employment refer to what the job or position requires to be done, as well as what is necessary to do those duties. The term covers the whole range of these requirements, and not just the essential ones. The requirements must be requirements ‘of the employment’. In other words, they must relate to and derive from the employment. They must be genuine requirements. An employer cannot invent requirements which are not truly requirements of the employment. They must be reasonable requirements.

4.12.3 Other relevant legislation

The *Disability Act 23 of 2006* also provides implied support for the RTW system, since there are a number of sections which support the general notion of RTW. For instance, the objectives¹³²¹ of the Act does allude to make provision for PWDs to be included and advance in society. The principles of the Act are set out in section 5(2) of the Act. It confirms that PWDs have the same rights as other members of the community, which entail, *inter alia*: The right to have their human dignity respected;¹³²² services which support quality of life;¹³²³ and the recognition of their individual capacity for their social, physical, emotional and intellectual

¹³¹⁹ *Davies v State of Victoria (Victoria Police [2012] VSC 343)*.

¹³²⁰ *Secretary, Department of Foreign Affairs and Trade v Styles* [1989] FCA 342; [1989] 23 FCR 251 at para 263.

¹³²¹ The objectives of the Act, is set out in section 4, as follows: “(a) advance the inclusion and participation in the community of persons with a disability; (b) promote a strategic whole of government approach in supporting the needs and aspirations of persons with a disability; (c) facilitate the planning, funding and provision of services, programs and initiatives for persons with a disability; (d) promote and protect the rights of persons accessing disability services; (e) support the provision of high quality disability services; (f) make disability service providers accountable to persons accessing those disability services; (g) ensure the efficient and effective use of public funds in the provision of disability services”.

¹³²² Sub-section 5(2)(a).

¹³²³ Sub-section 5(2)(g).

development.¹³²⁴ Section 5(3) emphasise that disability services need to be of such a nature that they also improve the rights of PWDs to be included and participate in the community. As such, the services need to be flexible in order to meet individual needs;¹³²⁵ of high quality and provided by properly experienced and skilled staff;¹³²⁶ and should be, as far as possible, accessible to the local community¹³²⁷.

The Charter of the *Human Rights and Responsibilities Act* also provides implicit support for RTW arrangements. In its Preamble, it is affirmed that all people in Victoria “are born free and equal in dignity and rights”. Section 8 is also important and provides as follows:

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

The Charter applies to Parliament, the courts, tribunals and public authorities as well as all government employers. It does not however, apply to private employers, unless they choose to comply or if they perform functions of a public nature on behalf of the State or public authority.¹³²⁸ The Charter compels state and local government to consider human rights when making laws, setting policies as well in the provision of services.¹³²⁹ The rights set out in section 8 go beyond formal

¹³²⁴ Sub-section 5(2)(c).

¹³²⁵ Sub-section 5(3)(b).

¹³²⁶ Sub-section 5(3)(g).

¹³²⁷ Sub-section 5(3)(f).

¹³²⁸ Submission to the National Inquiry into Employment against Older Australians and Australians with Disability – People with disabilities 4 December 2015.

¹³²⁹ Victorian Equal Opportunity and Human Rights Commission Date unknown <https://www.humanrightscommission.vic.gov.au/index.php/about-us/item/572-howvictorias-equal-opportunity-act-has-changed-over-time>

equality since they allow for disadvantaged or vulnerable people to be treated differently in order to ensure that they are treated equally.¹³³⁰

Detailed prescriptions are important when it comes to reasonable adjustments employers must make to assist employees. For instance, in 2010, the Australian Human Rights Commission published a Guide entitled: *Workers with Mental Illness: A Practical Guide for Managers*, which contains excellent examples/directives that could be of help to South Africa. For instance, Part 3.3 sets out detailed examples of how workers with mental illness can be reasonably accommodated. For example, flexible working options¹³³¹ need to be considered by employers and such options may comprise a variation of work hours; responsibilities and tasks; and even a variation in location. This will entail practical adjustments such as: Allowing the employee to work from home on allocated tasks; attending events and meetings; discretionary leave; offering a variety of tasks; moving the employee's work area to a quieter location; or by offering a "privacy screen" to create individual space. Employers need to consult with employees regarding the possible adjustments which will suit the job requirements as well as the employee's own circumstances. If it is proposed that the employee work flexible hours, but, at the same time organisations need to bear in mind that this could lead to isolation and therefore the support of colleagues is important.

The Guide contains strategies¹³³² that organisations need to consider for the treatment of employees with intellectual difficulties, like memory and concentration. Such strategies may include: Instructions in writing and making use of diagrams or models to demonstrate the tasks required; diarising work electronically; implementing a buddy system between co-employees in order to discuss progress of work tasks; highlighting tasks that need to be prioritised; allowing additional time to complete projects; allowing breaks so that the employee to collect his/her thoughts; using soundproofing or visual barriers for employees who are easily distracted; re-designing job requirements which may entail complex tasks and changing them to

¹³³⁰ Submission to the National Inquiry into Employment against Older Australians and Australians with Disability – People with disabilities 4 December 2015.

¹³³¹ Part 3.3.1 of the Guide.

¹³³² Part 3.3.2 of the Guide.

ones less challenging; and allocating a mentor or an external service provider to support the employee with thought processing strategies.

Employees who have difficulty with organisation and planning, can be assisted by means of a variety of measures¹³³³. For instance, managers could: Formulate written plans of action with set time frames for completion; allow additional time to complete tasks; use checklists; remind employees of important deadlines by way of informal e-mails; arrange informal support meetings without labelling them as “performance” meetings; and use a personal diary, which can be as simple as mobile reminders, to keep track of tasks. It is important that managers also need to be sensitive about their body language during meetings.

There may be employees who will have difficulty with social interaction and therefore hesitant to work with other colleagues. Managers must devise strategies¹³³⁴ to address such difficulties. This may include: Not making social activities compulsory; moving employees to a quieter place; allowing the employee to work from home for short periods; and allowing external support telephone calls from family members or external service providers. The Guide also makes provision for strategies to manage performance concerns.¹³³⁵ Managers may use their standard performance management system, however they do need to take certain factors into consideration, such as whether the performance problem is relevant to an essential part of the job or whether the job may be adjusted in order to avoid a recurrence of any shortcomings in future. Managers should keep the following considerations in mind:

As with all workers with performance issues, you need to address your concerns with the worker in a sensitive manner by identifying work-related adjustments to assist them meet the inherent requirements of the position; provide a timeline to implement the work-related adjustments; ensure that you and the worker are both clear about the requirements of the job and standards for performance; undertake disciplinary action or termination if it is not a result of mental illness; it is directly related to performance or an inability to perform the key requirements of the job; it occurs after considering whether reasonable adjustments are possible. If poor work

¹³³³ Part 3.3.3 of the Guide.

¹³³⁴ Part 3.3.4 of the Guide.

¹³³⁵ Part 3.4 of the Guide.

performance continues after the identified timeline you may decide to recommence the disciplinary process with the worker.¹³³⁶

Although the above suggestions on how mental illness could be accommodated seem obvious, it should be acknowledged that they can be of immense practical value in the workplace, even in the South African context and practical suggestions on how illnesses such as mental illness could be accommodated, will always be valuable.

In 2015¹³³⁷, The Victorian Equal Opportunity and Human Rights Commission¹³³⁸ made submissions as part of the Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability (the Inquiry). Part 7.1 is of direct relevance and important for this part of the chapter. The Commission made certain recommendations with reference to programmes, workplace practices and policies for employers. It submitted that all employers need to develop a Disability Action Plan, relevant to the organisation's size, functions and resources¹³³⁹, which contains policies and practices to address both the recruitment and retention of PWDs and policies and practices to eliminate discrimination. An equal opportunity policy was also addressed. It recommends that employers to make reasonable adjustments to accommodate PWDs, and such adjustments could include the following:

Reviewing and making any necessary changes to the position description so that all applicants can access and understand it; Making materials such as position descriptions, selection criteria and application forms available in other formats if an applicant requests it; Arranging for interpreters or other supports during interviews if requested by an applicant; Making the assessment process accessible, e.g. if the assessment process involves reading and commenting on a document, you may need to make adjustments for a person with a vision impairment to participate.

Furthermore, employers need to develop workplace practices that accommodate the needs of PWDs, including reasonable adjustments. They provide practical examples

¹³³⁶ Part 3.4 of the Guide.

¹³³⁷ Submission to the National Inquiry into Employment against Older Australians and Australians with Disability – People with disabilities 4 December 2015.

¹³³⁸ This Commission functions as an independent statutory body with responsibilities under the *Equal Opportunity Act 2010*, *Racial and Religious Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006*.

¹³³⁹ For the South African context, it will also be important to guard against a one size fits all approach in the way companies will be expected to draft and implement policies.

of the adjustments employers can consider, such as: Telephone typewriter phone access for employees who have speech or hearing impairments; screen reading software for employees with vision impairment; more regular breaks for individuals suffering from chronic fatigue or pain; desks with adjustable heights for the wheelchair-bound; flexible working hours (which may include flexible start and finish times); and part time employment and job-sharing. Employers may also need to consider special arrangements for employees who have fluctuating health conditions to enable them to work during periods when they are able and take leave during times of ill-health. Flexible leave options may be considered, such as special or extended leave or leave without remuneration. Flexible work locations should also form part of the enquiry, such as the option to work from home and the use of technology to meet with stakeholders or colleagues. One should, however, guard against isolation and as such, employers should have measures in place to include PWDs who are working off-site in staff and social activities. Organisations must review and amend, if necessary, the performance requirements of the job, for instance when an employee returns to work after a period of illness or after recovering from an injury. Companies must also consider implementing additional policies and practices to support PWDS, and such may include:

Appointing a disability contact officer within your organisation or business with whom employees with disabilities can discuss working arrangements, reasonable adjustments and complaint mechanisms to report discrimination and bullying. Developing and review policies and procedures for maintaining confidentiality within the workplace when an employee or job applicant discloses that they have a disability in order to maximise privacy protections.

The government as well as Peak Industry Bodies need to deliver education programmes for employers in both the public and private domain regarding their duties under anti-discrimination legislation as well as the initiatives to support PWDs. This may take the format of seminars (both face to face and online), media releases, the publication of articles and social media. Interestingly, the Commission recommends that particular attention must be drawn to medium and small organisations and businesses since they are often unaware of their obligations as well and initiatives that may exist. Such education programmes must be delivered to all government departments and must stretch across a range of vocational fields.

4.12.4 Case law: The duty to make reasonable adjustments in the quest to return workers to work

The case of *Butterworth v Independence Australia Services (Human Rights)*¹³⁴⁰ contains important guidelines on what the “reasonable adjustment” requirement entails.

The court refers to Section 20 of the *Equal Opportunity Act 16 of 2010* and stated that it poses a clear obligation on employers who offer to employ or have employed individuals with disabilities, and who required reasonable adjustments for them to perform their jobs adequately. The court investigated how other tribunals had interpreted the phrase “adequately” and referred to the Dziurbas¹³⁴¹ judgment in which the tribunal interpreted it as follows:

...the employer must make a judgment in the nature of a prediction. The prediction is to be one which will enable the employer to conclude that it is more probable than not that the person will not be able to perform adequately the requirements of the employment. The judgment will need to be genuinely made and will need to be based on information capable of supporting that judgment. An assumption, based on no information or on scant information, will not be enough.

It is important to note that the court provided a variety of examples of reasonable adjustments, such as:

...providing a ramp for access to the workplace or a particular software package for computers; modifying work instructions or reference manuals; allowing the person or employee to be absent during work hours for rehabilitation, assessment or treatment and allowing the person or employee to take breaks more frequently.¹³⁴²

The court¹³⁴³ also stated that in the quest of determining whether an adjustment is reasonable, one must consider all the relevant facts and circumstances, such as:

...the person's or employee's circumstances, including the nature of his or her disability; the nature of the employee's role or the role that is being offered; the nature of the adjustment required to accommodate the person's or employee's disability; the financial circumstances of the employer; the size and nature of the workplace and the employer's business; the effect on the workplace and the employer's business of making the adjustment including the financial impact of

¹³⁴⁰ *Butterworth v Independence Australia Services (Human Rights) [2015] VCAT 2056.*

¹³⁴¹ Para 143-144.

¹³⁴² Paragraph 204.

¹³⁴³ Paragraph 204.

doing so; the number of persons who would benefit from or be disadvantaged by doing so; the impact on efficiency and productivity and, if applicable, on customer service of doing so; the consequences for the employer of making the adjustment; the consequences for the person or employee of not making the adjustment; any relevant action plan made under Part 3 of the *Disability Discrimination Act 1992* of the Commonwealth ; and if the employer is a public sector body within the meaning of section 38 of the *Disability Act 2006*, any relevant Disability Action Plan made under that section.

An important observation of the court is that employers need to know that after they have complied with the 52 weeks employment obligation,¹³⁴⁴ they will still be required to consider whether reasonable adjustment can be made to enable employees, with workplace injuries, to adequately perform the “genuine and reasonable requirements of the employment”.¹³⁴⁵ It must be understood that this is not the same as returning to the pre-injury duties, where such duties do not comprise the full job description. Thus, when the 52-week employment obligation ends, employers cannot terminate employment without having regard to its obligations such as those contained in terms of the *Equal Opportunity Act*., Therefore, the *Accident Compensation Act* does not authorise employers to terminate employment automatically and rely on the inherent requirements defence after the 52-week period has expired.

Chandler correctly notes that the inquiry is not merely limited to obtaining a “comprehensive fitness for duty assessment” to determine whether the employee can or cannot perform the inherent requirements of the role, it also entails a comprehensive consideration of the “reasonable adjustments” component. Practically, employers thus need to engage in consultation with role players such as line-managers, supervisors who have knowledge about the workplace duties, processes and equipment and thus undertaking an internal review in order to establish whether the organisation will be able to provide services or facilities that

¹³⁴⁴ Section 194 of the *Accident Compensation Act 1994* entails an obligation to provide, for a period of 52 weeks, suitable employment if the employee has some capacity for work and pre-injury employment if the employee no longer has an incapacity.

¹³⁴⁵ Paragraph 297.

will assist the disabled employee to perform the inherent requirements of the position, even though a medical doctor could have disagreed.¹³⁴⁶

Previous case law¹³⁴⁷ suggests that “reasonable adjustments” do not entail modifying the inherent requirement of the substantive position itself, but rather providing a service outside of employment that may assist the employee to overcome the disability. In the case of *Cosma v Qantas Airways Ltd*¹³⁴⁸ the court explained this duty as follows:

...this provision does not require the employer to alter the nature of the particular employment or its inherent requirements. Rather it is a question of overcoming an employee’s inability, by reason of disability, to perform such work. This is done by provision of assistance in the form of ‘services’, such as providing a person to read documents for a blind employee, or ‘facilities’ such as physical adjustment like a wheel chair ramp. The ‘services’ or ‘facilities’ are external to the ‘particular employment which remains the same.

Fitness for duty assessments must be carried out jointly with an investigation of whether any reasonable adjustments may be implemented. I agree with the observation by Chandler that this case has illustrated that employers have certain specific obligations in terms of discrimination legislation, and that they need to “explore all possibilities for reasonable adjustments to the role”. This can be used to support an employer’s defence in discrimination claims.¹³⁴⁹

This case further serves as an illustration that employers need to become more aware of what their RTW obligations entail in order to prevent valuable skills from being lost as well as to avoid unnecessary litigation. The successful return of workers involves consultation with a variety of stakeholders. Medical practitioners alone do not always have the necessary knowledge to determine the inherent requirements of a particular post.

The tribunal, in its interpretation of the employer’s obligation to make reasonable adjustments, stated that it was not required of the employer to create “the perfect

¹³⁴⁶ Chandler 2016 <https://www.hcamag.com/opinion/opinion-reasonable-adjustments--a-key-element-in-avoiding-workplace-discrimination-213096.aspx>.

¹³⁴⁷ *X v Commonwealth* (1999) 200 CLR 177, 208 [102].

¹³⁴⁸ *Cosma v Qantas Airways Ltd* [2002] FCA 640.

¹³⁴⁹ Chandler 2016 <https://www.hcamag.com/opinion/opinion-reasonable-adjustments--a-key-element-in-avoiding-workplace-discrimination-213096.aspx>.

working environment” or to create another job for the employee. Nevertheless, employers must still consider what reasonable adjustments could be made within the workplace, and in determining whether the adjustment is reasonable,¹³⁵⁰ attention should be paid to the factors listed in section 20(3) as discussed above.

While employers need to be alert to federal anti-discrimination laws, but they must also ensure, when managing their employees’ workplace injury or other disability, that they comply with State anti-discrimination laws. Motro stated that this needs to be acknowledged when “navigating a complex legal landscape which creates many concurrent duties and responsibilities can be challenging”. In determining whether an adjustment was reasonable or not, it is important to evaluate each case on merit.¹³⁵¹

This tribunal decision is also an illustration that defining the genuine and reasonable requirements of employment is not a straight-forward task. The entire scope of employment should be considered, particularly the employment contract, which may contain the job description as well as its operational and organisational requirements. Thus, a broader consideration on the part of employers is expected. It goes beyond the possibility of whether the employee could merely perform the inherent requirements of the pre-injury position.¹³⁵²

In the case of *Muller v Toll Transport Pty Ltd*¹³⁵³ the Tribunal reminded organisations that proper consultation based on both medical information as well as the genuine requirements of the particular job is necessary to determine the required adjustments. Employees cannot be expected to determine such adjustments in an “information vacuum” and must therefore be made aware of the nature and difficulties of an employees’ disabilities.¹³⁵⁴ The Tribunal explained it as follows:

¹³⁵⁰ Motro 2016 <https://www.piperalderman.com.au/publications/employment-relations/article/7611>

¹³⁵¹ Motro 2016 <https://www.piperalderman.com.au/publications/employment-relations/article/7611>

¹³⁵² Rozenbergs and Bell 2019 <https://www.lexology.com/library/detail.aspx?g=dbf2e9bf-6460-489b-a3a8-7237b59cf6ff>

¹³⁵³ *Muller v Toll Transport Pty Ltd (2) [2014] VCAT 472.*

¹³⁵⁴ Ripps 2015 <http://www.mondaq.com/australia/x/401558/employee+rights+labour+relations/How+NOT+>

The first thing that strikes me about section 20 is that an employee needs to articulate what he or she needs and expects from an employer by way of adjustment so as to enable him or her to perform the genuine and reasonable requirement of the particular job. As counsel for the respondent put it, his clients are not mind readers.

In the case of *Dziurbas v Mondelez Australia Pty Ltd (Human Rights)*¹³⁵⁵, the Tribunal stated that the employers' obligation as set out in section 20, requires that the reasonableness of the adjustment requires a consideration of all relevant facts and circumstances.¹³⁵⁶ Further, the Tribunal emphasised that the term "adequately" must also be correctly understood to mean as follows: "The employee does not have to be capable of performing the genuine and reasonable requirements of the employment perfectly – just adequately".¹³⁵⁷

4.13 Chapter Summary

The first part of this chapter covered Malaysia's successful RTW programme. It showed that the country has a well-functioning social security system. Rehabilitation, RTW benefits and case management are well defined in legislation.

The importance of tax incentives to enhance SOSCO's RTW programme was discussed, as well as other relevant legislation and policies providing support for the RTW programme. This was followed by a discussion of the key features of SOSCO's programme and how it could be applied to a developing country like South Africa. This will be proposed in Chapter 6 of the thesis.

The second part of the chapter consists of a comparative study of Australia and examined its federal legislation which stipulates that all employers have a duty to reasonably accommodate their employees' disabilities, failing which, amounts to discrimination. A discussion of relevant federal case law revealed that this duty does not only apply to a general prohibition of discrimination, but also calls for positive action to make the necessary adjustments. It was further emphasised that employers need to be mindful of federal and state anti-discrimination law.

to+respond+when+an+employee+annoKunces+their+pregnancy+Lessons+for+business+fr
om+recent+cases

¹³⁵⁵ *Dziurbas v Mondelez Australia Pty Ltd (Human Rights) [2015] VCAT 1432.*

¹³⁵⁶ Para 139.

¹³⁵⁷ Para 141.

Accommodating disability is complex and the necessary adjustments may take time. Employers and employees must engage with one another to determine the extent to which an employee would remain capable of performing his/her pre-injury functions.

An examination of Victoria's RTW duties followed, with detailed prescriptive RTW requirements. The State's legislative framework provides the foundation upon which its RTW programme is based, and this plays a significant role in the success of its programme. The discussion commenced with the functions of "WorkSafe", which is responsible for *inter alia*, the management of Victoria's compensation scheme. Its progress and the initiatives launched in RTW were discussed as reaffirmation that RTW is a team effort with role-players collaborating to return ill or injured workers to employment.

The next part of the chapter was devoted to a discussion of Victoria's legislative framework, and the *Workplace Injury Rehabilitation and Compensation Act 67 of 2013*. The Act contains a designated RTW section, with the main theme that all role players must cooperate in the RTW process to ensure successful RTW outcomes. Employers have a duty to provide pre-injury employment or suitable employment to ensure that employees return to work. Employees need to participate in the RTW process, and they have the right to be represented. The aim is effective occupational rehabilitation to assist with early and sustainable RTW.

It was highlighted that successful RTW requires extensive consultation and exchange of information to determine the worker's capacity as well as workplace support and the investigation of different options for suitable pre-injury employment. Communication with health practitioners is also required. All RTW role-players have certain duties, as mandated by WIRA. Employers have a duty to provide suitable employment for a 52-week period. This implies work that is suited to the worker's current abilities, considering certain factors, such as the nature of the pre-injury employment; nature of the incapacity; rehabilitative services *et cetera*.

Employers further have a duty to draft detailed RTW plans. All employers must have an RTW programme or policy in place, making planning and consultation essential. Some employers are obliged to appoint RTW coordinators, dependant on the

rateable remuneration of the organisation. Employers need to supply all workers, as specified in the Act, with information about the duties and rights of employers and employees.

The role health practitioners play in the RTW in order to ensure safe and early return of workers was also highlighted. The roles and duties of RTW Coordinators were then discussed, and their responsibility to consult with stakeholders to monitor RTW progress and resolve disputes that may arise. The RTW coordinator need to be competent, even though formal training is not mandatory.

In terms of Victorian legislation, the injured worker has a considerable number of duties, as set out in WIRA. for instance, workers need to make every effort possible to: Participate actively in and cooperate with the RTW programme; make use of occupational rehabilitation services; cooperate with service providers; and make reasonable efforts to return to suitable employment or pre-injury employment either at the current place of employment or another place of employment. Workers are also obliged, if requested, to undergo capacity assessments.

Failure of workers to comply with RTW obligations are dealt with and the Act makes provision for the necessary actions to be taken. WIRA makes provision for dispute resolution, contained in the directives of the RTW Issues Resolution Procedure. Other important initiatives that motivate organisations to excel in RTW were pointed out. The discussion of WIRA was then followed by an examination of the *Equal Opportunity Act* in which a duty to make reasonable adjustments in order to achieve substantive equality exists.

A discussion of other relevant legislation formed part of the comparative discussion, since it provides implicit support for RTW. A discussion of relevant case law illustrated that that the RTW process requires obligations from employers and employees that they cannot ignore.

In the next chapter the conclusions and recommendations that can be drawn from the entire study will be discussed.

Chapter 5: Conclusions and recommendations

5.1 Introduction

In the previous chapters of this thesis, the author addressed the core subject of the study by determining how and to what extent international law and foreign law systems could contribute to the promotion of the re-integration, rehabilitation and RTW programmes of disabled workers in the South African labour market.

The applicable international and regional Conventions and the RTW frameworks of Malaysia and Australia were consulted. Chapter one gave a general introduction and background, a problem statement, rationale and justification, literature review, methodology, scope and limitations, explanation of technical terms and ethical considerations. In chapter two it was established that in terms of applicable regional and international conventions and standards, South Africa has several RTW commitments, and that international and regional instruments and standards could be of assistance for the country to develop and improve its legislative and policy frameworks to allow workers to be returned to work. Chapter three analysed South Africa's legal framework and assessed whether the current legislative and policy frameworks allow for disabled workers to be accommodated. Chapter four analysed the legal frameworks pertaining to RTW, in both Malaysia and Australia, both countries from which South Africa could gain further insight to develop its own RTW framework. This chapter provides a summary and conclusion regarding lessons that can be learnt from the study and makes a number of recommendations South Africa could explore in promoting the rehabilitation, re-integration and RTW of disabled workers. The chapter commences with a discussion of and conclusion of regional and international comparisons, and the standards South Africa needs to conform to. Thereafter, it provides the findings of the comparative assessments of the legal frameworks from Malaysia and Australia and proposes how these could assist South Africa in developing a more detailed RTW framework. This discussion will be followed by relevant recommendations for an RTW model, unique to South Africa's circumstances. Finally, the overall conclusions and the effect of the study on further research are discussed.

5.2 Broad findings on regional and international law

The aim of chapter two was to discuss how and to what extent regional and international law could be employed to promote the re-integration, rehabilitation and RTW programmes of disabled workers in the South African labour market. The applicable international and regional conventions and standards relating to these programmes were examined. As a signatory to several international and regional instruments, South Africa is mandated to domesticate such standards in its legal system. In order to achieve the aim of the chapter, a discussion of the role of various regional and international bodies as well as programmes, Treaties and Protocols which serve as benchmarks for South Africa's domestic system, were elucidated.

Of particular importance was the consideration of the provisions of the CRPD, being the first international legally binding treaty, specifically aimed at protecting the rights of PWDs. It was emphasised that the CRPD contains several important provisions for the development of an RTW programme. States Parties are obliged to promote employment opportunities as well as career advancement for PWDs, which will include assistance in the finding and maintaining of and returning to employment.¹³⁵⁸ States Parties must ensure that PWDs are reasonably accommodated¹³⁵⁹ in the workplace and put legislation to this effect in place. States Parties must also promote vocational and professional rehabilitation, job retention and RTW programmes for PWDs.¹³⁶⁰ It was argued that Article 26 requires States Parties to have comprehensive, high-quality, multi-faceted rehabilitation services in place. The CRPD also contains a provision which entails that PWDs, *inter alia*, have access to assistance and devices for their disability-related needs.¹³⁶¹ The CRPD also calls for international cooperation between States Parties.¹³⁶²

A study of international and regional perspectives, revealed yet again that the proposed RTW model must demonstrate that PWDs are entitled to decent and

¹³⁵⁸ Section 27(1)(e).

¹³⁵⁹ Section 27(1)(i) of the CRPD.

¹³⁶⁰ Section 27(1)(k) of the CRPD.

¹³⁶¹ Section 28(2)(a) of the CRPD.

¹³⁶² Section 32 of the CRPD.

productive employment. Social security systems need to be three-tier, and provide for prevention, compensation as well as for PWDs to be re-integrated into society. It is important that all types of disability be provided for, irrespective of the cause of the disability. PWDs have the right to participate in all aspects of life, which includes the right to return to employment, thereby contributing to the economy of the country. PWDs have the right to the best attainable health care, including the right to be rehabilitated after disability, and even more so in the event where the disability was the result of a work-related incident. Rehabilitation measures need to be aligned with the country's profile, abilities and conditions, and must develop over time. It has also emerged from the discussion that, in order for vocational rehabilitation to occur and for integration programmes to be effectively implemented, it will be necessary for competent authorities to work together. The development of policies and legislation must be carried out with the assistance of representative advisory committees, which must be properly represented, to include employer and employee organisations and authorities specialising in vocational rehabilitation and organisations for disabled people. It was also argued that not only is it important for countries to advocate the employment of PWDs, they must also keep them in employment. When RTW programmes are rolled-out nationally, it will be important that staff tasked with vocational rehabilitation should be trained and equipped with the necessary skills.

The comparison revealed further that employers need to have disability management strategies in place with different forms of adjustment to the work environment and assignments. It was further demonstrated that consultation is vital in any RTW process and that a range of services may be required in order to return employees to work, such as counselling, tailor-made RTW and job retention schemes. Authorities should be available to provide guidance to employers on work schedule adjustments, vocational retraining and information services relating to RTW and job retention.

States must have national disability coordination committees, with effective representation of PWDs at their disposal. Community-based service delivery needs to be supported in collaboration with international agencies and organisations.

Furthermore, communities need to be made aware of and informed about disability which must be mainstreamed in social, economic and political agendas of government.

The discussion revealed that governments need to take additional measures to allow for larger budgets to promote and regulate reasonable accommodation measures that must be attended to on a case-to-case basis. Member States need to ensure that duties relating to vocational rehabilitation, RTW programmes, and job retention are regulated and provided for in their respective national systems.

According to regional standards, countries, including South Africa, are required to have comprehensive social protection systems in place. This include preventative and reintegrative measures. PWDs, irrespective of origin or nature of disability, are entitled to substantial measures such as rehabilitation, vocational training and the appropriate organisation of the work environment.

It was also argued that a discussion of relevant jurisprudence could help South Africa, to get clarity on legal obligations as well as guidance on the implementation of rights in practice. This in turn may assist countries to incorporate rights and relevant standards into their domestic laws, systems and programmes.

It is important for South Africa to constantly reflect on whether international and regional obligations are being met and if shortfalls were to be identified, contingency plans must be in place. The recommendations of the Social Policy Framework were also listed and as such, advocate for the rights of PWDs to be mainstreamed and states to follow a comprehensive approach in order to deal with the employment, rehabilitation, re-integration and return to work of disabled workers.

5.3 Broad findings of comparative analysis of foreign law jurisdictions

In chapter four a number of observations were made that could extend the RTW agenda of South Africa. The first part of the chapter contained an analysis of the Malaysian RTW experience, its legislative framework and the key features of its RTW programme. The second part was devoted to Australia's experience, commencing with a discussion of applicable federal legislation and case law. The discussion then

focused on Australia's RTW policies, especially those in the state of Victoria. Although there are lessons to be learnt from Malaysia and Australia, South Africa's situation is different and its unique social, economic and political realities and legislation need to be taken into consideration.

5.3.1 Malaysia

It was significant that Malaysia's legislative framework provides the foundation for SOSCO's RTW Programme. Malaysia has several Acts in place for the successful execution of its programme. For instance, the *Employees' Social Security Act, 4 of 1969* provides benefits in instances of occupational illness or injury as well as invalidity and it applies to all employers – it is expected of both employees and employers to make contributions on a pro-rata basis.¹³⁶³ The Act provides for a range of different benefits such as regarding an employment injury scheme¹³⁶⁴; education; funeral benefits; cost-attendance allowances; rehabilitation¹³⁶⁵; medical treatment; and temporary and permanent disablement benefits. The Act provides further benefits in instances of invalidity,¹³⁶⁶ in the form of educational loans, funeral benefits, rehabilitation benefits; invalidity pension; a grant for uninterrupted attendance; and a survivor's pension. In the event of invalidity or injury, SOSCO makes provision for a free rehabilitation benefit for vocational and physical rehabilitation subject to certain conditions – contributing to an active and productive society. It was indicated that the RTW Programme of SOSCO thus falls within the ambit of this benefit. A scrutiny of the recently amended chapter V11A of COIDA, revealed that some of these benefits are already regulated to a certain extent in South Africa, in section 70A of the Act,¹³⁶⁷ as it stipulates that the Compensation Fund of South Africa may provide facilities, services and benefits to rehabilitate employees suffering from occupational injuries or diseases. Clinical, social and vocational rehabilitation are listed in the Act. Nonetheless, it is not clear whether the Compensation Fund will have a designated RTW department or an RTW programme,

¹³⁶³ See 4.3.2 in Chapter 4.

¹³⁶⁴ See paragraph a, 4.3.2 in Chapter 4.

¹³⁶⁵ Also see the discussion in 4.3.4 on the *Employees' Social Security (General) Regulations, 1971*.

¹³⁶⁶ See paragraph b, 4.3.2 in Chapter 4.

¹³⁶⁷ See paragraph 3.3.2.7 in Chapter 3.

where the rehabilitation of workers will take place in a systematic and coordinated manner. It will be in their best interest, to have designated RTW functions.

In terms of the *Employees' Social Security Act*¹³⁶⁸ recipients of disablement benefits, need to continue medical treatment and carry out the instructions of medical staff. They may not engage in activities that could hinder recovery and must be prepared to be examined by authorised medical staff members, non-compliance of which will lead to suspension. In South Africa, COIDA, in section 26, provides that the Director-General may withhold rewards should an employee, unreasonably refuse rehabilitation or misrepresent facts. The implications of this section illustrate how important it is to have more detailed provisions in COIDA clarifying the roles of all stakeholders involved, to prevent unnecessary suspension of benefits.

Section 53 of the *Employees' Social Security Act* provides protection from dismissal to employees during periods of temporary disablement – a benefit South Africa needs to consider when drafting RTW policies.

It was further indicated that Malaysia's *Income Tax Act 53 of 1967* contains a set of different tax incentives in order to promote the employment and retainment of PWDs. For example, the Act¹³⁶⁹ makes provision for personal income tax relief; relief for spouses and parents; tax relief for the personal purchase of supporting equipment and services. The Act further makes provision for tax relief for those who employ PWDs (both for remuneration and training purchases) as well as for expenditure related to the purchase of assistive equipment or alteration of work environment. With regard to these tax incentives, it is submitted that South Africa needs to consider amending its Income Tax Act or COIDA to make provision for tax incentives as a motivating force in the employment and RTW of disabled workers.

Malaysia's disability legislation has been in place since 2008. The *Persons with Disabilities Act of 2008*¹³⁷⁰ provides support for its RTW programme. This Act resembles the CRPD and shows Malaysia's commitment to its international

¹³⁶⁸ Section 46 of the Act, as discussed in paragraph 4.3.2 in Chapter 4. Suspension of benefits is also provided for in the Act, see the discussion in paragraph 4.3.2 in Chapter 4, part b.

¹³⁶⁹ See paragraph 4.3.3 in Chapter 4.

¹³⁷⁰ See paragraph 4.3.6 in Chapter 4.

obligations. For instance, the Act highlights the importance of collaboration between the private sector; government and non-governmental organisations to ensure that PWDs can fully and effectively participate in and be included as part of society. The Act also states that employers need to conduct a proper evaluation of their employees' abilities and provide appropriate placement and management. It also contains specific provisions on rehabilitation and makes provision for a multi-faceted approach to rehabilitation. The Act further requires a collaborative effort between governmental and non-governmental stakeholders and for intervention to occur at the earliest possible stage, with a multi-disciplinary sensitive approach being applied. The use of assistive devices and the need for community-based rehabilitation are also emphasised. This section provides a clear mandate to SOSCO about how their RTW programme should be carried out. Even though rehabilitation is set as an objective in COIDA, there is a need to amend Chapter V11A, to make provision for collaboration and for a multi-faceted and multi-disciplinary approach to how workers must be rehabilitated in South Africa.

Section 35 of the *Persons with Disabilities Act of 2008* highlights the importance of the PWDs right to health, equal to those without disabilities. Role-players (both government and the private sector) are called upon to take appropriate measures to ensure that PWDs have access to health services, including gender-sensitive health-related rehabilitation. This also needs to be a priority in South Africa, for workers to be rehabilitated and ultimately returned to work. A discussion of Section 3 of the Act revealed that Malaysia has a National Council for Persons with Disabilities, with a wide range of functions such as policy development and implementation; raising awareness; making recommendations on legislative reform; and entering into agreements with other role-players *et cetera*.¹³⁷¹ It was interesting to note that the Council, by virtue of section 3, are instructed to ensure quality of rehabilitation services, as the section provides that the council needs to:

(l) to promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services;

¹³⁷¹ See paragraph 4.3.6 in Chapter 4.

(m) to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding or obtaining employment on equal basis with persons without disabilities.

The Act calls on relevant ministries, government agencies, bodies, organisations, non-governmental organisations as well as private sector actors to cooperate with the Council and to give due consideration to national plans of action and policies, relating to PWDs and to take the necessary action stipulated by legislation. The discussion also indicated that the Act contains a “follow up” provision, in that relevant parties, may be requested to submit reports to the Council. In turn, the Council also needs to submit annual reports to the authorities as prescribed¹³⁷². The Act further makes provision for the early detection of disabilities and timely intervention to stop disabilities and treatment for rehabilitation.¹³⁷³

The Council thus has several functions in promoting the advancement of PWDs. Even though there are several non-governmental disability organisations¹³⁷⁴ in South Africa, there is a need to have a designated Disability Council, and for that Council to have a firm legislative mandate to oversee matters, similar to those provided for in the *Persons with Disabilities Act of 2008*.

The next part of the chapter¹³⁷⁵ discussed the key features of SOSCO’s RTW programme, which contributed towards its success. South Africa can use these features in the development of its own RTW model, but it must be acknowledged that like SOSCO’s programme, it will take time to develop and implement a comprehensive RTW programme in South Africa.

As was discussed in Chapter 4¹³⁷⁶, SOSCO’s RTW programme was properly devised and planned before being launched in Malaysia. After the project was piloted, it was followed by international collaboration to establish a benchmark. The project was once again piloted, following a systematic case-management approach, with

¹³⁷² Section 19 of the *Persons with Disabilities Act of 2008*.

¹³⁷³ Section 21 of the *Persons with Disabilities Act of 2008*.

¹³⁷⁴ Anon 2016 <https://www.disabilityemployment.co.za/content/national-council-persons-physical-disabilities-south-africa>.

¹³⁷⁵ See paragraph 4.4 in Chapter 4.

¹³⁷⁶ See paragraph 4.4.3 in Chapter 4.

properly trained Case Managers. For South Africa, it will be essential that the RTW programme is properly planned, developed and implemented in phases, to identify shortfalls and areas in need of reform for which international collaboration will be essential.

The case management approach of SOSCO's programme is one of its key features. It was highlighted in Chapter 4¹³⁷⁷ that such an approach entails a range of services to be delivered in a collaborative manner. The assignment of cases to specific Case Managers, followed by an initial assessment, allows for the RTW process to commence at the earliest stage possible. Afterwards, an RTW plan is designed which serves as a roadmap for the rest of the RTW process as well as for the appointment of a Case Manager who will bear the responsibility of providing the necessary support, not only during the rehabilitation phase, but also after the employee has resumed duties. The case management approach to RTW is a practice the author strongly advises for South Africa, even more so where there is a dual duty¹³⁷⁸ to return workers to work.

The second feature of the programme worth commending, is the online platform SOSCO's RTW Department developed.¹³⁷⁹ The platform fulfils a wide range of services, for instance records of previous cases; the system is integrated with medical and rehabilitation services; modification guidelines; rehabilitation plans *et cetera*. This practice could be followed successfully in South Africa. It may be useful, for the Compensation Fund to develop its online platform with the help of experts, such as IT specialists who assisted SOSCO with the development of its online platform. Proper maintenance of the programme is essential and contingency plans need to be in place to make provision for the functioning of the platform, regardless of electronic connection problems.

SOSCO has made extensive efforts to present its programme to the Board, before and after it was tested for buy-in. There is also proper role clarification, even though

¹³⁷⁷ See paragraph 4.4.4 in Chapter 4.

¹³⁷⁸ Shared between the Compensation Fund and employers.

¹³⁷⁹ See paragraph 4.4.5 in Chapter 4.

SOSCO follows a centralised approach to RTW. As was discussed in Chapter 4¹³⁸⁰, SOSCO, employers and employees all have designated duties in the RTW process. For instance, SOSCO is responsible for the coordination of disability management, RTW and case management services. Employers must offer employees job protection, and also operate in close collaboration with Case Managers in order to work towards a successful RTW. Malaysian employers have a particular role to play in vocational rehabilitation such as financial assistance in the form of tax incentives, for instance, workplace modification, assistive devices, worksite assessments *et cetera* as employees need to be motivated to participate in RTW programmes. SOSCO recognises that employer participation is a social responsibility and issues certificates of recognition. Employees have a key role in SOSCO's RTW programme and must give the employer timely notice of illness or injury. Furthermore, employees must participate actively in the RTW programme, which involves participation in the development of the rehabilitation plan, in cooperation with the Case and Disability Managers. They must also attend rehabilitation and therapy sessions and communicate and interact with their employer and SOSCO on a continual basis.¹³⁸¹ SOSCO works in close collaboration with different stakeholders in order to promote RTW practices.¹³⁸² South Africa should take note that it is important to train role-players and assign responsibilities in such a manner that all parties work together to return employees to work. Duplication of duties must be avoided, and quality control measures put in place for efficient execution functioning. Assigned functions, anticipated for the South African context, will be discussed in paragraph 5.4.5 of this chapter.

SOSCO's RTW programme utilises quality rehabilitation services provided by SOSCO's rehabilitation centre, private service providers or state hospitals. The range of services was discussed in Chapter 4.¹³⁸³ If services are outsourced, service providers need to be accredited with SOSCO and meet set criteria. In South Africa, the Compensation Fund will have to draft the standards of compliance to make use of accredited service providers only, in instances where services are outsourced.

¹³⁸⁰ See paragraph 4.4.6 in Chapter 4.

¹³⁸¹ See paragraph 4.4.6 in Chapter 4.

¹³⁸² See the discussion in paragraph 4.4.6.

¹³⁸³ See paragraph 4.4.7 in Chapter 4

Medical practitioners play a vital role in the RTW process and they will need specialised training to fulfil their assigned functions. In South Africa, the Compensation Fund should consider issuing special pamphlets to instruct medical practitioners on their role in RTW. Furthermore, thought should be given to include RTW policies in the medical curriculum either in the form of further compulsory training or short courses. Other service providers (in the field of physical and social rehabilitation and assistance with personal support) need to also ensure that RTW targets are met and that the necessary services are offered to workers. As was argued earlier¹³⁸⁴, even though COIDA does make provision for different rehabilitation treatments, more detail is required to establish who will be responsible for such services and the accreditation of the service providers. All referrals to service providers must be listed on an electronic database. Case Managers could assist with referrals between the worker and different service providers. The availability of service providers is another concern that needs to be addressed. It will also be necessary to determine how the proposed NHI will impact the distribution as well as the availability and quality of service providers.

Job placement and employment support services form part of SOSCO's RTW programme.¹³⁸⁵ Different stakeholders are involved in the development and implementation of the programme. Case Managers work in close collaboration with job placement officers who are tasked to conduct job placement assessments on an individual basis, followed with the drawing up of an individual employment support plan. This is a useful feature of the RTW programme, and it is submitted that the Compensation Fund consider developing its own job placement services, after it has piloted the RTW programme. Such a programme could be developed over time, as and when the national RTW programme roll-out takes place. The success of the programme will depend on the close cooperation the Compensation Fund (and its assigned Case Managers) and the network of employers.

¹³⁸⁴ See paragraph 3.3.2.7.

¹³⁸⁵ See paragraph 4.4.8 in Chapter 4.

In chapter four a number of other initiatives by the Malaysian government to enhance the employability of PWDs was identified.¹³⁸⁶ It will be worthwhile for South Africa to consider implementation of such initiatives (which can be in the form of workshops, forum discussions, roadshows, conferences *et cetera*) in support of its RTW programme, not only to raise awareness on the employment of PWDs, but also to address specific goals, such as the importance of stakeholder buy-in; best practices in disability management; community based rehabilitation).

5.3.2 Australia

In the second part of Chapter four, the Australian experience was discussed, with a particular focus on the state of Victoria. The discussion commenced with a discussion of the applicable federal legislation and case law, and several important observations can be drawn from this discussion. The *Disability Discrimination Act 135 of 1992* provides that employers have the duty to reasonably accommodate disabled employees, unless it will lead to an unjustifiable hardship, like in South Africa. The Act also contains a list of circumstances which must be considered when determining whether an accommodation will lead to an unjustifiable hardship.¹³⁸⁷ The *Disability Services Act, 129 of 1986* determines that PWDs receive a wide range of support services, for instance vocational training, workplace modification *et cetera*. The *Fair Work Act, 28 of 2009* allows for flexible working arrangements under certain circumstances, including disability.¹³⁸⁸ The functions of Safe Work Australia in terms of the *Safe Work Australia Act, 84 of 2009* were discussed as well as some of its RTW initiatives. The next part of the chapter¹³⁸⁹ contained a discussion of the applicable federal case law which highlights the duty of employers to provide reasonable adjustments. From the discussion, several themes emerged. For instance, employers need to be pro-active and conduct formal workplace assessments and put plans in place to make reasonable adjustments. Employers need to communicate the inherent requirements to medical practitioners, for them to

¹³⁸⁶ See paragraph 4.4.9.

¹³⁸⁷ See section 11(1) of the Act, paragraph 4.8.1 in Chapter 4. As was discussed in chapter 3 paragraph 3.3.2.4, South Africa has Codes and guidelines in place which contain valuable information pertaining to the duty to reasonably accommodate.

¹³⁸⁸ Section 65 of the Act.

¹³⁸⁹ See paragraph 4.9 in Chapter 4.

identify the reasonable adjustments needed, and communication between different role-players is thus of utmost importance. Managers need to identify the inherent requirements of the employee's position and identify the reasonable adjustments needed for the employee to remain in his/her original position.

A study of case law shows that employers need to consider federal and state laws when contemplating the dismissal of sick or injured employees. Reasonable adjustments can be a complex matter and it may take time to implement these changes. A change in technology and changing circumstances may require several adjustments that may vary over time. Defining the word "adjustment" in an Act would only limit the modification which may be required to enable an employee to perform his/her work. Employees must cooperate to identify the inherent requirements of his/her position, such as medical evidence that would help employers to identify the adjustments required. If an adjustment causes unjustifiable hardship, organisations will need verifiable proof to support their claim.

Case law further revealed that organisations are only obliged to make reasonable adjustments in order to allow employees to perform the duties they were employed for – therefore, they are not obliged to "re-deploy" an injured worker to an alternative position (unless this was a practice followed by the employer in the past). The employer will need to make enquiries with rehabilitation service providers to determine whether the employee has the capacity to perform the inherent requirements of the position he/she was employed for. Employees must have the opportunity to consider the proposed adjustments before employment can be terminated.

Victoria's legislative framework provides the foundation upon which their RTW programme is based. The discussion¹³⁹⁰ commenced with the functions of WorkSafe, which is responsible for, *inter alia*, the management of Victoria's compensation scheme, with its obligations firmly rooted in statute. The discussion also contained a summary of certain WorkSafe's RTW initiatives confirming that RTW is a team effort. It was interesting to note that WorkSafe is always aiming to improve RTW efforts by

¹³⁹⁰ See paragraph 4.11.2 in Chapter 4.

developing different initiatives, in conjunction with different role-players. For instance,¹³⁹¹ WorkSafe provides digital training and a knowledge management platform for occupational rehabilitation service providers to improve their capability. It has developed a Worksite Assessment initiative that allows occupational physicians access to the workplace to evaluate whether workers will be suitable for alternative duties after injury as well as a six-month wage subsidy to assist employers of injured workers. Several research projects have been undertaken to improve RTW rates, such as the Victorian Injured Workers Outcomes Study and other programmes aimed at improving the management of RTW processes, such as conflict resolution and using holistic claims management for work-related mental injury. Cooperation with general practitioners improve diagnostic and treatment practices.

These initiatives just as they stand will, however, not be suited to South Africa. It is suggested that after the RTW programme has been launched in this country, the Compensation Fund will identify areas of concern, and develop plans in order to address these along the same lines as WorkSafe has done. For instance, should it be decided that the RTW rate of workers with mental illness is not satisfactory, the Compensation Fund will have to conduct research in order to identify the underlying problems and come up with solutions. The Compensation Fund will need to find ways and means to strengthen the roles of the different players, such as training; reimbursements; collaboration agreements with service providers; and establishing an Inspectorate for RTW *et cetera*.

The following part of the chapter concerns Victoria's legislative framework and the *Workplace Injury Rehabilitation and Compensation Act 67 of 2013*. The Act contains a designated RTW section, the main theme being that all role players need to cooperate in the RTW process to ensure a successful outcome. The duties of the different role-players were discussed commencing with the duties of employers¹³⁹².

The duties of employers are set out in sections 103-07 of WIRA, which determines that employers need to plan for RTW and engage in consultation. All employers are obliged to appoint fulltime RTW coordinators in the case of an organisation with a

¹³⁹¹ See paragraph 4.11.2 in Chapter 4.

¹³⁹² See paragraph 4.12.1.2 in Chapter 4.

remuneration rateable remuneration of \$2 000 000 or higher. An organisation with a rateable remuneration lower than that need only appoint an RTW coordinator for a duration of 52 weeks. Information pertaining to RTW must be made available to all workers, irrespective of the rateable remuneration of the organisation.

Furthermore, employers are obliged to provide injured workers with suitable employment (work which fits the worker's current abilities whilst considering the factors prescribed in the Act) should they be unable to return to their pre-injury work, for a 52-week period after the injury has occurred. Employers thus have to keep the employee's position vacant for 52 weeks before dismissal can be considered. Once workers have returned to full capacity, employers need to provide them with pre-injury employment or the equivalent thereof. As was explained in Chapter 4,¹³⁹³ this duty requires many steps and employers are encouraged to make use of the guide WorkSafe has developed to investigate suitable employment options. In South Africa employers are obliged to conduct incapacity enquiries when dismissal is considered and the employer must determine whether the employee is capable of performing his or her duties, either in the pre-injury employment period or in the case of the "availability of any suitable alternative work". It was also explained in Chapter 3 that certain factors should be considered, such as the nature of the job; period of absence; seriousness of the illness or injury; possibility of securing alternative employment; and adapting duties or work circumstances.¹³⁹⁴

It is submitted that the list should be extended to include other factors¹³⁹⁵ that are directly relevant to the duty to provide suitable employment. It needs to include factors such as the worker's age, education, skills and work experience; the existence and nature of an RTW plan as well as the provision of occupational rehabilitation. It is further submitted that the duty to provide suitable employment must be included as a specific employer's obligation, either in the LRA or in Chapter V11A of COIDA, for a period of 52 weeks to enable the employee to return to gainful employment, in a modified position, while participating in an RTW programme. A specified duration will assist both employers and employees to gain a better

¹³⁹³ See paragraph 4.12.1.1 in Chapter 4.

¹³⁹⁴ Schedule 8 to the LRA: Code of Good Practice Item 10 and 11.

¹³⁹⁵ See the factors in Section 3 of WIRA, listed in paragraph in 4.12.1.1 in Chapter 4.

understanding of their functions, with the employer having more certainty regarding alternative employment.

As was discussed in chapter 4, no employers are exempt from RTW programmes. Employers are obliged to make the RTW information available to all workers, but the Act does not specify how, it is only stated that workers must be consulted in this regard. The RTW information should include the following specified information: Obligations of the employer in terms of WIRA and how the employer will meet its obligations; rights and obligations of workers, also prescribed in WIRA. Workers must be informed about where they can obtain further information about their rights and obligations. The RTW plan must further contain the details of an authorised agent, selected by the employer, as well as the details of the RTW coordinator (if applicable). Lastly, it needs to specify the procedure to be followed in resolving RTW disputes. The employer is further obliged to consult with the worker (or his representative), the worker's health practitioner (with his/her consent) and the occupational rehabilitation provider. Lastly, the employer must notify WorkSafe, when the worker has returned. Employers who are in breach of RTW duties may face a fine.

In Chapter 3 of the thesis¹³⁹⁶, it was argued that in South Africa, Chapter V11A of COIDA in its current format stipulates that the Compensation Fund bears the responsibility to rehabilitate and re-integrate workers into employment, even though the Department of Labour announced in 2018 that "the rehabilitation, re-integration and return to work programs as outlined in the new Chapter shall be implemented by all employers¹³⁹⁷. The dual roles of the Compensation Fund and employers thus require further clarification and possible amendments. It is submitted that all employers in South Africa need to have designated RTW duties which need to be set out in COIDA. The RTW obligations of employers will be proposed in paragraph 5.4.6 of this chapter.

¹³⁹⁶ See paragraph 3.3.2.7 in Chapter 3.

¹³⁹⁷ <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>.

The role health practitioners play in the RTW in order to ensure safe and early return of workers was also highlighted. WorkSafe has developed a guide in order to equip health practitioners with information that will enable them to lend more effective support to workers during the RTW process. For instance, they need to consult with the worker, not only for the purpose of completing the Certificate of Capacity, but also advise them on RTW. This may include the following functions: Inform the worker of the health benefits of safe work; identify barriers to RTW; make referrals to other service providers; and communicate with the patient's employer *et cetera*.

For South Africa, it is proposed that the RTW Department will be responsible for overseeing and developing RTW guidelines for health practitioners. RTW must be on health practitioners' agendas when assessing their patients' work capacity. Employers need to engage with health practitioners to discuss the genuine and reasonable requirements of the workers' positions and any treatment necessary in order to allow the worker to resume employment (either to pre-injury employment or in other suitable employment). The Department may further consider sending a delegate to national medical conferences or other healthcare events to raise RTW awareness amongst health practitioners.

The next section¹³⁹⁸ in Chapter 4 highlighted the roles and duties of RTW coordinators, and their responsibility to consult with different stakeholders to monitor RTW progress; resolve disputes which may arise; and assist employer to meet their RTW duties. Although an RTW coordinator is not required to undergo formal training WorkSafe, however, does encourage endorsed RTW coordinator training and further support is provided through distribution of fact sheets. It was further illustrated which soft skills, qualities and attributes could be of value for RTW coordinators. It will be proposed later in the chapter that RTW coordinators need to be appointed in South Africa to assist workers to safely return to work. It is suggested that the RTW coordinators must attend RTW training courses (on legislative topics and also in the development and refinement of attributes required for RTW coordinators). These could be offered by accredited service providers. The Compensation Fund needs to empower coordinators, through the use of information

¹³⁹⁸ See paragraph 4.12.1.4 in Chapter 4.

sheets relevant to RTW; by offering short courses and seminars on RTW; by inviting RTW specialists to address RTW coordinators at public events; and by the establishment of an online data basis which will assist RTW coordinators to make the necessary referrals. Organisations could consider the appointment of one of their own personnel members (for instance, a competent HR official) to act as RTW coordinator. It is proposed that the Compensation Fund must appoint designated Case Managers to assist RTW coordinators, to develop individualised RTW plans.

In the next part of the chapter, the role of injured workers was discussed. Their duties are entrenched in legislation, specifically sections 111-117 of WIRA. Incapacitated workers will have the following obligations: They must make reasonable efforts to actively participate and cooperate in the planning of their RTW; actively make use of and cooperate with an occupational rehabilitation service; make reasonable efforts to return to work either to suitable employment or pre-injury employment at the worker's place of employment or another place of employment; actively cooperate and participate in any assessment of their work capacity, rehabilitation progress or future employment prospects. Workers must also be available for an interview (if requested) with a representative of WorkSafe to improve their opportunities regarding RTW. Section 116 of WIRA was also discussed, which stipulates that benefits of workers may be suspended or terminated in instances where they fail to meet their RTW obligations. In the South African milieu, all these duties can be incorporated into existing legislation, since they are vital for workers to return to work. It is proposed that these duties be included in Chapter V11A of COIDA. Other duties of workers will be proposed in paragraph 5.4.6 of this chapter. WorkSafe encourages workers to follow a pro-active approach in their RTW process, for instance they must communicate with their employers about suitable employment and be honest with health practitioners regarding their capacities.

It was noted that Work Safe's agents or insurers do not have RTW obligations under WIRA, as these duties rest with employers and workers. They are however available to assist workers and employers to meet their RTW obligations, but they cannot fulfil any of these obligations on their behalf. They can for instance assist with RTW planning and writing of RTW arrangements, on condition that the employer still

takes ownership of such arrangements. It was indicated in chapter 3¹³⁹⁹ of the thesis that the Compensation Fund, by virtue of the recently amended Chapter V11A, is responsible to provide facilities, services and benefits aimed at rehabilitating employees suffering from occupational injuries or diseases and to reduce disability resulting from their injuries or diseases. It will be proposed later in the chapter, that the Compensation Fund will also have other duties especially with regard to RTW arrangements for companies who employ fifty or fewer employees.

In the next part of the chapter¹⁴⁰⁰, the conflict resolution protocol was discussed. This procedure is set out in WIRA. It stipulates that in case of a dispute the employer and worker are encouraged to attempt to resolve the dispute themselves, according to an agreed procedure or, in the absence thereof, in accordance to the procedure specified in directions given by the Minister. With regard to conflict resolution, it is submitted that Chapter V11A of COIDA must make provision for the manner in which disputes in the RTW process will be settled. It is proposed that a similar procedure be followed, but that the procedure the employer and employee have agreed upon, be in writing, and contained in the RTW plan. The proposed RTW department of the Compensation Fund may also publish and distribute conflict resolution strategies among role-players.

In the next section, the WorkSafe Incentive Scheme for Employers and its annual rewards programme was discussed. In Victoria, assistance and recognition are given to employers who support innovative RTW practices and who employ PWDs. With regard to South Africa, the Compensation Fund¹⁴⁰¹ indicated that it is still in the process of developing a policy framework on employers' incentives to assist with compliance in terms of the Act. It is unclear how employers will be rewarded. Once the guidelines are published, it will be important to determine whether they would assist to promote the RTW of workers. It will also be worthwhile to compare them to international best practices and standards.

¹³⁹⁹ See paragraph 3.3.2.7 in Chapter 3.

¹⁴⁰⁰ See paragraph 4.12.1.7 in Chapter 4.

¹⁴⁰¹ Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>

The discussion then continued with a reflection of other Victorian legislation, which provides implicit support for RTW. It was followed with a discussion of relevant case law, which highlighted that employers and employees have certain duties to return workers to work. For instance, employers are obliged to make reasonable adjustments, unless the employee cannot adequately perform the “genuine and reasonable” requirement of the position. When determining what reasonable adjustments may be required, it is important to consider all circumstances and facts, as well as other factors like the nature of the disability; the worker’s role in the organisation; financial circumstances of the employer; size of the workplace *et cetera*. A discussion of Victorian case law further revealed that after the 52-week employment obligation has lapsed, employers are obliged to consider whether a reasonable adjustment could be made to enable employees to perform adequately, according to genuine and reasonable requirements of employment. Employers also need to consider medical opinions and other relevant reports, which may provide information pertaining to workplace roles. Further, they need to guard against an approach where the duty to reasonably accommodate is interpreted too narrowly, and therefore, all the possibilities of how reasonable adjustments may be made, need to be explored. The task of determining the reasonable and genuine requirements of employment can be daunting and employers may need to treat the employment relationship, employment contract as well as the operational and organisational requirements in a holistic manner. It does not mean that the employee should only be able to meet the inherent requirements of his or her pre-injury position. The genuine and reasonable requirements of employment may also include certain abilities and skills relevant to the type of duties of the employment. It further emerged from the discussion that employers need to be cognisant of the factors listed in section 20(3) of WIRA. It also emerged that employees are obliged to express their needs to employers and to duly inform employers of the nature of their disability as well as difficulties they may experience. These principles crystallised from case law and are important aspects to consider when employers and employees engage with one another with the aim of returning ill or injured workers to work. Employers and employees need to communicate as much as possible in order to identify whether reasonable accommodation can be made to

return the worker back to gainful employment. Such an investigation requires a holistic view of the employment relationship as a whole. These principles can easily be incorporated into the RTW agenda of South Africa, especially by way of role clarification in the recently amended Chapter V11A of COIDA.

The next section explores a proposed RTW model for South Africa, and recommendations regarding the current legal framework are made.

5.4 Proposed Return to Work model for South Africa

The recommendations made below flow from the discussions in chapters one to four above. The assessment in chapter 3 concluded that the management of disabilities and diseases and the RTW of the injured and disabled are areas in need of reform, especially in a developing country like South Africa.¹⁴⁰² The lack of a suitable RTW framework often results in injured or ill workers becoming unemployed and dependent on disability pensions or incapacity compensation.¹⁴⁰³ Thus, an RTW system that allows for injured or disabled workers to secure and retain suitable employment and promotion possibilities is essential in furthering the worker's re-integration into the labour market and society in general. This can only be achieved through legislative frameworks, supported by institutional and organisational arrangements.¹⁴⁰⁴ South Africa needs to have an RTW framework in place which would ensure that PWDs are assessed thoroughly, rehabilitated as far as possible and re-integrated into society. South Africa has a long way to go in mainstreaming its disability schemes and develop a "core value" approach to disability.¹⁴⁰⁵ Basson¹⁴⁰⁶ correctly observes that PWDs do not enjoy dedicated disability-specific legislation, which has developed in a piecemeal-fashion and does not set out the rights to which they are entitled.¹⁴⁰⁷ South Africa needs detailed legislative provisions which set out duties to rehabilitate, re-integrate and return workers back to work. It

¹⁴⁰² Olivier et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries" 9.

¹⁴⁰³ Olivier et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries" 9.

¹⁴⁰⁴ Olivier et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries" 9.

¹⁴⁰⁵ Millard "Models to Assess Personal Injury" 704.

¹⁴⁰⁶ Basson 2017 *PER / PELJ* 1.

¹⁴⁰⁷ Basson 2017 *PER / PELJ* 1.

was further indicated in Chapter 3¹⁴⁰⁸ that even though policy documents from state departments make provision for a theoretical and principled framework for the rehabilitation of PWDs, there is very little focus on connecting rehabilitation with RTW programmes.¹⁴⁰⁹ Reference was made of the White Paper on the Rights of People with Disabilities,¹⁴¹⁰ which contains significant directives for RTW. For instance, affordable vocational rehabilitation and related programmes are indicated as some of its directives, and it is required that disabled employees “must have access to affordable vocational rehabilitation, skills development, job retention and return-to-work programmes after onset of disability”.¹⁴¹¹ The importance of training for those who will be involved in rehabilitation services was emphasised as well as the need for affordable assistive devices. The need for incentives (tax rebates and punitive measures) to employ and train and the need for inclusive collaboration between government departments in the administration of social security were indicated as matters worthy of investigation, and the policy also referred to examples of reasonable adjustment in the work environment. It is interesting to note that a Handbook on Reasonable Accommodation for People with Disabilities in the Public Service, which promotes a case management approach to reasonable accommodation already exists.¹⁴¹² However, the statistics from the Annual Report on Employment Equity in the Public Service 2015/2016, indicate a shortfall of its 2 percent representation target.¹⁴¹³ This shows that South Africa must have stronger mandatory RTW frameworks than handbook guidelines that are not being enforced. It is submitted that the case management approach, as suggested above, should form part of the proposed amendments to COIDA or of a mandatory RTW policy. It will also be necessary to determine how governmental policies that contain valuable elements of rehabilitation, re-integration and RTW will function alongside the recent

¹⁴⁰⁸ See paragraph 3.3.1 in Chapter 3.

¹⁴⁰⁹ Olivier et al The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa 221. Some of the policy documents are to be discussed in the paragraphs to follow, with the INDS being the most important policy document.

¹⁴¹⁰ See paragraph 3.3.1.1 in Chapter 3.

¹⁴¹¹ Paragraph 6.5.1.2 White Paper on Disability.

¹⁴¹² See paragraph 3.3.1.2.5 in Chapter 3.

¹⁴¹³ Annual Report on Employment Equity in the Public Service 2015/2016, 33.

amendments to COIDA as well as future amendments, to avoid duplication of functions.

It was further demonstrated in Chapter 3¹⁴¹⁴ that The Bill of Rights provides implied support for an RTW system and there are a number of sections which may be interpreted as support for the general notion of RTW provisions, in addition to the right to access to social security.¹⁴¹⁵ The South African legislative framework was also analysed, and it was argued that even though various disability management obligations do exist, for instance reasonable accommodation for PWDs, there is a need to move towards a more unified system where rehabilitation, re-integration and RTW of workers are mandatory, with clarification of the functions of all role-players involved.

*5.4.1 Recommendations to the government*¹⁴¹⁶

1. The RTW, rehabilitation and re-integration of disabled workers need to become one of the key performance indicators or one of the key strategic interventions on the agenda of the South African cabinet.
2. The government needs to be a key stakeholder in RTW, since it is in the national economic and social interest that disabled workers return to work, rather than become dependent on disability grants.
3. The COIDA Amendment Bill in its current format will need to include more detailed provisions on how objectives¹⁴¹⁷ will be reached.¹⁴¹⁸
4. It will be necessary to determine how other social security reforms will influence the role of the Compensation Fund, for instance, whether duties will

¹⁴¹⁴ See paragraph 3.3.2.3 in Chapter 3.

¹⁴¹⁵ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 9 and Grobbelaar-du Plessis and Grobler *African Disability Rights Yearbook* 315.

¹⁴¹⁶ The recommendations here also include recommendations made to the proposed RTW Department of the Compensation Fund.

¹⁴¹⁷ As was explained in Chapter 3, para 3.3.3.7, rehabilitation, reintegration and return to work is now included as aims, whereas previously the focus was merely on the payment of compensation.

¹⁴¹⁸ See paragraph 3.3.3.7 in Chapter 3 where several proposed changes to COIDA was suggested.

be delegated to the National Social Security Fund. Furthermore, other Acts¹⁴¹⁹ will need to be amended to ensure that labour legislation functions in harmony, for the RTW of disabled workers.

5. The government needs to involve as many role-players as possible, across different sectors, when conceptualising and drafting further provisions in Chapter V11A of COIDA.
6. The RTW framework must be informed by international, regional and best practices of foreign jurisdictions.
7. A multi-disciplinary approach will be needed when drawing up an RTW programme, which must accommodate a wide variety of and number of role-players.
8. Ultimately, South Africa will need a solid legislative and policy framework upon which to base an RTW programme.
9. National disability coordination committees on which PWD representation must feature strongly, need to be established. Community-based service delivery needs to be supported in collaboration with international agencies and organisations. Further, disability awareness must be raised in communities and it needs to be mainstreamed in social, economic and political agendas of government.
10. The government needs to take additional measures in order to increase funding to promote and regulate reasonable accommodation measures.
11. South Africa needs to investigate the possibility to construct suitable provincial rehabilitation centres, for the provision of multi-faceted rehabilitation services. An example would be the Malaysian rehabilitation centre.
12. Both the Malaysian and Australian experiences¹⁴²⁰ could inform the South African government on how tax incentives can motivate disabled workers to return to work. Provisions to this effect need to be contained in legislation as well.

¹⁴¹⁹ Recommendations to this effect was included in 3.3.3.8.

¹⁴²⁰ See paragraphs 4.3.3 and 4.11.1.8 in Chapter 4.

13. Clear role descriptions will be key in order to ensure that RTW targets are met. Duties need to be set out in legislation, as the experience of Victoria has demonstrated.
14. The Department of Labour needs to develop a strategy for dealing with stakeholder relations in the context of RTW, to ensure that all ¹⁴²¹ work towards a common goal.
15. Since rehabilitation is key in an RTW strategy The Departments of Labour and Social Development will have to collaborate with the Department of Health in order to ensure a sufficient supply of quality and multi-faceted rehabilitation services for every province. Community-based rehabilitation must also be on the Department's agenda in order to ensure that rehabilitation services are delivered within communities. The Government will further have to investigate how the National Health Insurance will impact on the provision of rehabilitation benefits.
16. Rehabilitation measures must be aligned with the country's profile, abilities and conditions, and need to be developed over time. The development of rehabilitation policies and legislation need to occur with the assistance of representative advisory committees, that must be properly represented to include employer and employee organisations and authorities specialising in vocational rehabilitation and organisations for disabled people. When RTW programmes are rolled-out nationally, it will be important that staff who are tasked with vocational rehabilitation must receive training.
17. Appropriate research needs to be conducted on how an RTW programme will be piloted in different industries and sectors. For instance, a decision needs to be taken whether the RTW programme will be piloted within a certain industry where a high rate of occupational illness and injury exists or only within a certain province.

¹⁴²¹ Different stakeholders, besides employers; employees; Case Managers and the Compensation Fund are involved in the RTW programme, such as Trade Unions, Employer Organisations; Professional Bodies; Larger Disability Movements.

18. Awareness-raising will be key, and the government will need to arrange special workshops with delegates from different sectors to build a networking community to help with collaboration, essential for the RTW processes.
19. The Compensation Fund will need to conduct roadshows in order to raise awareness of the benefits of RTW.
20. South Africa will need to formulate key strategies to meet the international benchmarks for time it takes to return a worker to work. This timeline can be used when designing RTW systems and processes.
21. If RTW-specific legislation is enacted, it needs to be amended from time to time in order to meet international and regional developments.
22. The public sector should model best practices relating to RTW.
23. It is recommended that in the private sector, RTW programmes should be the dual responsibility of employers and the Compensation Fund. It is the author's submission that all employers should have RTW functions (as will be alluded in 5.4.2). However the Compensation Fund will bear the primary responsibility to oversee RTW.
24. COIDA currently stipulates that the Compensation Fund is responsible for the duty to rehabilitate and re-integrate. This needs clarification and legislative amendment.
25. It will be essential to have clarification of the functions of all role-players involved in the RTW process.
26. It is recommended that the Compensation Fund establishes an RTW department/Task team responsible for formulating and implementing RTW programmes. It will be necessary to have tri-partite representation in the RTW department to allow for engagement with government, employers and employees.
27. A RTW programme requires time and resources to be developed comprehensively.

28. In South Africa the Compensation Fund, must plan, develop and implement its programme in phases, in order to identify shortfalls and areas in need of reform, before ultimately having a national roll-out of the programme.
29. The RTW programme needs to be presented to the Organisational Management structure of the Compensation fund, the Department of Labour as well as other stakeholders in order to ensure buy-in (both before and after the pilot phase).
30. International collaboration will be essential for determining the standard of the South African programme. This should be an ongoing process as the programme develops over time, and valuable lessons could be learnt from countries who have had successes in RTW. South Africa must consider close collaboration with international organisations such as NIDMAR and the ILO, in order to develop a country specific RTW protocol.
31. In the event of the programme having been piloted, it is proposed that the designated RTW department of the Compensation Fund investigate how it could be decentralised to include all employers. However, it needs to be investigated whether designated employers will bear a similar responsibility to that of the Compensation Fund in returning workers to work. This can be done by concluding Memoranda of Understanding within specific industries, in order to have a gradual roll-out of the RTW programme.
32. It is proposed that South Africa follows a case management approach, similar to that of Malaysia. This includes a range of services delivered in a collaborative manner. The assignment of cases to specific managers, followed by an initial assessment, will allow the RTW process to commence at the earliest stage possible. Afterwards, an RTW plan must be designed to serve as a roadmap for the rest of the RTW process and for the appointment of Case Managers who must provide the necessary support, not only during the rehabilitation phase, but also after employees have resumed duties. The case management approach to RTW is a practice the author strongly advises for

South Africa and even more so where there is a dual duty¹⁴²² to return workers to work.

33.As was argued in Chapter 3¹⁴²³, the Compensation Fund announced in 2018 that the COIDA Amendment Bill will make provision for the Fund to appoint Disability Managers responsible for the coordination, implementation of rehabilitation and reintegration programmes in consultation with Case Managers appointed by employers in the workplace.¹⁴²⁴ However, the Bill does not make any direct reference to the appointment of designated Disability or Case Managers. It is the author's recommendation that COIDA needs to be amended in such a way as to make provision for both in the following manner: During the pilot phase of the programme, the Compensation Fund will bear the responsibility of appointing both Disability Managers and Case Managers. After the programme has been piloted, the Compensation Fund should gradually move towards a decentralised approach and designated employers (those with 50 or more employees) who will be responsible for appointing their own Case Managers. There should be incentive schemes for non-designated employers (50 or fewer employees) who take the initiative to appoint Case Managers. The Compensation Fund will, in all instances, be responsible for the appointment of a Disability Manager. The functions of both Case Managers and Disability Managers are set out in paragraph 5.4.5.

34.Before a national roll-out of the RTW programme could be considered, the Compensation Fund needs to ensure that there is a sufficient number of Disability Managers available to assist in all provinces.

35.The Compensation Fund must ensure that chosen Disability Managers undergo proper training by international experts in the field of RTW by

¹⁴²² Shared between the Compensation Fund and employers.

¹⁴²³ See paragraph 3.3.3.7 in Chapter 3.

¹⁴²⁴ Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>.

sending them abroad to gain better insight from international practices and benchmarks.

36. Prevention is a vital component of RTW, and Disability Managers must also be assigned duties in this regard.
37. The Compensation Fund needs to monitor the workload of Disability Managers and ensure that the ratio between Case Managers and workers is fair.
38. It is proposed that Case Managers maintain contact with workers, for a period of at least six months after RTW to lend assistance in the new work environment.
39. The Compensation Fund will need to support Case Managers by: i) providing them with information sheets relevant to RTW; ii) offering short courses, on legislative aspects and soft skills required; iii) organising seminars and public events; and iv) having a fully functional online data base that will enable RTW coordinators to make the necessary referrals. Organisations may also consider an in-house appointment of their company's RTW coordinator, provided that he/she is knowledgeable about RTW. It is proposed that the Compensation Fund have designated Case Managers to assist RTW coordinators and draw up individualised RTW plans.
40. The Compensation Fund should have a designated RTW department, as well as other departments to support workers who return to work, such as a Job Placement Unit to assist workers to transfer to a different employer, should they be unable to return to their previous one. Vocational training should also be available to workers in instances where the worker requires re-training. The Malaysian experience has demonstrated that this would involve Case Managers to work in close collaboration with job placement officers who are tasked with assessments on an individual basis, followed by the drafting of an individual employment support plan. This is a useful feature of the RTW programme, and it is submitted that the Compensation Fund should consider developing its own job placement services, after the pilot phase of the RTW programme has been completed.

41. The Compensation Fund must ensure that the RTW programme contains an accountability component, and regular reports will need to be submitted by role-players to a designated board or department.
42. The entire RTW and rehabilitation processes need to be evidence-based, preferably by using an online platform, as the Malaysian experience has demonstrated. This will allow others to learn from the successes of organisations and to promote RTW practices that are organised and transparent. It also provides records of previous cases and the system is useful when integrated with medical and rehabilitation services; modification guidelines; rehabilitation plans *et cetera*. This practice could be imitated in South Africa, with the assistance of IT specialists who assisted SOSCO in the development of its online platform. IT specialists in the Department of Labour should compare such services to the online platforms used in Malaysia, but must be sensitive to South Africa's needs, with contingency plans for solutions in case of malfunction owing to power failures and connectivity problems.
43. If an online RTW system is established, it will need to contain a "feed forward" component to enable other organisations or even countries (both in Africa and internationally) to share and compare best practices.
44. At times it may be necessary for the Compensation Fund to outsource some of its services. However, in order to ensure quality, such service providers need to be accredited and comply with set criteria.
45. A multi-disciplinary approach to RTW must be adopted at all times, and it may be necessary for different service providers to work together. Here again, the Malaysian experience has demonstrated that it is possible to be successful when there is a common goal.
46. The disability community needs to be involved, in both the planning and implementation phase of the RTW programme.
47. The Compensation Fund should utilise the International Classification of Functioning, Disability and Health as a measuring tool to move away from a

sole medical diagnosis towards a more holistic method of determining disability and health status.

48. Platforms need to be developed where employers who comply with RTW out of their own accord, can be recognised.
49. The Department will need to establish a council for the development of disability management policies.
50. The RTW programme determine a limit for a worker's absence, for the longer this period becomes, the more difficult it is to return to work. Thus, strategies to reduce the turn-around time of RTW must be investigated.
51. The Compensation Fund must have strategies in place to motivate workers and to encourage them not to give up on the RTW programme prematurely.
52. Employers will need guidance on assessing the work experience and abilities of employees with a disability or reduced capacity to work. The employee's main purpose is to remain in the same job with possible modification of current job tasks, work schedule, working environment or re-training.
53. The Compensation Fund must provide advisory and information services relating to RTW and job retention and to guide employers, if needs be, on aspects such as work schedule adjustments and vocational retraining of workers.
54. Services provided to PWDs in the RTW programme need to be of a high standard, properly coordinated, and available without delay.
55. Other service providers (physical and social rehabilitation and assistance with personal support) must ensure that RTW targets are met and that the necessary services are offered to workers. As was argued earlier, even though COIDA does make provision for distinct types of rehabilitation to occur, more detail is required to establish who will be responsible for these services and what their credentials should be. All referrals to service providers must be done electronically, facilitated by Case Managers. The availability of service must be addressed as well as the question of the impact that the NHI will have on the availability and quality of service providers.

56. The Australian experience has demonstrated that it is important to continuously identify initiatives to improve RTW outcomes, such as Worksite Assessment Initiatives; Injured Workers Outcome studies; information distribution on aspects such as the meaning of "suitable employment"; holistic claim management processes *et cetera*, as were discussed in Chapter 4. However, it will not be sensible for South Africa to adopt these initiatives as they are. It is suggested that after the RTW programme has been launched in South Africa, the Compensation Fund must identify areas of concern, and develop plans in order to address those challenges, along the lines of what WorkSafe (Victoria) has done, as was discussed above. For instance, should it be determined that the RTW rate of workers with mental illness is not satisfactory, the Compensation Fund will need to conduct research in order to identify the problems and find solutions. The Compensation Fund will need to find ways and means to reinforce the functions of the different role-players. This could be effected in ways, such as training; reimbursements; collaboration agreements with service providers; and establishing an Inspectorate for RTW *et cetera*.

57. The Compensation Fund should also have a conflict resolution protocol in place and further publish conflict resolution strategies and communicate them to role-players. As was argued in Chapter 3, COIDA must be amended to include a provision on how disputes in the RTW process will be settled. It is recommended that employers and employees agree in writing, on a conflict resolution procedure that must be included in the RTW plan.

58. It will be essential to give recognition to employers who have an innovative RTW policy in place. As was mentioned in Chapter 3 the Compensation Fund¹⁴²⁵ has indicated that it is still in the process of developing a policy framework for employers' incentives to assist with compliance in terms of the Act. It is not clear how employers will be rewarded. Once the guidelines have been published, it will be important to determine whether they will assist to

¹⁴²⁵ Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>.

promote the RTW of workers and it will be worthwhile to measure the guidelines against international best practices and standards.

59. The Compensation Fund needs to investigate the possibility to design a disability management curriculum in order to build human capital for organisations to implement disability management at organisational level.¹⁴²⁶

5.4.2 Recommendations to employers

1. As was indicated in 5.4.1, COIDA in its current format stipulates that the Compensation Fund is responsible for rehabilitation and re-integration. The dual roles of the Compensation Fund and employers thus require further clarification and legislative amendment.
2. After the RTW programme is piloted, it will be necessary to determine whether designated employers will have the same responsibility as the Compensation Fund in returning workers to work. This can be done by drawing up a Memoranda of Understanding within specific industries, to facilitate a gradual roll-out of the RTW programme.
3. Even if a centralised approach is followed at first, clear guidelines need to be formulated on how employers and the Compensation Fund could work together.
4. It is suggested that designated employers (with 50 or more employees) have the duty to appoint a Case Manager who will act as the RTW coordinator. The Compensation Fund will be responsible for appointing Case Managers for non-designated employers.
5. However, it is possible for all employers to fulfil RTW obligations, in conjunction with the Compensation Fund, as will be explained in the paragraphs to follow.
6. All employers (irrespective of company size) need to formulate action plans on how disabled workers can be rehabilitated and returned to work.

¹⁴²⁶ Similar to the Malaysian experience, see the discussion in paragraph 4.4.4 and 4.4.6 in Chapter 4.

7. Strategies to raise awareness amongst co-workers on RTW procedures as well as its benefits must be put in place. Co-workers need to know that they have a significant role in such a process.
8. Organisations need to pay more attention to the prevention of illness or injuries by conducting preventative worksite assessments.
9. In-house training on RTW and disability management must be conducted at regular intervals.
10. Line managers need to undergo RTW-training, and managers must give their cooperation to limit the turn-around time of RTW.
11. Employers must show a sincere interest in returning disabled workers to work and motivate workers to fully participate in RTW.
12. Measures to combat stigma associated to disability should form part of the RTW plan, also amongst co-workers.
13. Realistic time frames need to be developed. It may take time for RTW to show results.
14. Employers should include job retention measures in an RTW programme and consider the importance of early intervention and referral of the employee to appropriate services.
15. Employers must further include measures that will allow for gradual resumption of work.
16. There must be a potential for alternative jobs should a disabled employee be unable to resume previous employment.
17. Employers should encourage the use of support and technical services and identify adjustments that might be required.
18. Employers need to be aware of the different options of RTW. For example, in some cases employees might be able to resume employment, without requiring changes to the workplace, while others may require adjustments to the job itself, or the workstation, or a transfer to an alternative position in the organisation. The organisation must ensure that its disability management

strategy makes provision for these different forms of adjustment. Employers thus need to have disability management strategies in place which encompass different forms of adjustments to the work environment and tasks.

19. In the re-deployment of a disabled employee, employers must keep the occupational preferences of the employee in mind, and if necessary, engage in discussions with employee representatives. If an employee becomes disabled, employers need to take a holistic view to ensure that the residual skills and potential of the employee are considered, before any further steps are taken.
20. Experts should assist employers (or employer organisations, or groups of employers) by providing them with the necessary guidance, services and incentives to avail themselves of the opportunities for PWDs in retaining their employment and resume work after an event causing disablement.
21. Measures should be in place to make provision for a range of services, including individual counselling, job retention programmes, individualised rehabilitation programmes, promotion of talent and experience of employees to either promote opportunities in their current employment or in another occupation, without loss of income. These measures should be developed in conjunction with employer and employee organisations, of PWD organisations and relevant professionals.
22. Organisations should be encouraged to publish a Code of Good Practice on Disability Management.
23. Employers must ensure employees' job protection and need to work in close collaboration with Case Managers for successful RTW outcomes.
24. Employers need to be pro-active and conduct formal workplace assessments and put plans in place to make reasonable adjustments. Employers need to communicate the genuine and reasonable requirements of the position to medical practitioners for them to identify the reasonable adjustments required in necessary to accommodate the workers' current capacity. Communication between different role-players is therefore vital.

25. Managers need to identify the inherent requirements of the employee's position and then identify the reasonable adjustments that could be effected in order for the employee to remain in his or her original position. It may also be necessary for employers to consider reports from vocational rehabilitation service providers. Reasonable accommodation measures need to be attended to on a case-to-case basis.
26. Employees need to be made aware of the range of benefits available within their respective social security schemes, which should make provision for preventative, compensatory or rehabilitative functions.
27. Employers need to understand that the duty to make reasonable adjustments as part of RTW, can be complex and they need to acquaint themselves with the duties as set out in legislation, when considering the dismissal of sick or injured employees.
28. Information pertaining to RTW must be made available to all workers, irrespective of the rateable remuneration of the organisation. If the worker is enrolled in an RTW programme, an RTW plan¹⁴²⁷ needs to be agreed upon in writing and the following RTW information should be included: Obligations of the employer in terms of COIDA (once it is amended to make provision for detailed employer obligation) and how the employer will meet its obligations; regarding the rights and obligations of workers, also as stipulated in COIDA. It also needs to contain information about where workers can obtain further information about their rights and obligations. The RTW plan also needs to contain the details of the different service providers involved in the RTW process, as well as the details of the RTW coordinator. It further needs to specify the procedure to be followed in resolving RTW disputes. The employer is obliged to consult with the worker (or his representative), the worker's health practitioner (with their consent) and the occupational rehabilitation

¹⁴²⁷ The fact that South Africa has eleven official languages should be filtered into the employer's RTW planning. The RTW plan needs to be in a language the employee understands in order for him or her to have a clear understanding of his obligations as well as the obligations of other role-players. The Compensation Fund also need to raise RTW awareness amongst organisations in a language they understand, especially smaller organisations in rural areas.

provider. Lastly, the employer must notify the Compensation Fund when the worker has returned to work.

29. In South Africa, the Code of Good Practice does not prescribe an uninterrupted period of absence before dismissal can be considered, and it is recommended, in line with the Australian experience, that all employers are obliged to provide injured workers with suitable employment¹⁴²⁸ for a 52 week period after the injury has occurred should they be unable to return to their pre-injury work. Once workers have returned to full capacity, employers must allow pre-injury employment or its equivalent. In South Africa employers are obliged to conduct incapacity enquiries when contemplating the dismissal of an employee as was explained in Chapter 3,¹⁴²⁹ and the employer must determine whether the employee is capable of performing his/her duties, either in the pre-injury employment or the “availability of any suitable alternative work”. It was also explained in Chapter 3 that certain factors should be considered such as the nature of the job; period of absence; seriousness of the illness or injury; possibility of securing alternative employment; and adapting to duties or work circumstances.¹⁴³⁰ It is submitted that the list should be broadened to include other factors¹⁴³¹ relevant to the duty to provide suitable employment. It needs to include factors such as the worker’s age, education, skills and work experience; the existence and nature of an RTW plan that has been agreed upon as well as whether occupational rehabilitation is provided to the worker. It is further submitted that the duty to provide suitable employment for 52 weeks after injury be included as a specific employer’s obligation either in the LRA or in Chapter V11A of COIDA. Having a time-bound duty will assist both employees and employers to better understand their functions and to bring more certainty regarding the employer’s duty to provide suitable employment.

¹⁴²⁸ In South Africa, there is also a duty to provide suitable employment, but it is not time bound and it is only contained in the Code of Good Practice. See the discussion in chapter 3, paragraph 3.3.3.2.

¹⁴²⁹ See paragraph 3.3.3.2 in Chapter 4.

¹⁴³⁰ Schedule 8 to the LRA: Code of Good Practice Item 10 and 11.

¹⁴³¹ See the factors in Section 3 of WIRA, listed in paragraph in 4.12.1.1 in Chapter 4.

30. It is further recommended that, after 52 weeks have lapsed, employers are obliged to consider what reasonable adjustments could be made or the employee to perform the genuine and reasonable requirements of employment. Employers also need to consider medical opinions and other relevant reports, which may provide information pertaining to workplace roles. Further, they need to guard against an approach where the duty to reasonable accommodation is interpreted too narrowly.
31. In South Africa the duty to accommodate is only bound to the "inherent requirements" of the position, and it is submitted that this requirement be broadened, in line with Australia, to rather entail "genuine and reasonable requirements". One will therefore need to look beyond the inherent requirements of the pre-injury position, and also consider other factors such as the employment relationship as a whole, including the employment contract as well as the operational and organisational requirements. The genuine and reasonable requirements of employment may also include certain abilities and skills relevant to the duties of the employment.¹⁴³²
32. If the adjustment causes unjustifiable hardship for the company, it must have solid proof to support its claim.
33. The Malaysian comparison revealed that additional support may be required once workers return to work. It is submitted that employers need to identify additional support systems which could be deployed to assist employees once they have resumed employment, such as the "fading" and "natural support" that were discussed in Chapter 4.
34. Employers need to identify strategies for trade unions to be involved and engaged in RTW processes. If a collective agreement is reached, employers must respect and adhere to its provisions and ensure that the organisation's RTW policy is in line with such an agreement. If RTW professionals have been

¹⁴³²

In South Africa in the Technical Assistance Guidelines, Chapter 11, reference is drawn to "essential job functions and it is explained that it is a "set of tasks that comprises the most important activities of a job - they are not job skills, individual job tasks, or job descriptions. Therefore, in making return-to-work recommendations, a person must determine which essential job functions must be accomplished in order for modified work to be successful and productive".

appointed, they must nurture a good relationship with trade unions and be able to resolve conflicts. It is advisable to develop tools to monitor the effectiveness of the RTW system.¹⁴³³

5.4.3 Recommendations to employees

1. As was indicated in Chapter 3, the current version of COIDA does not contain detailed employee obligations pertaining to RTW. It will be essential to include the duties of employees in Chapter V11A of COIDA. Employees must be assigned specific functions (proposed functions to be set out in the flow diagram) to ensure role clarification and better cooperation of role-players in the RTW programme.
2. It is recommended that employees have a key role to play in the RTW programme, and they must give the employer early notice of illness or injury, after which an RTW plan must be formulated.
3. After an RTW plan has been agreed upon, the worker will need to cooperate and participate in any assessment of his/her capacity,¹⁴³⁴ and also participate in an interview with a representative of the Compensation Fund (assigned Case Manager) for the purpose of enhancing his/her opportunity to RTW.
4. The worker needs to attend physical and vocational rehabilitation sessions, as agreed upon, in the RTW plan.
5. Whilst participating in RTW, the worker needs to remain in contact with the Case Manager and the employer for progress to be monitored.
6. The worker must make reasonable efforts to return to work, either to suitable employment or pre-injury employment at the worker's place of employment or another place of employment, as agreed upon in the RTW plan.

¹⁴³³ Guideline 23 - ISSA Guidelines RTW and Reintegration.

¹⁴³⁴ The worker needs to inform the medical practitioner of the genuine and reasonable requirements of his or her employment in order for the medical practitioner to determine his capacity to work.

7. The worker must to cooperate and participate in any further assessments where his or her rehabilitation progress or future employment prospects are assessed.
8. Employees need to be informed that benefits may be suspended or terminated if they unreasonably refuse to participate in the RTW programme. For instance, it will be required of the worker to continue with medical treatment and carry out instructions by medical officers; to not engage in activities which may hinder recovery and allow him or herself to be examined by authorised medical staff members.
9. Workers need to articulate their needs to employers and Case Managers and by informing them of difficulties they may experience.

5.4.4 Recommendations to trade unions

1. Trade unions should be educated, as they are ideal role-players to convey details pertaining to RTW.¹⁴³⁵
2. Formal Memoranda of Understanding need to be negotiated with key role-players, such as trade unions (e.g. COSATU) and other political role-players in order to promote buy-in and to assist with role clarification in the RTW process.
3. Employees' representatives could assist to establish job retention policies thorough a collective bargaining process.
4. Trade Unions could support workers throughout the RTW process.
5. In their capacity as representatives of employees, unions can exercise influence on employers to appoint experienced RTW coordinators and, through collective bargaining, encourage employers to consider flexible working arrangements.¹⁴³⁶

¹⁴³⁵ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 103-104.
¹⁴³⁶ International Association of Industrial Accident Boards and Commissions 2016
<https://www.ini.wa.gov/Main/WorkingSolutions/Docs/ReturnToWorkFoundationalApproachReturnFunction.pdf>.

6. Trade unions can also play a vital role in the development of individual injury management plans for workers.¹⁴³⁷
7. Collective agreements can be used as a tool to avoid unnecessary conflict and premature strike action.
8. Trade unions could play a valuable role to remove stigma and raise awareness that PWDs.
9. Furthermore, they could motivate workers positively to remove pre-conceived notions on the RTW process.
10. Unions must encourage members to participate in RTW programmes and once workers have returned to work, union representatives need to remain in contact them and should provide on-going support for at least six months. Unions, like employers, need to adhere to conflict management procedures agreed upon during collective bargaining, and should strive to avoid premature strike action.

5.4.5 Proposed obligations: RTW Programme (Pilot Phase)

Table 1: Compensation Fund (Designated RTW Department) (Pilot Phase)

<i>Compensation Fund (Designated RTW Department)</i>
<ol style="list-style-type: none"> 1. Conceptualise the proposed RTW model (consult key role-players as suggested in paragraph 5.4.1). 2. Identify a province or a sector where the RTW programme will be piloted. 3. Appoint and train Case Managers and adopt a case management approach. 4. Establish rehabilitation centres or points of delivery (if services need to be outsourced, accreditation and quality control processes need to be in place). 5. Establish an electronic platform for data capturing.

¹⁴³⁷ Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers" 103-104.

6. Conduct research in order to establish effectiveness of programme and identify areas of concern.
7. Develop a conflict resolution protocol.
8. Develop RTW manuals for the different role-players.
9. Give recognition to employers who have innovative RTW practices in place.
10. Provide advisory and information services relating to RTW and job retention and guide employers, if needs be, on aspects such as work schedule adjustments; work capacity and vocational retraining of workers.
11. Develop a quality control manual.
12. Provide advisory and information services to general practitioners and inform them of their role to assist workers to return to work.
13. Identify measures to ensure buy-in from different role-players and identify measures to motivate role-players to actively remain involved in the RTW process.
14. Repeat the pilot project in another province or sector.
15. The first and second pilot projects must be presented to the Board of the Compensation Fund.

Table 2: Government (Pilot Phase)

<i>Government</i>
<ol style="list-style-type: none"> 1. Involve as many role-players as possible, across different sectors, when conceptualising and drafting further provisions in Chapter V11A of COIDA.¹⁴³⁸ 2. Finalise the policy framework on employers' incentives, as was noted in Chapter 3.¹⁴³⁹ 3. Determine how other social security reforms will impact on the role of the

¹⁴³⁸ The sections which requires amendment was indicted in paragraph 3.3.2.7 in Chapter 3.
¹⁴³⁹ See paragraph 3.3.3.7 in Chapter 3.

Compensation Fund, for instance, whether duties will be delegated to the National Social Security Fund. Furthermore, other Acts¹⁴⁴⁰ will need to be amended to ensure that all labour legislation function in harmony.

4. Establish National Disability Coordination Committees, with effective representation of PWDs. Community based service delivery needs to be supported in collaboration with international agencies and organisations. Further, awareness on disability must be raised in communities. Disability needs to be mainstreamed in social, economic and political agendas of government.
5. Take additional measures in order to increase budgets for the promotion and regulation of reasonable accommodation measures. Investigate the feasibility of constructing multi-faceted provincial rehabilitation centres, for multi-faceted rehabilitation services along the lines the Malaysian rehabilitation centre.
6. Department of Labour to have a key strategy to deal with stakeholder relations, to ensure that all stakeholders¹⁴⁴¹ work towards a common goal.
7. Departments of Labour and Social Development to collaborate with the Department of Health to determine whether sufficient high quality and multi-faceted rehabilitation services, as well as access to assistance and devices are available in every province. Community-based rehabilitation needs to be part of the Department's agenda and the impact that the National Health Insurance will have on rehabilitation benefits, must be investigated.
8. Train staff tasked with vocational rehabilitation and encourage them to attend RTW workshops and conferences with delegates from difference sectors to build a networking community.
9. Establish National Disability Coordination Committees, with effective representation of PWDs. Support community-based service delivery in

¹⁴⁴⁰ Recommendations to this effect was included in 3.3.3.8 in Chapter 3.

¹⁴⁴¹ Different stakeholders, besides employers; employees; Case Managers and the Compensation Fund are involved in the RTW programme, such as Trade Unions, Employer Organisations; Professional Bodies; Larger Disability Movements.

collaboration with international agencies and organisations. Raise awareness on disability in communities and mainstream in social, economic and political agendas of government.

10. Make RTW, rehabilitation and re-integration of disabled workers a Key Performance Indicator or one of the key strategic interventions of the cabinet.

11. Exercise best practices relating to RTW.

Table 3: Employers (Irrespective of size) (Pilot Phase)

<i>Employers (Irrespective of size)¹⁴⁴²</i>
<ol style="list-style-type: none">1. Give their full cooperation to the Compensation Fund for the pilot phase of the RTW programme.2. Formulate RTW action plans with realistic time frames in conjunction with Case and Disability Managers.3. Collaborate closely with assigned Case and Disability Managers to investigate how employee could be returned to work gradually.4. Conduct workplace assessments in order to identify reasonable accommodation measures.5. Have a holistic overview of the employment relationship; employment contract; genuine and reasonable requirements of the worker's position; residual skills etc in order to determine whether and how the employee will be able to return to work.6. Provide dismissal protection to workers whilst participating in the pilot RTW programme.7. Report to the Compensation Fund in instances where dismissal is contemplated and submit reports on RTW progress.

¹⁴⁴² For purposes of the Pilot phase, a distinction is not drawn between designated and non-designated employers since the duty to appoint Case Managers will rest with the Compensation Fund.

Table 4: Workers (Pilot Phase)

<i>Workers</i>
<ol style="list-style-type: none">1. Notify the employer of illness/injury as soon as possible.2. Engage in consultation with the Case Manager and employer to agree to an RTW plan in writing.3. Participate in all assessments necessary in order to determine work capacity.4. Attend physical and vocational rehabilitation sessions as well and retraining sessions, if applicable.5. Remain in close contact with the Case Manager during the recovery and RTW process.6. Make reasonable efforts to return to work either to suitable employment or pre-injury employment at the worker's place of employment or another place of employment, as agreed upon in the RTW plan.7. Refrain from conduct or actions that may lead to suspension or termination of benefits.8. Mention needs and difficulties to Case Manager and employer.

Table 5: Disability Managers (Pilot Phase)

<i>Disability Managers</i>
<ol style="list-style-type: none">1. Act as liaison between the employers and employees.2. Prepare an RTW plan in conjunction with employers, employees, and Case Managers.3. Advise employees on their rights and duties in respect of legislation.4. Inform Case Managers whether the employer have an RTW plan in place as well as the options available to employees to resume work.5. Inform employers when employees will be able to return to work.

6. Assist the employers in meeting their RTW obligations.
7. Coordinate functional needs assessment of employees.
8. Collect reports from all the role-players and coordinate the chain of opinions.
9. Ensure that the rights of participants are protected.
10. Resolve disputes that may arise.

Table 6: Case Managers (Pilot Phase)

<i>Case Managers</i>
<ol style="list-style-type: none"> 1. Follow a case management approach in order to assist workers to return to work. 2. Support workers during recovery and for a duration of six months after the resuming of employment. 3. Keep track of employees' RTW progress and inform the Disability Managers and employers of progress. 4. Report on the possibility of the employee resuming employment.

Table 7: Health Practitioners (Pilot Phase)

<i>Health Practitioners</i>
<ol style="list-style-type: none"> 1. Consult with Case Managers on genuine and reasonable requirements of the employees' position when assessing workers' capacity to work. 2. Inform workers of the benefits of work in the recovery process. 3. Submit reports timeously to allow workers to resume employment in a safe and prompt manner.

Table 8: Trade Unions (Pilot Phase)

<i>Trade Unions</i>
<ol style="list-style-type: none">1. Represent workers and advise them on RTW obligations and rights during the RTW pilot programme.2. Assist with conflict resolution, if needs be.3. Assist with buy-in amongst members.4. Assist with drafting of RTW plan, if needs be.5. Support workers once they have returned to work.6. Assist to establish job retention policies, individualised disability management plans and assist workers to acquire flexible working arrangements.

5.4.6 Proposed obligations: RTW Programme (Post-Pilot Phase)

Table 9: Compensation Fund (Designated RTW Department) (Post-Pilot Phase)

<i>Compensation Fund (Designated RTW Department)</i>
<ol style="list-style-type: none">1. Should be responsible for appointing disability managers for all cases, and Case Managers for non-designated employers only.2. Continue training of Disability Managers.3. Continue to use a case management approach to RTW.4. Increase the number of facilities where physical and vocational rehabilitation can occur, with quality control measures in place (in conjunction with the Department of Health).5. Develop RTW and disability management protocols and manuals for different industries.6. Continue to improve the electronic platform in order to have an online centralised system where all services are delivered in a prompt and

coordinated manner and develop databases of best practices.

7. Continue to monitor the implementation of RTW programmes nationally.
8. Improve quality control measures and conflict resolution procedures.
9. Continue to provide advisory and information services relating to RTW and job retention and to guide employers on aspects such as work schedule adjustments; work capacity and vocational retraining of workers.
10. Give recognition to non-designated employers who appoint Case Managers out of their own accord.
11. Continue to provide advisory and information services to general practitioners.
12. Identify other measures to motivate all role-players to remain active and motivated.
13. Support Case Managers appointed by designated employers.
14. Establish a Job Placement and Retraining Unit to allow for re-employment and retraining in a wide range of sectors in the open labour market.
15. Analyse RTW compliance reports.
16. Identify strategies to reduce the number of days it takes to return workers to work and formulate other strategies relevant to the RTW process, such as an RTW manual for employees suffering from mental illness.
17. Continue the RTW programme with international best practices.
18. Obtain NIDMAR certification and obtain a disability management curriculum in order to train Disability Managers at organisation level.
19. Establish a call centre to assist all parties with RTW relevant inquiries.
20. Appoint an RTW Inspectorate with authority to enter workplaces and issue RTW improvement notices in instances where employers are in contravention of RTW obligations.

Table 10: Government (Post-Pilot Phase)

Government
<ol style="list-style-type: none">1. Disability needs to continue to be mainstreamed in social, economic and political agendas of government.2. National disability coordination committees should have designated functions, including the RTW of ill or injured employees.3. Must continue to investigate ways to support and enhance community-based service delivery.4. Budget for the promotion and regulation of reasonable accommodation measures.5. Establish more provincial rehabilitation centres, where multi-faceted rehabilitation services can be provided. It will be essential to provide on-going training for staff tasked with vocational and physical rehabilitation.6. Develop further strategies on stakeholder relations, in order to ensure that all stakeholders¹⁴⁴³ work towards a common goal.7. Arrange more RTW workshops and conferences with delegates from different sectors to further develop a networking community.8. The public sector should model best practices relating to RTW.9. The Director-General of the Department of Labour should be authorised to not only appoint medical advisory panels as currently set out in COIDA, but also the mandate to appoint other specialised advisory panels on rehabilitation and RTW services and obligations to create a multi-disciplinary focus on the prevention of illnesses or injuries.10. Strive to collect more reliable data on disability to inform RTW programmes.11. Actively support the integration of PWDs into employment. This can be achieved by a variety of measures, such as incentive-oriented quota schemes;

¹⁴⁴³ Different stakeholders, besides employers; employees; Case Managers and the Compensation Fund are involved in the RTW programme, such as Trade Unions, Employer Organisations; Professional Bodies; Larger Disability Movements.

vocational training and financial assistance to organisations employing PWDs, such as tax incentives.

12. Implement action plans, which *inter alia*, make provision for adaptation of workplaces; supporting the production of affordable individualised assistive devices and individual assistance and public awareness training to combat negative attitudes and prejudices towards workers with disabilities.

13. National rehabilitation plans for all groups of PWDs need to be established, with the assistance of experts and PWD organisations.

14. Sign Memoranda of Understanding with trade unions on RTW arrangements.

Table 11: Non-designated and Designated Employers (Post-Pilot Phase)

<i>Non-designated Employers (fewer than 50 employees)</i>	<i>Designated Employers (50 or more employees)</i>
<ol style="list-style-type: none"> 1. Work in close collaboration with assigned Case and Disability Managers. 2. Formulate RTW plans in writing with realistic time frames. 3. Conduct preventative worksite assessments and formulate measures which can assist with the early identification of illness and injury. 4. Motivate workers during RTW process. 5. Conduct workplace assessments in order to identify reasonable accommodation measures, with the assistance of the Disability Manager. 6. Have a holistic overview of the employment relationship; employment contract; genuine and reasonable 	<ol style="list-style-type: none"> 1. Appoint a Case Manager for a duration of 52 weeks, who will work in conjunction with the assigned Disability Manager of the Compensation Fund. 2. Formulate an RTW plan in writing with realistic time frames. 3. Conduct preventative worksite assessments and formulate measures which can assist with the early identification of illness and injury. 4. Conduct workplace assessments in order to identify reasonable accommodation measures, with the assistance of the Disability Manager if assistance is required. 5. Have a holistic overview of the

<p>requirements of the worker's position; residual skills <i>et cetera</i> in order to determine whether and how the employee will be able to return to work.</p> <p>7. Provide suitable employment for a duration of 52 weeks, as discussed in paragraph 5.4.2.</p> <p>8. Agree to a conflict resolution protocol together with the employee.</p> <p>9. Remain in contact with the Case and Disability Manager in order to remain up to date regarding the worker's recovery and RTW progress.</p> <p>10. Inform all workers of RTW rights and obligations in a language they understand.</p> <p>11. Report to the Compensation Fund in instances where dismissal is contemplated and submit reports on RTW progress.</p> <p>12. After the employee has informed the employer of his or her illness or injury, employers are obliged to report it to the Compensation Fund as soon as possible but no later than seven days after occurrence, to allow for the drafting of the RTW plan to begin as soon as possible.</p> <p>13. Employers need to keep proper</p>	<p>employment relationship; employment contract; genuine and reasonable requirements of the worker's position; residual skills etc in order to determine whether and how the employee will be able to return to work.</p> <p>6. Provide suitable employment for a duration of 52 weeks, as discussed in paragraph 5.4.2.</p> <p>7. Agree to a conflict resolution protocol together with the employee.</p> <p>8. Remain in contact with the Case and Disability Manager in order to remain up to date regarding the worker's recovery and RTW progress.</p> <p>9. Formulate strategies to raise awareness on RTW amongst all employees.</p> <p>10. Conduct in-house training on disability management and RTW.</p> <p>11. Develop disability management strategies unique to the organisation and industry.</p> <p>12. Inform all workers of RTW rights and obligations in a language they understand.</p> <p>13. Follow a case management approach in order to return the worker back to work.</p>
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records at all times.

14. Employers need to investigate measures which will allow ill or injured employees to gradually resume work.

15. Employers need to consult with an employee or his/her representative as well as experts (medical and vocational) as soon as an employee becomes disabled in order to gather enough evidence in order to obtain a holistic picture of the employee's residual skills.

14. Publish a Code of Good Practice on Disability Management.

15. Investigate different avenues to provide additional support to workers once they resume employment.

16. Adhere to collective agreements, if applicable.

17. Monitor the effectiveness of the organisation's RTW plan.

18. Report to the Compensation Fund in instances where dismissal is contemplated and submit reports on RTW progress.

19. After the employee has informed the employer of his or her illness or injury, employers are obliged to report it to the Compensation Fund as soon as possible but no later than seven days after occurrence, to allow for the drafting of the RTW plan to begin as soon as possible.

20. Employers need to keep proper records at all times.

21. Employers should be encouraged to collaborate with other employers in the industry in order to establish a network to allow for placement of disabled workers.

22. Employers need to investigate

	<p>measures which will allow ill or injured employees to gradually resume work.</p> <p>23. Employers need to consult with the employee or his/her representative as well as experts (medical and vocational) as soon as employee becomes disabled in order to gather enough evidence in order to obtain a holistic picture of the employee's residual skills.</p>
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Table 12: Workers (Post-Pilot Phase)

<i>Workers</i>
<ol style="list-style-type: none"> 1. Notify the employer of illness as soon as possible, and in the case of an accident, within 48 hours. 2. Engage in consultation with the Case Manager and employer in order to agree to an RTW plan in writing. 3. Participate in all assessments necessary to determine work capacity. 4. Attend physical and vocational rehabilitation sessions as well and retraining sessions, if applicable. 5. Remain in close contact with the Case Manager during the recovery and RTW process. 6. Make reasonable efforts to return to work either to suitable employment or pre-injury employment at the worker's place of employment or another place of employment, as agreed upon in the RTW plan. 7. Refrain from conduct or actions which may cause suspension or termination of benefits. 8. Express needs and difficulties to Case Manager and employer.

9. Should the worker be unable to resume employment, the worker should undergo a final multi-disciplinary assessment to establish why the worker was unable to return to work.

Table 13: Disability Managers (Post-Pilot Phase)

<i>Disability Managers</i>
<ol style="list-style-type: none"> 1. Act as liaison between the employer and employee. 2. Prepare an RTW plan in conjunction with the employee, employer, and Case Manager. 3. Advise the employee on his/her rights and duties in respect of legislation. 4. Inform Case Managers on whether the employer has an RTW plan in place as well as the options available to the employee to resume work. 5. Informs the employer when the employee will return to work. 6. Assist the employer to meet his RTW obligations. 7. Coordinate the functional needs assessment of the employee. 8. Collects reports from all the role-players and coordinate the chain of opinions in order to gather advice on rehabilitation, worksite adjustment and work task adjustments. 9. Ensure that the rights of participant's are protected. 10. Resolve disputes which may arise.

Table 14: Health Practitioners (Post-Pilot Phase)

<i>Health Practitioners</i>
<ol style="list-style-type: none"> 1. Consult with Case Managers on the genuine and reasonable requirements of the employee's position when assessing the worker's capacity to work. 2. Inform workers of the benefits of work in the recovery process. 3. Submit reports in time in order to allow the worker to resume employment in

a safe and prompt manner.

Table 15: Case Managers (Post-Pilot Phase)

<i>Case Managers</i>
<ol style="list-style-type: none">1. Follow a case management approach in order to assist the worker to return to work.2. Support the worker during recovery and for a duration of six months after the employee resumes employment.3. Keep track of the employees' RTW progress and inform the Disability Manager and the employer of progress made in this regard.4. Report on the possibility of the employee resuming employment.

Table 16: Trade Unions (Post-Pilot Phase)

<i>Trade Unions</i>
<ol style="list-style-type: none">1. Represent workers and advise workers on RTW obligations and rights.2. Assist with conflict resolution.3. Assist with buy-in amongst members by re-assuring workers that returning to work is in their best interest.4. Assist with drafting of RTW plan.5. Negotiate Memoranda of Understanding in order to assist with role clarification in the RTW process.6. Assist to establish job retention policies, individual disability management plans and assist the worker to request flexible working arrangements.7. Lend support to the worker throughout the RTW process and when they have returned to work.8. Assist Case Managers, by providing information pertaining to job descriptions within a specific industry.

9. Advise family members of workers on RTW processes.

10. Assist workers with job placements or consult with other unions on options for placing workers in other position when unable to perform under their current collective agreement.

5.6 Concluding remarks

When South Africa signed and ratified the CRPD in 2007, it committed itself to either amend its current laws or enact new legislation to meet the obligations as stipulated by the CRPD. South Africa is, *inter alia*, obliged to: Ensure that reasonable accommodation measures are provided to PWDs in the workplace; promote physical and vocational rehabilitation; secure job retention and RTW programmes for PWDs.

Even though COIDA has been amended recently to include rehabilitation, re-integration and RTW as objectives, it is argued that South Africa will need to have targeted legislation and policies in place, with mandatory disability management functions to allow for PWDs to be returned to gainful employment. In this context, a comparative analysis of international and regional law and analysis of RTW practices in two foreign jurisdictions were valuable. The observations drawn from the comparative discussions enabled the author to devise recommendations and identify assigned functions of role-players, such as the government, employers, employees and Case Managers.

The case law, which was discussed in Chapter 4, clearly indicates that employers still do not seem to understand how intricate the management of disabled employees could be and demonstrates that more detailed guidelines are needed. South Africa must identify role-players tasked to investigate strategies to ensure that disabled workers are given the fair opportunity to participate in an RTW programme, which must be compared to international standards. This will require time and resources and the commitment of all the stakeholders involved with such processes within the framework of a unique South African context. The current and on-going reforms in the health and labour sectors must be seen as an opportunity to embrace change and address poor service delivery and unemployment. Designated roles could only

be assigned to different state departments, and programmes developed, once partnerships with international role-players such as NIDAR have been established. Programmes will need to be piloted and the data collected during this process will have to be analysed to address shortcomings experienced during roll-out. Amendments must be enacted before a national roll-out can be considered. Most important, a legislative framework, which will detail RTW obligations for the Compensation Fund, employers and employees must be in place. Should individuals be excluded from the ambit of protection from COIDA, a different policy to provide for alternative arrangements for those who are self-employed or employed in the informal sector, will be required. The differential treatment for occupational and non-occupational illness and accidents must also be considered. Socio-economic aspects must be factored into any proposed changes to legislation.

To summarise, the overall aim of RTW is to assist the injured or disabled worker to return to employment as soon as possible, taking the injury or disability into consideration. To achieve this, it is suggested that there must be mandatory legislative obligations, and that COIDA should be instrumental in conveying these obligations. If COIDA is amended, it must be determined whether it is aligned with the broader legislative and policy framework, and to investigate whether all the key principles of RTW are included. Provision must be made for early intervention. An effective rehabilitation programme, preferably workplace-based, must be in place. It should follow a case management approach, as was successfully implemented in Malaysia. It is also submitted that COIDA needs to contain provisions which will ensure on-going consultation and collaboration between all the stakeholders in the RTW process. These individual elements are complex, but even more so if they are part of a chain in the RTW process. Hence, alongside the amendments, manuals containing rights and obligations in layman's terms, should be written for all role-players.

Without South Africa having an appropriate and detailed RTW framework, ill or injured employees stand the risk of losing their jobs and becoming dependent on family members and/or disability grants. This may have a direct impact on other constitutionally guaranteed rights, such as the right to dignity. If South Africa could

find a way for different governmental sectors to cooperate closely with the private sector, it may succeed in approaching social security in a more comprehensive manner.

This recommendations made in the study may contribute to furthering the development of an RTW agenda for South Africa. For South Africa to rehabilitate and return disabled workers to work, it will be essential to stipulate a clear role-clarification in Chapter V11A of COIDA. It will be necessary to conduct further research on how a RTW agenda will impact other legislation. Furthermore, it must be determined how social security reforms will impact RTW in South Africa.

In conclusion, PWDs can make a valuable contribution in the formal employment sector and society at large, which should recognise their contributions, as set out in the preamble of the CRPD:

Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty.

Bibliography

Literature

African Union Commission and New Zealand Crown *The African Union Handbook*

African Union Commission and New Zealand Crown *The African Union Handbook 2nd edition 2015* (Jointly published by the African Union Commission and New Zealand Ministry of Foreign Affairs and Trade/Manat Aorere)

African Union "Social Policy Framework for Africa"

African Union "Social Policy Framework for Africa" Unpublished contribution delivered at Namibia Windhoek *Social Policy Framework for Africa*" (27-31 October 2008 Windhoek)

Allen *University of New South Wales Law Journal*

Allen, D. "Adverse effects: Can the fair work act address workplace discrimination for employees with disability" 2018 *University of New South Wales Law Journal*, 41(3), 846-870

Awang et al 2017 *Journal of Rehabilitative Medicine*

Awang H et al "Factors related to the successful return to work following multi-disciplinary rehabilitation" 2017 *Journal of Rehabilitative Medicine* 520-525

Awang, Mansor and Rodrigo *Southeast Asian J Trop Med Public Health*

Awang H, Mansor N and Rodrigo KA "Work Related Injury and Illness: Exploring the Return-to-Work Program in Malaysia" 2015 *Southeast Asian J Trop Med Public Health* Volume 46 No 6 1124-1133

Awang, Shahabudin and Mansor *Asia Pacific Journal of Public Health*

Awang H, Shahabudin SM and Mansor N "Return-to-Work Program for Injured Workers: Factors of Successful Return to Employment" 2007 *Asia Pacific Journal of Public Health* 1-15

Basser and Jones Melbourne University Law Review

Basser L and Jones M "The Disability Discrimination Act 1992: A Three-Dimensional Approach To Operationalising Human Rights 2002 Melbourne University Law Review 254-284

Basson 2017 *PER / PELJ*

Basson Y "Selected Developments in South African Labour Legislation related to Persons with Disabilities" 2017 *PER / PELJ* 1-21

Basson et al Essential Labour Law

Basson et al The new Essential Labour law Handbook 6th edition (Labour Law Publications Centurion 2017)

Behari 2017 *ILJ*

Behari A "Disability and workplace discrimination: Smith v Kit Kat Group Pty Ltd 2017 38 ILJ 438 (LC)" 2017 *ILJ* 2226-2240

Blanck 2009 *TJCLCR*

Blanck P "The right to live in the World: Disability Yesterday, Today and Tomorrow" 2009 *TJCLCR* 369-403

Bohatko-Naismith Journal of Occupational Rehabilitation

Bohatko-Naismith J et al "The Role of the Australian Workplace Return to Work Coordinator: Essential Qualities and Attributes" 2015 Journal of Occupational Rehabilitation Volume 25 65-73

Botha 2015 *De Jure*

Botha "Responsible Unionism During Collective Bargaining & Industrial Action: Are We Ready Yet?" 2015 *De Jure* 235 – 350

Chilemba 2015 *ADRY*

Chilemba EM "Regional developments disability rights and emerging disability legislation in selected African jurisdictions: A diagnostic commentary" 2015 *ADRY* 291-308

Chow, Lo and Tin Journal of UOEH

Chow SL, Lo SY and Tin T "Perceived Barriers and Facilitators for Return to Work Among Colorectal Cancer Survivors: Malaysian Healthcare Professionals Experience – A Qualitative Inquiry" 2015 Journal of UOEH 127-138

Christianson 2012 *ActaJuridica*

Christianson M "People with Disabilities inside (and outside) the South African Workplace: The Current Status of the Constitutional and Statutory Promises" 2012 *Acta Juridica* 286-305

Cole and Van der Walt 2014 *Obiter*

Cole EC and van der Walt A "The Effect of Labour Legislation in the Promotion and Integration of Persons with Disabilities in the Labour Market" 2014 *Obiter* 506-538

Combrinck 2013 *ADRY*

Combrinck H "Disability Rights in the African Regional Human Rights System During 2011 and 2012" 2013 *ADRY* 362-368

Combrinck and Mute 2014 *ADRY*

Combrinck H and Mute LM "Development Regarding Disability Rights in 2013: The African Charter and African Commission on Human and People's Rights" 2014 *ADRY* 309-317

Combrinck and Van Reenen 2011 *IJOHR*

Combrinck H and Van Reenen TP "The UN Convention on the Rights of - Persons with Disabilities in Africa: Progress after five years" 2011 *IJOHR* 133-166

De Jong 2010 *ESPC*

De Jong P "Sickness Disability and Work: Breaking the Barriers – A Synthesis of Findings across OECD countries" 2010 *ESPC* 9-165

Devi, Bickenback and Stucki 2011 *European Journal of Disability Research*

Devi N, Bickenback J and Stucki G "Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities" 2011 *European Journal of Disability Research* 249-264

Donald et al 2011 *Encyclopaedia of Occupational Health and Safety*

Donald E et al "Disability Management at the Workplace: Overview and Future Trends" 2011 *Encyclopaedia of Occupational Health and Safety* 1-3

Dubber and Garbers 2012 *Acta Juridica*

Dubber O and Garbers C "The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace" 2012 *Acta Juridica* Volume 2012 Issue 1 244-269

Dugard et al *International Law: A South African perspective*

Dugard J et al *International Law: A South African perspective* 5th edition (Juta Cape Town)

Du Plessis and Van Reenen *Aspects of Disability*

Du Plessis IG and Van Reenen T *Aspects of Disability* (Pretoria University Law Press Cape Town 2011)

Fasciglione "Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism"

Fasciglione M "Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism" in Fina VD and Cera R (eds) *International, European and National Perspectives Protecting the Rights of People with Autism in the Fields of Education and Employment* (Springer Cham Heidelberg New York Dordrecht London 2015) 145-170

Finger et al 2015 *The Journal for Researchers and Clinicians in Physical Therapy*

Finger et al "Using the International Classification of Functioning, Disability and Health in Physiotherapy in Multidisciplinary Vocational Rehabilitation: A Case Study of Low Back Pain" 2015 *The Journal for Researchers and Clinicians in Physical Therapy* 231-234

Frederiks and Visagie 2013 *South African Journal of Occupational Therapy*

Frederiks JP and Visagie S "The rehabilitation programme and functional outcomes of persons with lower limb amputations at a primary level rehabilitation centre" 2013 *South African Journal of Occupational Therapy* 18-27

Ganie *An Exploration of the Experiences and Perceptions of Employer And Caregivers*

Ganie Z *An Exploration of the Experiences and Perceptions of Employer And Caregivers of Individuals with Mild-Moderate Traumatic Brain Injury Returning to Work* (Degree – Dissertation University of the Western Cape 2016)

Gathiram 2008 *IJSW*

Gathiram N "A Critical Review of the Developmental Approach to Disability in South Africa" 2008 *International Journal of Social Welfare* 146-155

Gordon 2014 *BMC Public Health*

Gordon LG et al "The return to work experiences of middle-aged Australian workers diagnosed with colorectal cancer: a matched cohort study" 2014 *BMC Public Health* 1-11

Govindjee, Olivier and Nyenti "The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa" 216-238

Govindjee A, Olivier M and Nyenti M "The role of international and regional standards in the development of an appropriate rehabilitation, reintegration and return-to-work policy framework in South Africa" in Govindjee A, Olivier M and Dupper O *The Role of Standards in Labour and Social Security Law: International, Regional and National Perspectives* 1st ed (JUTA Cape Town 2013)

Greenberg 2012 *SJUSL*

Greenberg EE "Overcoming our Global Disability in the Workforce: Mediating the Dream" 2012 *SJUSL* 597-602

Grobbelaar-du Plessis and Grobler *African Disability Rights Yearbook*

Grobbelaar-du Plessis I and Grobler C *African Disability Rights Yearbook (Pretoria University Law Press Pretoria 2013)*

Grogan *Workplace Law*

Grogan *Workplace Law* 12th ed (JUTA place of publication 2017)

Guthrie et al 2001 *ICR*

Guthrie T et al "The South African Federal Council on Disability Social Security Policy Options for People with Disabilities in South Africa: An International and Comparative Review 2001 *ICR* 1-139

Handley 2001 *Australian Journal of Political Science*

Handley P "Caught Between a Rock and a Hard Place': Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act" 2001 *Australian Journal of Political Science*, Vol. 36, No. 3, 515-528

Harpur 2012 *Disability and Society*

Harpur P "Embracing the new disability rights paradigm: The importance of the Convention on the Rights of Persons with Disabilities" 2012 *Disability and Society* 1-14

Hassim "Supporting Disability Employment: Tax incentives"

Hassim AB "Supporting Disability Employment: Tax incentives" Unpublished contribution delivered at the Regional RTW Conference in Putra 24-25 June 2014

Hiranandani *Critical Social Work*

Hiranandani V "Towards a Critical Theory of Disability in Social Work" 2005 *Critical Social Work* 1-16.

Holness 2016 *SAJHR*

Holness W "The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace" 2016 *SAJHR* 510-537

Islam 2015 *International Journal of Social Science and Humanity*

Islam MR "Rights of the People with Disabilities and Social Exclusion in Malaysia" 2015 *International Journal of Social Science and Humanity* 171-178

Keetharuth "Major African Legal Instruments"

Keetharuth S "Major African Legal Instruments" in Boesl A and Diescho J (eds) *Human Rights in Africa* (Macmillan Education Namibia 2009) 163-231

Keys, Carter and Bédard Design of an employment insurance system for Malaysia

Keys JM, Carter J and Bédard M Design of an employment insurance system for Malaysia 1st edition (ILO 2015 Bangkok)

Klinck 2001 *EJLF*

Klinck E "It takes three to Tango: The Right to Equality, Social Security and Constitutional Law in South Africa" 2001 *European Journal of Law Reform* 163-187.

Knauf and Schultz Current Conceptual models of Return to Work"

Knauf MT and Schultz IZ "Current Conceptual models of Return to Work" in Schultz IZ and Gatchel RJ (eds) *Handbook of Return to Work* (Springer 2016) 27-51

Lane et al 2018 *Journal of Occupational Rehabilitation*

Lane TJ et al " A Prospective Cohort Study of the Impact of Return-to-work Coordinators in Getting Injured Workers back to work 2018 *Journal of Occupational Rehabilitation* 298-306

Lord et al 2010 *SPDP*

Lord J et al "Disability and International Cooperation and Development: A Review of the Policies and Practices" 2010 *SPDP* 1-46

Maja et al 2011 *SAJOT*

Maja PA et al Employing People with Disabilities in South Africa 2011 *SAJOT* 24-32

Marumoagae 2012 *PELJ*

Marumoagae MC "Disability discrimination and the right of disabled persons to access the labour market" 2012 *PELJ* 346-365

Marylyn 2004 *ILJ*

Marylyn C "Incapacity and Disability: A retrospective and Prospective Overview of the Past 25 years" 2004 *ILJ* 879-875

Merican 2010 *Journal of Politics and Law*

Merican RM "Employees' Rights under the Malaysian Social Security Organisation 2010 *Journal of Politics and Law* 24-44

Mgijima "The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa"

Mgijima I ""The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa" in Ngwenya et al (Eds) African Disability Rights Yearbook (PULP Pretoria 2016) 269-282

Millard 2006 *TSAR*

Millard D "Models to assess personal injury: lessons from Norwegian law? 2006 *TSAR* 690-704

Mohammed "Malaysia: Returning successfully to work"

Mohammed MABA "*Malaysia: Returning successfully to work*" Unpublished contribution delivered at the International Conference on Employment Rights Innovative Policies and Innovative Practices for Persons with Disabilities in Vienna, Austria 18-19th February 2013

Mohammed "Return-to-Work and Disability Management under the auspices of the Social Security Organisation, Malaysia – applying the UN Disability Convention"

Mohammed MABA "Return-to-Work and Disability Management under the auspices of the Social Security Organisation, Malaysia – applying the UN Disability Convention" Unpublished contribution delivered in Stellenbosch, South Africa, 21-22 June 2011

Mokhtar and Hisham *International Journal of Business, Economics and Law*

Mokhtar KA and Hisham I "Malaysia's Ratification of the UN Convention of the rights of Persons with Disabilities" 2016 *International Journal of Business, Economics and Law* 2016 Volume 11 83-87

Mpedi 2012 *Acta Juridica*

Mpedi LG "The Evolving Relationship Between Labour Law and Social Security" 2012 *Acta Juridica* 270-285

Mpedi and Nyenti 2015 *CICLASS*

Mpedi GM and Nyenti MAT 2015 *CICLASS* "Key International, Regional and National Instrument Regulating Social Security in the SADC" 2015 *CICLASS* 4th edition (Sunpress Stellenbosch 2015)

Msipa et al 2014 *The South African Journal on Human Rights*

Msipa D et al "Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way we think about Equality" 2014 *The South African Journal on Human Rights* 252-274

Ngwenya 2005 *Stell LR* P538

Ngwenya C "Interpreting aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative law Part 1 Defining Disability 2005 2 *Stell LR*

Ngwenya et al *African Disability Rights Yearbook*

Ngwenya C et al *African Disability Rights Yearbook* Vol 1 (Pretoria University Law Press Pretoria 2013)

Ngwenya and Pretorius 2003 *ILJ*

Ngwenya C and Pretorius L "Code of Good Practice on the Employment of People with Disabilities: An Appraisal" 2003 4 *ILJ* 1816-1839

Nxumalo 2017 *ILJ*

Nxumalo L "Transformation and the Duty of Care concerning People with Disabilities in the Workplace: An Analysis of *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 *ILJ* 483 (LC)" 2017 *ILJ* 1523-1535

Olivier "Social Security Framework"

Olivier MP "Social Security Framework" in Joubert WA et al (eds) *The Law of South Africa* 2nd edition (LexisNexis Durban 2012)

Olivier and Govindjee *Social Protection Lessons from SADC for the Global South*

Olivier M and Govindjee A *Social Protection Lessons from SADC for the Global South* 1st ed (MacMillan Palgrave 2011)

Olivier and Govindjee "Critical factors in implementing the ISSA Guidelines on Return-to-Work in developing world contexts"

Olivier and Govindjee "Critical factors in implementing the ISSA Guidelines on Return-to-Work in developing world contexts" Unpublished contribution delivered at the International Forum on Disability Management Melbourne Australia 16-19 November 2014

Olivier and Janse van Rensburg 2000 *LDD*

Olivier M and Janse van Rensburg L "Protection and Enforcement of the Right to Social Security" 2000 *LDD* 87-99

Olivier et al "Rehabilitation, Reintegration and Return-to-Work of Workers"

Olivier M et al "Rehabilitation, Reintegration and Return-to-Work of Workers who have Suffered Occupational Injuries or Diseases (Policy Prepared for the Compensation Fund of South Africa 2011)

Olivier et al 2013 International labour and social security standards: A developing country critique"

Olivier M et al International labour and social security standards: A developing country critique" in *The role of standards in labour- and social security law: international, regional and national perspectives* (eds: M Olivier, O Dupper & A Govindjee) (Juta, 2013).

Olivier et al *2015 ISLP*

Olivier M et al "Return to work: Research Project" 2015 *ISLP* 1-153

Olivier et al "Selected Perspectives"

Olivier M et al "Selected Perspectives on Return-to-work and Disability Management in Two Developing Countries: Malaysia and South Africa" *based on paper entitled 'Return-to-work and Disability Management in the developing world: Developments in South Africa and Malaysia, with reference to the UN Convention on the Rights of Persons with Disabilities and comparative precedents presented at the 16th ILERA (2 - 5 July 2012 Philadelphia)* 1-20

Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook

Olivier et al SOSCO RTW Programme in Malaysia – A Journey through a Decade: A Handbook 1st edition (SOSCO and IISLP Malaysia 2016)

Oyaro 2015 *AUILR*

Oyaro LO "The United Nations Convention on the Rights of Persons with Disabilities" 2015 *AUJLR* 348-377

Oyaro American University International Law Review

Oyaro LO "Africa at Crossroads: The United Nations Convention on the Rights of Persons with Disabilities" 2015 American University International Law Review 347-377

Pagura *Journal of the Australian Traditional-Medicine Society*

Pagura I "The Fair Work Act 2009 and You" 2011 *Journal of the Australian Traditional-Medicine Society* Vol. 17 Issue 3, 161-162

Pretorius, Klinck and Ngwena Employment Equity Law

Pretorius JL, Klinck ME and Ngwena CG Employment Equity Law (Lexisnexis 2017)

Quinn 2009 *TJCLCR*

Quinn G "The United Nations Convention on the Rights of Persons with Disabilities – Towards a new International Politics of Disability" 2009 *TJCLCR* 257-277

Rahim et al Malaysian Plan of Action for People with Disabilities 2016-2022: Way Forward"

Rahim A et al "Malaysian Plan of Action for People with Disabilities 2016-2022: Way Forward" Unpublished contribution delivered at the Seoul World Architects Congress 2017 Seoul Korea, 3-10 September 2017

Ramano *Perceptions and Practices of Occupational therapists*

Ramano, EM Perceptions and Practices of Occupational therapists in determining work capacity of employees suffering from major depressive disorder (LLM Dissertation University of Pretoria 2011)

Ramano and Buys 2018 *South African Journal of Occupation Therapy*

Ramano E and Buys T "Occupational therapists' views and perceptions of functional capacity evaluations of employees suffering from major depressive disorders" 2018 *South African Journal of Occupation Therapy* 9-15

Rooshida et al *Journal of Politics and Law*

Rooshida M et al "Employees' Rights under the Malaysian Social Security Organisation Employees' Rights under the Malaysian Social Security Organisation" 2010 *Journal of Politics and Law* 2010 24-44

Schultz and Stowell 2007 *Journal of Occupational Rehabilitation*

Schultz IZ and Stowell A "Models of Return to Work for Musculoskeletal Disorders" 2007 *Journal of Occupational Rehabilitation* 327-352

Shaari "Disability Management and the Malaysian Tax System"

Shaari A "Disability Management and the Malaysian Tax System" Unpublished contribution delivered at the SOCSO RTW Conference on Breaking Down Barriers and Moving Forward in Kuala Lumpur, 4 – 5 July 2011

Shaw et al 2008 *Journal of Occupational Rehabilitation*

Shaw, W et al " A literature review describing the role of return-to-work coordinators in trial programs and interventions designed to prevent workplace disability" 2008 *Journal of Occupational Rehabilitation*, 18 (1), 2-15

Shrey and Hursh *Journal of Occupational Rehabilitation*

Shrey DE and Hursh N "Workplace Disability Management: International Trends and Perspectives" 1999 *Journal of Occupational Rehabilitation* 45-59

Smit and Guthrie 2008 *Obiter*

Smit N and Guthrie R "Job Security for Disabled Workers: A comparative study between South Africa and Australia" 2008 *Obiter* 373-394

Sim 1999 *Social Security Bulletin*

Sim J "Improving Return-to-Work Strategies in the United States Disability Programs, with Analysis of Program Practices in Germany" 1999 *Social Security Bulletin* Vol. 62 No. 3 41-49

Smith 2014 *African Human Rights Law Journal*

Smith A "Equality constitutional adjudication in South Africa" 2014 *African Human Rights Law Journal* 609-632

Smith 2011 *Melbourne University Law Review*

Smith, B. "What kind of equality can we expect from the fair work act" 2011 *Melbourne University Law Review*, 35(2), 545-577

Smith 2012 *The International Journal of Law & Education*

Smith, N "More Things Change, the More They Stay the Same: Reasonable Adjustments' following the 2009 Amendments to the Disability Discrimination Act 1992" 2012 *The International Journal of Law & Education*, Vol. 17, Issue 1 (2012), 7-22

Ssenyonjo 2011 *The International Journal of Human Rights*

Ssenyonjo M "Reflections on state obligations with respect to economic, social and cultural rights in international human rights law" 2001 *The International Journal of Human Rights* 969-1012

Stancliffe 2014 *International Journal of Inclusive Education*

Stancliffe RJ "Inclusion of adults with disability in Australia: outcomes, legislation and issues" 2014 *International Journal of Inclusive Education*, 18:10, 1053-1063

Stein and Lord "Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities" 17-36

Stein M and Lord J "Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities" in Quinn G and Arnardotti OM in the United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives 1st ed (Martnus Nihhoff Publishers 2009)

Tyler 1993 *Melbourne University Law Review*

Tyler, M "The disability discrimination act 1992: Genesis, drafting and Prospects 1993 *Melbourne University Law Review*, 19(1), 211-228

United Nations *The Convention On The Rights Of Persons With Disabilities Training Guide*

United Nations *The Convention On The Rights Of Persons With Disabilities Training Guide* (United Nations Publication Geneva 2014)

Van Niekerk et al Law @ Work

Van Niekerk et al Law @ Work 3rd edition (LexisNexis South Africa 2015)

Van Staden *Strategy for the Employment of Persons with Disabilities*

Van Staden AF *Strategy for the Employment of Persons with Disabilities* (Phd-dissertation University of Pretoria 2011)

Wahab HA and Ayub ZA International Journal of Economics and Financial Issues

Wahab HA and Ayub ZA "Persons with Disabilities Act 2008: The Economic Promosis for People with Disabilities" 2016 International Journal of Economics and Financial Issues Volume 6 no 75 31-319

Watermeyer et al *Disability and Social Change*

Watermeyer B et al *Disability and Social Change: A South African Agenda: Disability and Human Rights: the South African Human Rights Commission* (HSRC Press 2006)

Wigget-Barnard *Disability employment attitudes and practices in South African companies: A survey and case studies*

Wigget-Barnard C *Disability employment attitudes and practices in South African companies: A survey and case studies (LLM Dissertation University of Stellenbosch 2013)*

Case Law

A.F v Italy CRPD/C/13/D/9/2012 (CRPD Committee 2013)

Andre van Zyl v Thebe Employee Benefits Risk Group (Pty) Ltd Case no GA 32808-03 of 7 July 2004

Azapo v President of the RSA 1996 (8) BCLR 1015

Bennett and Mondipak (2004) 25 *ILJ* 583 (CCMA)

Butterworth v Independence Australia Services (Human Rights) [2015] VCAT 2056

Cosma v Qantas Airways Ltd [2002] FCA 640

Davies v State of Victoria (Victoria Police [2012] VSC 343)

Du Toit & Another v Minister of Welfare and Population Development & Others 2003 (2) SA 198 (CC)

Dziurbas v Mondelez Australia Pty Ltd (Human Rights) [2015] VCAT 1432

E C Lenning Ltd t/a Besaans Du Plessis Foundries v Engelbrecht (1999) 20 *ILJ* 2516 (LAC)

Free State Consolidated Gold Mines (Operations) Bpk h/a Western Holdings Goudmyn v Labuschagne (1999) 20 *ILJ* 2823 (LAC)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46

Grant v BHP Coal Pty Ltd [2014] FWCFB 3027 and *Australian and International Pilots Association v Qantas Airways Ltd* (2014) 240 *IR* 342; [2014] FCA32

Harksen v Lane 1997 11 BCLR 1489 (CC); 1998 1 SA 300 PAR 53 (CC)

Hilditch v AHG Services (NSW) Trading As Lansvale Holden [2017] FCCA 1086

HM v Sweden CRPD/C/7/D/3/2011 (CRPD Committee 2012)

Hoffmann v South African Airways 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC)

Hong Leong Equipment Sdn.Bhd v Liew Fook Chuan 1996 1 CLJ 665

Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW) [2015] FCCA 1827

Independent Municipal & Allied Trade Union obo Strydom v Witzenburg Municipality (2008) 29 ILJ 2947 (LC)

IMATU obo Strydom v Witzenberg Municipality & others (2012) 33 ILJ 1081 (LAC)

Jansen v Legal Aid South Africa (C678/14) [2018] ZALCCT 17 (16 May 2018)

Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others 2004 6 BCLR 569 (CC)

LS v CCMA (2014) 35 ILJ 2205 (LC)

Mashavha v President of the Republic of South Africa 2005 2 SA 476 (CC); 2004 12 BCLR 1243 (CC)

MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

Ms Marie-Louise Jungelin v Sweden CRPD/C/12/D/5/2011 (CRPD Committee 14 November 2011)

Muller v Toll Transport Pty Ltd (2) [2014] VCAT 472

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)

National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape) (2004) 25 ILJ 2091 (BCA)

President of RSA v Hugo (CCT11/96) [1997] ZACC 4

Prinsloo v Van der Linde 1997 (3) SA 1012

Purohit & Moore v Gambia (2003) AHRLR 96 (ACHPR 2003)

S v Makwanyane 1995 (2) SACR 1

S v Zuma and Others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995)

SA Airways Pty Ltd v Jansen van Vuuren and Another [2013] 10 BLLR 1004 (LC) (1 November 2012)

SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae) 2014 35 ILJ 2891 (CC)

SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd 2005 26 ILJ 293 ILJ PAR 84

S.C v Brazil CRPD/C/12/D/10/2013 (CRPD Committee 2013)

Secretary, Department of Foreign Affairs and Trade v Styles [1989] FCA 342; [1989] 23 FCR 251

Smith v Kit kat Group (Pty) Ltd (JS787/14) [2016] ZALCJHB 362; [2016] 12 BLLR 1239 (LC); (2017) 38 ILJ 483 (LC) (23 September 2016)

Soobramoney v Minister of Health (Kwazulu Natal) CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015

Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration & Others (2008) 29 ILJ 1239 (LC)

Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration 2008 4 BLLR LC 356-390

Strydom v Witzenberg Municipality & others (at 1081) 2008) 29 ILJ 2947 (LC).

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan 1996 1 CLJ 771

Watts v Australian Postal Corporation [2014] FCA 370.

WH Bosch v Minister of Safety and Security (EC) unreported case number 25/2005 Port Elizabeth (19 May 2006)

Wylie and Standard Executors & Trustees (2006) 27 ILJ 2210 (CCMA)

X v Commonwealth (1999) 200 CLR 177, 208 [102]

Legislation

Accident Compensation Act 1994

Australian Human Rights Commission Federal Discrimination Law 2016

Basic Conditions of Employment Act 75 of 1997

Charter of Human Rights and Responsibilities Act 2006

Code of Good Practice on the Employment of People with Disabilities

Constituion of the Republic of South Africa, 1993

Constituion of the Republic of South Africa, 1996

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Disability Discrimination Act 135 of 1992

Disability Services Act 129 of 1986

Employment Equity Act 55 of 1998

Employment Services Act 4 of 2014

Employees Social Security Act, 1969

Fair Work Act 28 of 2009

Income Tax Act, 1967

Health Act 61 of 2003

Labour Relations Act 66 of 1995

Mine Health and Safety Act 29 of 1996

National Land Transport Act 5 of 2009

Occupational Health and Safety Act 85 of 1993

Persons with Disabilities Act, 2008

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Protected Disclosures Act 26 of 2000

Racial and Religious Tolerance Act 2001

Safe Work Australia Act 84 of 2009

Skills Development Act 97 of 1998

Social Assistance Act 13 of 2004

The Employees' Social Security (General) Regulations, 1971

Technical Assistance Guidelines on the Employment of Persons with Disabilities
The Standard Rules on the Equalization of Opportunities for Persons with Disabilities
The United Nations Convention on the Rights of People with Disabilities

Unemployment Insurance Act 63 of 2001

Workplace Injury Rehabilitation and Compensation Act 67 of 2013

International Instruments

Charter of the United Nations of 1945

Code of Practice on Managing Disability in the Workplace (Tripartite Meeting of Experts on the Management of Disability at the Workplace Geneva, October 2001)

Convention on the Elimination of All Forms of Discrimination against Women

ILO Occupational Safety and Health Convention, 1981 No.155

ILO Safety and Health in Mines Convention, 1995 No.176

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Managing Disability in the Workplace: ILO Code of Practice

Occupational Safety and Health Convention, 1981 No.155

Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities

Protocol to the United Nations Convention on the Rights of Persons with Disabilities (CRPD 2008)

The International Covenant on Economic, Social and Cultural Rights

The International Convention on the Elimination of All Forms of Racial Discrimination

UN Standard Rules on the Equalisation of Opportunities for People with Disabilities (1993)

United Nations Convention on the Rights of Persons with Disabilities (CRPD 2008)

Universal Declaration of Human Rights 1948

Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 No.159

Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 No.168

Vocational Rehabilitation (Disabled) Recommendation, 1955 No.99

Regional instruments

African Charter on Human and People's Rights (1981)

African Youth Charter (2006)

Charter of Fundamental Social Rights in SADC (2003)

Code on Social Security in the SADC (2008)

Draft Protocol on Employment and Labour 2013

Protocol on Employment and Labour in the SADC (2014)

Protocol on the Rights of People with Disabilities (2018)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (2016)

Southern African Development Community Charter of Fundamental Social Rights in SADC, 2003

Southern African Development Community Protocol on Employment and Labour, 2017

Internet Sources

ACHPR 2018 <http://www.achpr.org/activity-reports/>

ACHPR 2018 <http://www.achpr.org/activity-reports/> accessed 13 April 2018

ACHPR 2018 <http://www.achpr.org/mechanisms/older-disabled/>

ACHPR 2018 <http://www.achpr.org/mechanisms/older-disabled/> accessed 18 March 2018

ACHPR 2018 <http://www.achpr.org/resolutions/about/>

ACHPR 2018 <http://www.achpr.org/resolutions/about/> accessed 5 April 2018

ACHPR 2018 <http://www.achpr.org/states/>

ACHPR 2018 <http://www.achpr.org/states/> accessed 13 April 2018

ACHPR 2019 <http://www.achpr.org/instruments/economic-social-cultural/>

ACHPR 2019 <http://www.achpr.org/instruments/economic-social-cultural/> accessed 10 February 2019

ACHPR date unknown

http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf

ACHPR date unknown <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> accessed 3 June 2017

African Commission on Human Rights 2017 <http://www.achpr.org>.

African Commission on Human Rights 2017 <http://www.achpr.org>
accessed March 2018

African Union Commission Department of Social Affairs Date Unknown
<http://sa.au.int>

African Union Commission Department of Social Affairs Date Unknown
<http://sa.au.int> accessed 23 March 2017

Anglo American 2017 <http://www.angloamericanplatinum.com/about-us/what-we-do.aspx>

Anglo American 2017 <http://www.angloamericanplatinum.com/about-us/what-we-do.aspx> accessed 20 December 2017

Anglogold Ashanti 2017 <http://www.anglogoldashanti.com/company/overview/>

Anglogold Ashanti 2017
<http://www.anglogoldashanti.com/company/overview/> accessed 14 December 2017

Anon and date unknown <http://undocs.org/E/ESCAP/APDDP/4/REV.1>.

Anon and date unknown <http://undocs.org/E/ESCAP/APDDP/4/REV.1>.
accessed 15 March 2017

Anon and date unknown file:///C:/Users/NWUUser/Downloads/Chapter_5-9.pdf p 54.

Anon and date unknown file:///C:/Users/NWUUser/Downloads/Chapter_5-9.pdf p 54.

Anon 2016 <https://www.disabilityemployment.co.za/content/national-council-persons-physical-disabilities-south-africa>

Anon 2016 <https://www.disabilityemployment.co.za/content/national-council-persons-physical-disabilities-south-africa> accessed 2 March 2019

Anon 2002 www.mhss.gov.na

Anon 2002

www.mhss.gov.na/files/downloads/535_COntinental_plan_of_action_eng.doc
accessed on 21 October 2015

Anon 2012 <https://juta.co.za/newsletter/newsletter/ilj-monthly-preview-may-2012/>.

Anon 2012 <https://juta.co.za/newsletter/newsletter/ilj-monthly-preview-may-2012/> accessed June 2016

Anon 2012 <http://www.unescap.org/news/asia-pacific-governments-launch-new-decade-disability-inclusive-development>.

Anon 2012 <http://www.unescap.org/news/asia-pacific-governments-launch-new-decade-disability-inclusive-development> accessed November 2017

Anon 2017 <http://www.fitness4work.co.za>

Anon 2017 <http://www.fitness4work.co.za> accessed 15 December 2017

Anon 2017 <http://www.fitness4work.co.za/about-us>

Anon 2017 <http://www.fitness4work.co.za/about-us> accessed 10 March 2017

Anon 2017 <http://www.fitness4work.co.za/services/casemanagement>

Anon 2017 <http://www.fitness4work.co.za/services/casemanagement>
accessed 10 December 2017

Anon 2017 https://www.gov.za/sites/www.gov.za/files/39792_gon230.pdf

Anon 2017 https://www.gov.za/sites/www.gov.za/files/39792_gon230.pdf
accessed 14 December 2017

Anon 2017

https://www.safety2017singapore.com/pcontent/uploads/world_congress_2017_first_announcement.pdf

Ansa 2016 <https://www.nst.com.my/news/2016/11/190813/zahid-tasks-socso-enhancing-disability-management-msia>

Ansa 2016 <https://www.nst.com.my/news/2016/11/190813/zahid-tasks-socso-enhancing-disability-management-msia> accessed 18 July 2018

Apec 2013 <https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Human-Resources-Development>.

Apec 2013 <https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Human-Resources-Development> accessed June 2015

APTA date unknown <http://www.apta.org/ICF/>

APTA date unknown <http://www.apta.org/ICF/> (accessed 10 February 2019)

Arcellor Mittal 2017 <https://arcelormittalsa.com/>

Arcellor Mittal 2017 <https://arcelormittalsa.com/> accessed 100 November 2017

AU 2017 https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf

AU 2017 https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf accessed 20 October 2017

Bakti-Mind 2018 <https://mind.org.my/employment/return-to-work-programme/>

Bakti-Mind 2018 <https://mind.org.my/employment/return-to-work-programme/> accessed 15 July 2018

BAL Lawyers 2016 <https://www.lexology.com/library/detail.aspx?g=eb836c81-291d-4577-966d-6930257bf536>

BAL

Lawyers

2016

<https://www.lexology.com/library/detail.aspx?g=eb836c81-291d-4577-966d-6930257bf536> accessed 12 July 2019

Bernama 2015 <http://www.theborneopost.com/2015/07/31/11457-socso-contributors-back-to-work-under-return-to-work-programme-riot/>.

Bernama 2015 <http://www.theborneopost.com/2015/07/31/11457-socso-contributors-back-to-work-under-return-to-work-programme-riot/>.

Accessed November 2017

Blind SA 2017 <http://blindsa.org.za/2018/02/13/protocol-african-charter-human-peoples-rights-rights-persons-disabilities-africa/>

Blind SA 2017 <http://blindsa.org.za/2018/02/13/protocol-african-charter-human-peoples-rights-rights-persons-disabilities-africa/> accessed 25 April 2018

Chandler 2016 <https://www.hcamag.com/opinion/opinion-reasonable-adjustments--a-key-element-in-avoiding-workplace-discrimination-213096.aspx>

Chandler 2016 <https://www.hcamag.com/opinion/opinion-reasonable-adjustments--a-key-element-in-avoiding-workplace-discrimination-213096.aspx> accessed January 2017

Civil Society union 2011

http://www.icsw.org/images/docs/Regions/seasia/news/2011/2011-12_SEAPNewsletter_3.pdf

Civil Society union 2011

http://www.icsw.org/images/docs/Regions/seasia/news/2011/2011-12_SEAPNewsletter_3.pdf accessed June 2017

of-international-comparative-and-regional-disability-law-reform/ (accessed 12 March 2016)

Department of Labour 2013

<http://www.labour.gov.za/DOL/downloads/documents/annual-reports/compensation-fund-strategic-plan/2013-2019/cfstratplan2013.pdf>

Department of Labour 2013

<http://www.labour.gov.za/DOL/downloads/documents/annual-reports/compensation-fund-strategic-plan/2013-2019/cfstratplan2013.pdf>
accessed 10 May 2018

Department of Labour 2016/2017

<http://www.labour.gov.za/DOL/documents/annual-reports/annual-report-pfma/2017/annual-report-of-the-department-of-labour-2016-2017>

Department of Labour's Annual Report for the term 2016/2017

<http://www.labour.gov.za/DOL/documents/annual-reports/annual-report-pfma/2017/annual-report-of-the-department-of-labour-2016-2017> accessed 23 November 2017

Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs>

Department of Labour 2019 <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/department-of-labour2019s-compensation-fund-to-incentivize-employers-that-complies-with-the-rehabilitation-re-integration-and-return-to-work-programs> accessed April 2019

Department of Labour 2019

<http://www.labour.gov.za/DOL/legislation/acts/unemployment-insurance-fund/unemployment-insurance-act-no-63-of-2001>

Department of Labour 2019
<http://www.labour.gov.za/DOL/legislation/acts/unemployment-insurance-fund/unemployment-insurance-act-no-63-of-2001> accessed April 2019

Disabled World 2019 <https://www.disabled-world.com/news/africa/>

Disabled World 2019 <https://www.disabled-world.com/news/africa/> (accessed 10 April 2019)

Erasmus 2015 <https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html>

Erasmus 2015 <https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html> accessed 10 April 2017

Escap 2011 <http://www.unescap.org/resources/biwako-millennium-framework-action-towards-inclusive-barrier-free-and-rights-based-society>

Escap 2011 <http://www.unescap.org/resources/biwako-millennium-framework-action-towards-inclusive-barrier-free-and-rights-based-society> accessed January 2018

Escap 2014 <http://www.maketherightreal.net/incheon-strategy/ministerial-declaration-asian-and-pacific-decade-persons-disabilities-2013-2022>

Escap 2014 <http://www.maketherightreal.net/incheon-strategy/ministerial-declaration-asian-and-pacific-decade-persons-disabilities-2013-2022> accessed January 2018

ESCR-Net 2015 <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>

ESCR-Net 2015 <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> accessed 2 April 2018

ESCR-Net Date unknown <https://www.escr-net.org/resources/principles-and-guidelines-implementation-economic-social-cultural-rights-african-charter>

ESCR-Net Date unknown <https://www.escr-net.org/resources/principles-and-guidelines-implementation-economic-social-cultural-rights-african-charter>
accessed 3 April 2018

Fadzell 2016 <http://www.thesundaily.my/node/410000>

Fadzell 2016 <http://www.thesundaily.my/node/410000> accessed 19 July 2018

Forced Migration Review 1987 <http://www.fmreview.org/>.

Forced Migration Review 1987 <http://www.fmreview.org/> accessed June 2017

Granger 2015 <https://www.claytonutz.com/knowledge/2015/october/critical-developments-in-managing-ill-and-injured-employees>

Granger 2015 <https://www.claytonutz.com/knowledge/2015/october/critical-developments-in-managing-ill-and-injured-employees> accessed March 2016

Hassan date unknown <https://mind.org.my/wp-content/uploads/2017/09/P3-Incheon-Strategy-Implementation-in-Malaysia-Puan-Hamidah.pdf>

Hassan date unknown <https://mind.org.my/wp-content/uploads/2017/09/P3-Incheon-Strategy-Implementation-in-Malaysia-Puan-Hamidah.pdf> accessed
January 2018

Hoefsmi et al 2014 <https://www.ncbi.nlm.nih.gov/pubmed/23803441>

Hoefsmi et al 2014 <https://www.ncbi.nlm.nih.gov/pubmed/23803441>
(accessed 15 March 2016)

IBA date unknown

https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx

IBA date unknown

https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx accessed 19 July 2018

IDMSC 2010 <https://www.cspdm.ca/wp-content/uploads/2014/10/IDMSC-Newsletter-Vol-4-No-14-Malaysia-Oct-2010.pdf>.

IDMSC 2010 <https://www.cspdm.ca/wp-content/uploads/2014/10/IDMSC-Newsletter-Vol-4-No-14-Malaysia-Oct-2010.pdf>. Accessed May 2017

IDMSC 2011 Communique volume 9 no 27

http://www.nidmar.ca/news/news_articles/IDMSC%20Communique%20Vol%209%20No%2027%20PERKESO%20Rehabilitation%20Centre%20January%202015.pdf

IDMSC 2011 Communique volume 9 no 27
http://www.nidmar.ca/news/news_articles/IDMSC%20Communique%20Vol%209%20No%2027%20PERKESO%20Rehabilitation%20Centre%20January%202015.pdf accessed June 2017

IDMSC 2011

http://www.nidmar.ca/news/news_articles/IDMSC%20Communique%20Vol%205%20No%2018%20Malaysia%20December%202011.pdf

IDMSC 2011

http://www.nidmar.ca/news/news_articles/IDMSC%20Communique%20Vol%205%20No%2018%20Malaysia%20December%202011.pdf accessed may 2016

ILO 2001 <http://www.ilo.org>

ILO 2001 http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_407645.pdf accessed 24 March 2016

ILO 2001 www.ilo.org

ILO 2001 www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221116344_EN/lang--en/index.htm?ssSourceSiteId=safework accessed on 8 October 2016

ILO 2012 www.ilo.org/skills/pubs/WCMS_194822/lan

ILO 2012 www.ilo.org/skills/pubs/WCMS_194822/lan accessed 15 November 2017

ILO 2013 http://www.ilo.org/skills/pubs/WCMS_229918/lang--en/index.htm

ILO 2013 http://www.ilo.org/skills/pubs/WCMS_229918/lang--en/index.htm accessed 10 April 2016

ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863>

ILO 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53863> accessed December 2017

ILO 2017 <http://www.ilo.org>

ILO 2017 <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed on 16 April 2017

ILO 2018
http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888

ILO 2018
http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888 accessed 20 March 2018

ILO 2018 <http://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:>

ILO 2018 <http://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:>
accessed 10 April 2018

ILO 2018 <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> accessed

ILO 2018 <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> accessed 20 March 2018

ILO 2018 <http://www.ilo.org/global/about-the-ilo/newsroom/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/about-the-ilo/newsroom/lang--en/index.htm> accessed 2 April 2018

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> accessed 2 April 2018

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 10 March 2018

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/the-impact-of-the-regular-supervisory-system/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/the-impact-of-the-regular-supervisory-system/lang--en/index.htm> accessed 1 April 2018

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> accessed 10 April 2018

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm> accessed 2 March 2018

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>

ILO 2018 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> accessed 1 April 2018

ILO 2018 Reports: http://www.ilo.org/global/standards/information-resources-and-publications/WCMS_190528/lang--en/index.htm

ILO 2018 Reports: http://www.ilo.org/global/standards/information-resources-and-publications/WCMS_190528/lang--en/index.htm accessed 11 March 2018

ILO 2019

https://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102888

ILO 2019

https://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102888 accessed February 2019

ILO 2018 <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>

ILO 2018 <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm> accessed April 2018

Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715>

Indramalar 2016 <https://www.pressreader.com/malaysia/the-star-malaysia-star2/20161114/281595240110715> accessed June 2017

International Association of Industrial Accident Boards and Commissions 2016 <https://www.Ini.wa.gov/Main/WorkingSolutions/Docs/ReturnToWorkFoundationalApproachReturnFunction.pdf>

International Association of Industrial Accident Boards and Commissions 2016 <https://www.Ini.wa.gov/Main/WorkingSolutions/Docs/ReturnToWorkFoundationalApproachReturnFunction.pdf> accessed 15 July 2018

International Bar Association date unknown https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx.

International Bar Association date unknown https://www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx. Accessed April 2019

International Justice Resource Centre 2016 <http://www.ijrcenter.org>

International Justice Resource Centre 2016 <http://www.ijrcenter.org> accessed 5 April 2018

ISSA 2012 www.cspf.ir/Download.aspx?page=issamsph&sh=22

ISSA 2012 www.cspf.ir/Download.aspx?page=issamsph&sh=22 accessed on 28 March 2017

Jefferson 2017 <http://www.derebus.org.za/employment-law-update-dismissal-for-disability/>

Jefferson M 2017 <http://www.derebus.org.za/employment-law-update-dismissal-for-disability/> accessed 10 September 2017

Kesamang 2014 L

www.un.org/disabilities/documents/desa/urban_dev_lefhoko_kesamang.pptx

Kesamang 2014 L

www.un.org/disabilities/documents/desa/urban_dev_lefhoko_kesamang.pptx
accessed on 23 June 2016

Lechwano 2012 <http://www.saflii.org/za/journals/DEREBUS/2012/89.html>

Lechwano *when going to work is illegal or impossible? To what extent are employers expected to accommodate incapacitated employees?* 2012
<http://www.saflii.org/za/journals/DEREBUS/2012/89.html> accessed 12 October 2017

Lord et al 2010 <http://siteresources.worldbank.org>

Lord et al

2010 http://siteresources.worldbank.org/DISABILITY/Resources/Publications-Reports/Disability_and_Intl_Cooperation.pdf accessed on 16 June 2016

Lumb 2018 <http://www.labourguide.co.za/most-recent/2366-disabled-employees-a-duty-to-act>

Lumb 2018 <http://www.labourguide.co.za/most-recent/2366-disabled-employees-a-duty-to-act> accessed 10 November 2017

Majid 2011 <http://ripph.qc.ca/fr/node/48121>

Majid 2011 <http://ripph.qc.ca/fr/node/48121> accessed 2 March 2016

MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/>

MacDermott 2017 <https://www.peopleculture.com.au/how-long-is-too-long-when-the-job-can-no-longer-be-done-by-an-injured-worker/> accessed April 2018

Mobrepsi date unknown www.fom.ac.uk/wp-content/uploads/mobrepsi.doc

Mobrepsi date unknown www.fom.ac.uk/wp-content/uploads/mobrepsi.doc accessed 10 March 2017

Mondaq 2018

<http://www.mondaq.com/australia/x/366606/Constitutional+Administrative+Law/Workplace+Relations+discrimination+in+NSW>

Mondaq 2018

<http://www.mondaq.com/australia/x/366606/Constitutional+Administrative+Law/Workplace+Relations+discrimination+in+NSW> accessed May 2019

Mont 2004

<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1433&context=gladnetcollect>

Mont 2004

<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1433&context=gladnetcollect> accessed 15 March 2016

Motro 2016 <https://www.piperalderman.com.au/publications/employment-relations/article/7611>

Motro 2016 <https://www.piperalderman.com.au/publications/employment-relations/article/7611> accessed May 2019

Mpofu 2012 <https://www.iol.co.za/dailynews/news/departments-failing-to-meet-disabled-employment-targets-1246383>

Mpofu 2012 <https://www.iol.co.za/dailynews/news/departments-failing-to-meet-disabled-employment-targets-1246383> accessed April 2017

NEDLAC 2017 <http://nedlac.org.za/development-chambers-2/>

NEDLAC 2017 <http://nedlac.org.za/development-chambers-2/> accessed 10 August 2018

Nidmar 2013 www.idmsc.org

Nidmar 2013 www.idmsc.org (accessed 15 February 2016)

OHCHR 2019

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx

OHCHR 2019

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx
accessed March 2019

OHCHR 1996-2018

<http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

OHCHR 1996-2018

<http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>
accessed 15 April 2018

OHCHR 2014 <http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD-C-18-DR-22-2014.pdf>

OHCHR 2014 <http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD-C-18-DR-22-2014.pdf> accessed 3 April 2018

OHCHR 2018 <http://juris.ohchr.org/Search/Details/2007>

OHCHR 2018 <http://juris.ohchr.org/Search/Details/2007> accessed 2 March 2018

OHCHR 2018 CRPD/C/ZAF/1

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN

OHCHR 2018 CRPD/C/ZAF/1

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN accessed 12 April 2018

OHCHR 2018 <http://juris.ohchr.org/Search/Details/2006>

OHCHR 2018 <http://juris.ohchr.org/Search/Details/2006> accessed 10 April 2018

OHCHR 2018

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN

OHCHR 2018

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN accessed 12 April 2018

OHCHR 2019 <https://www.ohchr.org/en/hrbodies/crpd/pages/jurisprudence.aspx>

OHCHR 2019

<https://www.ohchr.org/en/hrbodies/crpd/pages/jurisprudence.aspx> accessed 10 March 2019

PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/kemudahan-pemulihan-jasmani-atau-vokasional-dan-dialisis>

PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/kemudahan-pemulihan-jasmani-atau-vokasional-dan-dialisis> accessed January 2018

PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/program-return-to-work>

PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/program-return-to-work> accessed june 2017

PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/theme/profile>

PERKESO 2017 <https://www.perkeso.gov.my/index.php/en/theme/profile> accessed December 2017

PERKESO 2018 <https://www.perkeso.gov.my/index.php/en/kemudahan-pemulihan-jasmani-atau-vokasional>

PERKESO 2018 <https://www.perkeso.gov.my/index.php/en/kemudahan-pemulihan-jasmani-atau-vokasional> accessed 19 July 2018

Population Australia 2019 <http://www.population.net.au/population-of-victoria/>

Population Australia 2019 <http://www.population.net.au/population-of-victoria/> accessed March 2019

Pratt 2017 <https://hallandwilcox.com.au/reasonable-impact-federal-discrimination-laws-managing-injured-workers/>

Pratt 2017 <https://hallandwilcox.com.au/reasonable-impact-federal-discrimination-laws-managing-injured-workers/> accessed February 2019

Ripps 2015

<http://www.mondaq.com/australia/x/401558/employee+rights+labour+relations/How+NOT+to+respond+when+an+employee+annoKunces+their+pregnancy+Lessons+for+business+from+recent+cases>

Ripps 2015

<http://www.mondaq.com/australia/x/401558/employee+rights+labour+relations/How+NOT+to+respond+when+an+employee+annoKunces+their+pregnancy+Lessons+for+business+from+recent+cases> accessed January 2019

Robin 2016 <http://www.cbn.co.za/services/safety-in-industry/a-solution-to-workforce-absenteeism-caused-by-injuries-in-the-workplace>

Robin 2016 <http://www.cbn.co.za/services/safety-in-industry/a-solution-to-workforce-absenteeism-caused-by-injuries-in-the-workplace> accessed January 2019

Rozenbergs and Bell 2019

<https://www.lexology.com/library/detail.aspx?g=dbf2e9bf-6460-489b-a3a8-7237b59cf6ff>

Rozenbergs and Bell 2019

<https://www.lexology.com/library/detail.aspx?g=dbf2e9bf-6460-489b-a3a8-7237b59cf6ff> accessed February 2019

Sabah 2016 <https://www.pressreader.com/malaysia/the-borneo-post-sabah/20160331/281513635290738>

Sabah 2016 <https://www.pressreader.com/malaysia/the-borneo-post-sabah/20160331/281513635290738> accessed January 2018

SABC News 2016

<http://www.sabc.co.za/news/a/4e2816004c0352439b629bf0bca466af/SA-disabilities-white-paper-comprehensive-and-solid>

SABC News 2016 *SA disabilities white paper comprehensive and solid*

<http://www.sabc.co.za/news/a/4e2816004c0352439b629bf0bca466af/SA-disabilities-white-paper-comprehensive-and-solid> accessed 13 March 2016

SABPP 2017 http://sabpp.co.za/wp-content/uploads/2017/10/Fact-Sheet_October_v002-with-active-links.pdf 4.

SABPP 2017 http://sabpp.co.za/wp-content/uploads/2017/10/Fact-Sheet_October_v002-with-active-links.pdf 4 accessed July 2017

SADC 2012 <http://www.sadc.int/about-sadc/overview/sa-protocols/>

SADC 2012 <http://www.sadc.int/about-sadc/overview/sa-protocols/> accessed 3 May 2017

SADC 2012 <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>

SADC 2012 <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> accessed 3 June 2017

SADC 2012 <http://www.satucc.org/.../SADC-EMPLOYMENT-AND-LABOUR-PR...>

SADC 2012 <http://www.satucc.org/.../SADC-EMPLOYMENT-AND-LABOUR-PR...> Accessed March 2016

Safe work Australia 2018 <https://www.safeworkaustralia.gov.au/workers-compensation/return-work>

Safe work Australia 2018 <https://www.safeworkaustralia.gov.au/workers-compensation/return-work> accessed April 2019

SAHRC 2002

https://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf

SAHRC 2002

https://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf (accessed 15 April 2016)

Sarr and Dube date unknown
<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/disability/FMR35/07.pdf>

Sarr and Dube date unknown
<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/disability/FMR35/07.pdf> accessed 12 February 2017

Sasol 2017 <http://www.sasol.com/about-sasol/company-profile/overview>

Sasol 2017 <http://www.sasol.com/about-sasol/company-profile/overview>
accessed 15 December 2017

Sasol 2017

http://www.sasol.com/extras/AIR_2015/sites/sasrep_live_sdr2015/files/Promotingpercent20thepercent20safetypercent20Cpercent20healthpercent20andpercent20wellbeingpercent20ofpercent20ourpercent20people.pdf

Sasol 2017

http://www.sasol.com/extras/AIR_2015/sites/sasrep_live_sdr2015/files/Promotingpercent20thepercent20safetypercent20Cpercent20healthpercent20andpercent20wellbeingpercent20ofpercent20ourpercent20people.pdf accessed 15 December 2017

Sivanandam 2017 <https://www.thestar.com.my/news/nation/2017/05/02/disability-management-is-paying-off-expert-malaysias-efforts-are-inclusive-and-integrative-but-more/>.

Sivanandam 2017

<https://www.thestar.com.my/news/nation/2017/05/02/disability-management-is-paying-off-expert-malaysias-efforts-are-inclusive-and-integrative-but-more/> accessed January 2018

South African Institute of Occupational Safety and Health 2018
<https://www.saioosh.co.za/news/424855/COIDA-Amendment-Bill-2018-and-Regulations-published-for-public-comment.htm>

South African Institute of Occupational Safety and Health 2018
<https://www.saioosh.co.za/news/424855/COIDA-Amendment-Bill-2018-and-Regulations-published-for-public-comment.htm> accessed April 2019

Staff 2012 <http://eacj.org/general/24-general-east-africa/103-the-au-mission-goals-organs-and-objectives.html>

Staff 2012 <http://eacj.org/general/24-general-east-africa/103-the-au-mission-goals-organs-and-objectives.html> accessed 5 April 2018

Statistics South Africa 2011 <http://www.statssa.gov.za/?p=3180>

Statistics South Africa 2011 <http://www.statssa.gov.za/?p=3180> (accessed 10 February 2016)

Statistics South Africa 2014 <http://www.statssa.gov.za/?p=3180>

Statistics South Africa 2014 <http://www.statssa.gov.za/?p=3180> accessed 10 March 2015

Stein MA and Lord JE 2009 https://media.law.wisc.edu/m/zdq3n/2-20-09_stein-lord_future_prospects_for_un_on_disability_rights.pdf

Stein MA and Lord JE 2008 https://media.law.wisc.edu/m/zdq3n/2-20-09_stein-lord_future_prospects_for_un_on_disability_rights.pdf (accessed 12 February 2016)

Tey 2016 <https://www.thestar.com.my/metro/community/2016/11/26/helping-the-injured-and-sick-to-return-to-work-international-forum-offers-sharing-of-info-on-systema/>.

Tey 2016
<https://www.thestar.com.my/metro/community/2016/11/26/helping-the-injured-and-sick-to-return-to-work-international-forum-offers-sharing-of-info-on-systema/>

The African Union Commission date unknown <https://au.int/en/au-nutshell>

The African Union Commission date unknown <https://au.int/en/au-nutshell>
accessed 13 April 2018

The Australasian Faculty of Occupational & Environmental Medicine 2010
<https://www.workcover.wa.gov.au/wp-content/uploads/sites/2/2015/07/helping-people-return-to-work-using-evidence-for-better-outcomes-28-05-2010.pdf>

The Australasian Faculty of Occupational & Environmental Medicine 2010
<https://www.workcover.wa.gov.au/wp-content/uploads/sites/2/2015/07/helping-people-return-to-work-using-evidence-for-better-outcomes-28-05-2010.pdf> (accessed 10 September 2016)

The Australasian Faculty of Occupational & Environmental Medicine 2011
[https://www.racp.edu.au/docs/default-source/default-document-library/read-realising-the-health-benefits-of-work-position-statement-october-2011-\(pdf-654kb\).pdf?sfvrsn=0](https://www.racp.edu.au/docs/default-source/default-document-library/read-realising-the-health-benefits-of-work-position-statement-october-2011-(pdf-654kb).pdf?sfvrsn=0)

The Australasian Faculty of Occupational & Environmental Medicine 2011
[https://www.racp.edu.au/docs/default-source/default-document-library/read-realising-the-health-benefits-of-work-position-statement-october-2011-\(pdf-654kb\).pdf?sfvrsn=0](https://www.racp.edu.au/docs/default-source/default-document-library/read-realising-the-health-benefits-of-work-position-statement-october-2011-(pdf-654kb).pdf?sfvrsn=0) (accessed 12 March 2016)

The Patriot Namibia 2018 <http://thepatriot.com.na/index.php/2018/02/23/the-resurrection-of-the-sadc-tribunal/>

The Patriot Namibia 2018
<http://thepatriot.com.na/index.php/2018/02/23/the-resurrection-of-the-sadc-tribunal/> accessed 3 April 2018

The Presidency 2017 <http://www.thepresidency.gov.za/content/sona-2015percent3A-legislation-come-parliament>

The Presidency 2017 <http://www.thepresidency.gov.za/content/sona-2015percent3A-legislation-come-parliament> accessed 10 November 2017

UN date unknown <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

UN date unknown <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 10 August 2018

UN DESA 2019 <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html>

UN DESA 2019 <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html>
accessed 25 March 2019

OHCHR 2018

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx

OHCHR 2018
https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx
accessed 19 July 2018

United Nations Enable 2003/2004

<https://static.un.org/esa/socdev/enable/disafricadecade.htm>

United Nations Enable 2003/2004

<https://static.un.org/esa/socdev/enable/disafricadecade.htm> accessed 10
March 2016

UN 2017 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

UN 2017
<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
accessed March 2018

UN 2017 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en

UN 2017 <https://www.un.org/development/desa/disabilities/> accessed on 21 January 2017

UN 2017 [www.un.org https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html](https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html) (stats as per April 2018)

UN 2017 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (stats as per April 2018) accessed 10 November 2017

UN 2017 <http://www.un.org/disabilities/documents/maps/enablemap.jpg>

UN 2017 <http://www.un.org/disabilities/documents/maps/enablemap.jpg> accessed May 2019

UN date unknown <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

UN 2019

http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf

UN 2017

http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf accessed February 2018

Victorian Equal Opportunity and Human Rights Commission Date unknown <https://www.humanrightscommission.vic.gov.au/index.php/about-us/item/572-howvictorias-equal-opportunity-act-has-changed-over-time>

Victorian Equal Opportunity and Human Rights Commission Date unknown <https://www.humanrightscommission.vic.gov.au/index.php/about->

us/item/572-howvictorias-equal-opportunity-act-has-changed-over-time
accessed January 2019

WHO 2019 https://www.who.int/classifications/icf/icf_more/en/

WHO 2019 https://www.who.int/classifications/icf/icf_more/en/ accessed
February 2019)

WHO 2019 <https://www.who.int/classifications/icf/training/icfbeginnersguide.pdf>

WHO 2019

<https://www.who.int/classifications/icf/training/icfbeginnersguide.pdf>
accessed February 2019

Workability 2012 https://workability.co.za/site/about_us

Workability 2012 https://workability.co.za/site/about_us accessed June 2019

Workability 2012 <https://workability.co.za/site/services>

Workability 2012 <https://workability.co.za/site/services> accessed June 2019

Workability 2012 <https://workability.co.za/site/rehab-units>

Workability 2012 <https://workability.co.za/site/rehab-units> accessed June
2019

WorkSafe 2016

[https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-Steps-
to-resolving-return-to-work-issues-2016-07.pdf](https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-Steps-to-resolving-return-to-work-issues-2016-07.pdf)

WorkSafe 2016

[https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-
Steps-to-resolving-return-to-work-issues-2016-07.pdf](https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/208335/ISBN-Steps-to-resolving-return-to-work-issues-2016-07.pdf) accessed February 2019

WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/suitable-employment-injured-workers-step-step-guide-assessing-suitable-employment>.

WorkSafe 2019 <https://www.worksafe.vic.gov.au/resources/suitable-employment-injured-workers-step-step-guide-assessing-suitable-employment> accessed February 2019

WorkSafe 2019 <https://www.worksafe.vic.gov.au/insurance/types-of-Workers>.

WorkSafe 2019 <https://www.worksafe.vic.gov.au/insurance/types-of-Workers> accessed February 2019.

WorkSafe 2019
https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0009/193797/FINAL-WORKSAFE.pdf

WorkSafe 2019
https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0009/193797/FINAL-WORKSAFE.pdf accessed February 2019

Worksafe 2019
https://www.worksafe.vic.gov.au/documents/search?queries_title_query=return+to+work+direction

Worksafe 2019
https://www.worksafe.vic.gov.au/documents/search?queries_title_query=return+to+work+direction accessed February 2019

Worksafe 2019
http://www.worksafe.vic.gov.au/info/home?query=information+for+employers&collection=worksafe-knowledge-centre-web&meta_docAssetID=10548&temp=landing

Worksafe 2019

http://www.worksafe.vic.gov.au/info/home?query=information+for+employers&collection=worksafe-knowledge-centre-web&meta_docAssetID=10548&temp=landing accessed April 2019

Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf> 23.

Worksafe 2019 <https://prod.wsvdigital.com.au/sites/default/files/2018-10/ISBN-WorkSafe-annual-report-2018.pdf> 23 accessed March 2019

WorkSafe 2019

https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/coordinators>

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/coordinators> accessed March 2019

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/employers>

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/employers> accessed March 2019

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/wise>

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/wise> accessed March 2019

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/workers>

Worksafe 2019 <https://www.worksafe.vic.gov.au/return-to-work/workers> accessed March 2019

Worksafe 2019 <https://www.worksafeawards.com.au/judging-criteria/>

Worksafe 2019 <https://www.worksafeawards.com.au/judging-criteria/>
accessed March 2019

Worksafe Victoria date unknown

https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/212268/ISBN-Compliance-code-1-of-4-providing-employment-planning-consultation-rtw-2014-07.pdf

Worksafe Victoria date unknown

https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0003/212268/ISBN-Compliance-code-1-of-4-providing-employment-planning-consultation-rtw-2014-07.pdf accessed March 2019

Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations>

Worksafe Victoria date unknown <https://www.worksafe.vic.gov.au/return-to-work/employers/obligations> accessed March 2019

WorkSafe 2019 <https://www.worksafe.vic.gov.au/general-practitioners-gps-your-role-return-work>

WorkSafe 2019 <https://www.worksafe.vic.gov.au/general-practitioners-gps-your-role-return-work> accessed March 2019

Other documents

ACHPR/Res.165 (XLVII)10 Resolution on the Prevention of Women and Child trafficking in South Africa during the 2010 World Cup Tournament

ACHPR/Res.305 (EXT.OS/XVIII) 2015: Resolution on Accessibility for Persons with Disabilities

Annual Report of the Compensation Fund 2016/2017

Annual Report on Employment Equity in the Public Service 2015/2016

Belin A *et al*/ Rehabilitation and return to work: Analysis report on EU and Member States policies, strategies and programmes. Report by the European Agency for Safety and Health at Work.

Committee on Economic, Social and Cultural Rights: List of Issues in relation to the initial report of South Africa E/C.12/ZAF/Q/1. UNHRC 2018

CESCR General Comment No. 5: Persons with Disabilities Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994,

Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present Protecting the Future* (2002)

Committee Report No 3: Constitutional framework of Social Security in South Africa: regulation, protection, enforcement and adjudication

Comprehensive Social Security Reform: Department of Social Development: Presentation to Portfolio Committee 14 June 2017

Department of Public Works and Administration Handbook on Reasonable Accommodation for People with Disabilities in the Public Services October 2007

Foreword to the *National Development Plan (2030 vision)*

Hinricks S and Bromberg T Safer and healthier work at any age: Workshop report: GERMANY No. EUOSHA-PRU/2013/C/02 June 2014

Hinga "Country Report: Human Resources Development for People with Disabilities: Improvement of Employability in Malaysia".

ILO 2002 Managing Disability in the Workplace Catalogue

Integrated National Disability Strategy ISSA Social Policy Highlight 22 2012 ISSN online 1818-5940 Return-to-work programmes.

Mazza et al "Fit to Work: General Practitioners Facilitating Injured Workers to Return to Work" 2013 Research Report # 050-0913-R01

Mitra S 'The recent decline in the employment of people with disabilities in South Africa 1998–2006' Discussion Paper No 2008–12 (July 2008)

Morris "Disability and Economics" Presentation: Disability and Economics: The nexus between disability, education, and Employment – DESA Briefing Seminar 2011

National Health Insurance: Healthcare for all South Africans: Summary Department of Health 2018

Resolution WHA 54.21

Return to Work for Long Term Absent Employees Deliverable 6.1 Employers Good Practice Guide RETURN Project Work Research Centre Dublin February 2002

The Disability Framework for Local Government 2015 – 2020

The National Development Plan (2030 vision)

Van der Byl C Twenty year Review: South Africa: Background Paper Disability: 1994-2014

Waddell, G., & Burton, A. K. (2006). *Is Work Good for Your Health and Well-Being?* London: TSO.

White Paper on the Rights of People with Disabilities

World Health Organisation *World report on Disability* (World Health Organisation 2011)

The Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002

The World Programme of Action Concerning Disabled Persons