

# **EXTENDING EMPLOYMENT INJURY AND DISEASE PROTECTION TO NON-TRADITIONAL AND INFORMAL ECONOMY WORKERS: THE QUEST FOR A PRINCIPLED FRAMEWORK AND INNOVATIVE APPROACHES\***

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## **SUMMARY**

Non-traditional and informal economy workers often work outside the sphere of a formal employment relationship and are therefore by and large excluded from occupational injuries and disease protection. It is argued that innovative approaches, set within a principled and policy framework, need to be considered from a comparative perspective in order to extend this protection to these workers. These approaches refer to an appropriate definitional or conceptual widening of coverage; relevant human rights, international standards and standard-setting considerations; alternative institutional arrangements and appropriate regulatory responses; an increased role for governments and innovative funding options; and alternative prevention, rehabilitation/re-integration and compensation modalities. It is further argued that the South African occupational health and safety and workers compensation regimes could benefit richly from the comparative experiences and perspectives in this regard.

## **1 INTRODUCTION**

This contribution deals with the need to introduce innovative approaches and develop a principled framework for extending coverage to non-traditional and informal economy workers in the area of employment injuries and disease protection. These workers often do not work within the framework of a formal employment relationship. Several categories of workers are potentially

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\* Based on a paper presented by the author at the 7<sup>th</sup> International Work Congress (International Congress on Work Injuries Prevention, Rehabilitation and Compensation), Hong Kong, 27-29 June 2006.

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affected, ranging from independent to dependent contractors, informal economy workers, homeworkers and hired workers, to name but a few.

The *status quo* in a range of countries, including some developing countries, indicates that occupational health and safety legislation may, but does not always cover non-traditional workers, depending on the definition used for institutions and/or workplaces covered for purposes of such legislation. Rehabilitation and compensatory measures are often limited to those covered in terms of workers' compensation legislation, that is, those employed in terms of an employer-employee relationship, thereby (often) excluding those who work non-formally.

It is argued that a number of innovative approaches, set within a principled and policy framework, need to be considered from a comparative perspective in order to extend occupational injuries and disease protection to these workers. These refer to an appropriate definitional or conceptual widening of coverage; relevant human rights, international standards and standard-setting considerations; alternative institutional arrangements and appropriate regulatory responses; an increased role for governments and innovative funding options; and alternative prevention, rehabilitation/re-integration and compensation modalities. It is further argued that the South African occupational health and safety and workers' compensation regimes could benefit richly from the comparative experiences and perspectives in this regard.

## 2 COVERAGE RESTRICTIONS

Worldwide there is a growth in non-traditional, and in particular informal, employment, and a decline in standard forms of work. These forms of work are usually associated with increasing job insecurity and precarious conditions of work.<sup>1</sup> Recent figures indicate the extent and growth in the rate of informal work:<sup>2</sup>

Region	1990	2003
Sub-Saharan Africa	30	39
South Asia	22	28
East Asia & Pacific	18,5	20
Latin America & Caribbean	29	38
Europe & Central Asia	33	37
Developing Countries (excluding China)	28	36
Developed Countries	10	13

Informal economy as a percentage of total GDP

<sup>1</sup> Quinlan *The Global Expansion of Precarious Employment: Meeting The Regulatory Challenge* (paper) (Australian Council of Trade Unions, 2003) 2-3 [http://www.actu.asn.au/public/ohs/reactivatecampaign/1064473735\\_24238.html](http://www.actu.asn.au/public/ohs/reactivatecampaign/1064473735_24238.html).

<sup>2</sup> "The Informal Plague goes Global" 2005 *Labour Bulletin* 44.

A perusal of existing occupational injury and disease arrangements leaves one with the clear impression that non-traditional workers are largely excluded from the preventive, rehabilitative/re-integrative and compensatory mechanisms available in many countries. The reasons for this state of affairs are manifold, including statutory and definitional exclusions from the scope of the applicable legislation, lack of appropriate standards and monitoring of same, and the absence of an integrated approach towards the prevention and mitigation of risks, rehabilitation efforts and payment of compensation to victims or their dependants.

One of the core problems experienced with designing and implementing occupational health and safety and workers' compensation legislation is the fact that the legislation is usually premised on the existence of an employer-employee relationship. However, problems are experienced when third parties are introduced in the work arrangements. This also relates to compliance, as "the introduction of third parties creates more complicated and potentially attenuated webs of legal responsibility that place heavier logistical demands on the inspectorate".<sup>3</sup>

Sometimes workers are statutorily excluded from the scope of coverage in the legislative framework in regard to occupational injury and diseases. Certain categories of workers may be excluded specifically from the purview of the applicable legislation.<sup>4</sup> Also, definitional approaches, in particular in the legal sense of the word, seem to be crucial to the issue of coverage and the extension of protection to non-formal sector workers. Workers' compensation schemes, especially in the developing world, typically restrict coverage to workers who are employed in terms of an employment relationship, thereby excluding those who work in other forms of dependent relationships and those who are self-employed. As a result of the surge in informal and other non-traditional workers who are either excluded from cover or for whom cover is entirely voluntary, a decline in formal coverage of workers under workers' compensation has been noted.<sup>5</sup> Even where occupational health and safety legislation may extend protection to non-employees, core duties and rights are often restricted to those directly involved in the employment relationship (*ie*, the employer and the employee) only – such as the obligation to identify occupational hazards, evaluate the associated risks, and take the necessary precautionary, preventive and remedial action,<sup>6</sup> and the right to be informed of occupational health and safety hazards,<sup>7</sup> or to be appointed or elected as a health-and-safety representative.<sup>8</sup> Moreover, occupational health-and-safety legislation is usually operationally restricted to "workplaces" (or a similar concept), which

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<sup>3</sup> Quinlan 10.

<sup>4</sup> *Eg*, in South Africa domestic workers, as well as a person who contracts for the carrying out of work and himself engages other persons to perform such work, are excluded from the scope of coverage of the Compensation of Occupational Injuries and Diseases Act 130 of 1993 (see s 1(xix)).

<sup>5</sup> See Quinlan 14.

<sup>6</sup> See, *eg*, s 12 of the Occupational Health and Safety Act 85 of 1993 (South Africa).

<sup>7</sup> S 13 of the Occupational Health and Safety Act 85 of 1993 (South Africa).

<sup>8</sup> S 17 of the Occupational Health and Safety Act 85 of 1993 (South Africa).

is often defined with reference to a premise or place where employees work.<sup>9</sup> Premises or places where only workers work who do not meet the definitional standards of “employees” are therefore excluded from the purview of the legislation.<sup>10</sup> Workplace size may also pose a problem, as the threshold for the appointment of a safety-and-health representative and/or committee may not be met in the event of smaller non-traditional work contexts.<sup>11</sup>

The very definition of non-traditional and informal economy workers must therefore be treated with caution, from the perspective of occupational health and safety arrangements. There are several reasons why this is so. Firstly, from a *legal* perspective, whenever coverage in terms of and entitlement to occupational health and safety, and in particular workers’ compensation arrangements, is linked to the existence of an employment relationship, the term “formal” could be said to equal the employment relationship, as that term is understood at common law or in terms of statutory law, and “informal” would cover persons who are not involved in an employment relationship. On the basis of such a definitional approach employees in the formal sense are persons who work for a private or public employer and receive (or who are entitled to receive) remuneration in wages, salary, commission, tips, piece-rates or pay in kind. A *non-legal* (and much more imprecise) approach towards what is meant by the informal sector or informal economy is, however, also possible. The ILO recognises that this notion covers a large variety of groups (many of whom are self-employed) and defines this with reference to internationally accepted nomenclature. It states:<sup>12</sup>

“In 1993 the Fifteenth International Conference of Labour Statisticians (ICLS) adopted an international statistical definition of the informal sector; it defined the informal sector in terms of characteristics of the enterprises (production units) in which the activities take place, rather than in terms of the characteristics of the persons involved or of their jobs. Accordingly, persons employed in the informal sector were defined as comprising all persons who, during a given reference period, are employed in at least one production unit of the informal sector, irrespective of their status in employment and whether it is their main or a secondary job.

Production units of the informal sector were defined by the Fifteenth ICLS as a subset of unincorporated enterprises owned by the household, that is, production units which are not constituted as separate legal entities independently of the household or household members that own them.”

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<sup>9</sup> See, *eg*, the definition of “workplace”, read with the definition of “employment”, in s 1 of the Occupational Health and Safety Act 85 of 1993 (South Africa).

<sup>10</sup> See Chen *The Business Environment and the Informal Economy: Creating Conditions for Poverty Reduction* (Draft Paper for Committee of Donor Agencies for Small Enterprise Development Conference on “Reforming Business Environment”, Cairo, Egypt, Nov 2005) 17.

<sup>11</sup> See Quinlan 11.

<sup>12</sup> See *World Labour Report 2000 (Income security and social protection in a changing world)* (2000) 194 (Box 10.2).

While this definition has been criticised,<sup>13</sup> it remains important to recognise, on the one hand, the stricter legal approach referred to above adopted in occupational health-and-safety and workers' compensation systems in many countries in the world and, on the other hand, the forms, nature and characteristics of the work relationships occurring in the informal economy and in the broader non-traditional sense. This raises, secondly, the issue that informal and non-traditional employment can include a wide variety of people. The borderlines between formal and informal and between traditional and non-traditional have increasingly become fluid and blurred as formal employment has decreased world-wide, and as people tend to move out of formal into informal and non-traditional employment, and vice versa, more readily than in the past.<sup>14</sup> Examples of those working in the non-traditional sense have been said to include the atypically employed, the self-employed, the informally employed, (sub) contracted workers, casual employees, seasonal employees, the minor-employed, permanent or temporary part-time employees, "women's work" done at home (in particular in the care economy), and work-from-home (home work), which could all be classified as part of non-traditional activity. There is unregulated work for a wage, regulated casual-waged work, subcontracted work that is supervised or not supervised, *etcetera*. The atypically employed have, however, become more "typical" as the number of contract and casual workers increases and more links are forged between formal and informal enterprises. In fact, the very concept of work is changing fundamentally. As Lund and Srinivas remark:

"Fewer people are in the formal workforce, for shorter periods of time; formal business contracts out more of the work; there is a greater distance between the owners of capital and producers, through chains of sub-contractors. The definition of self-employed, casualized, contracted and part-time work as 'atypical' has become out of date, in that it is now 'typical' for increasing numbers of people."<sup>15</sup>

Thus the definition of these groups is of critical importance. One also has to understand, at least for developing country purposes, the difference between the self-employed in the professional sense of the word and those working in the informal economy. Professional self-employed workers often have ample means to provide in their own (private) social security mechanisms. In a number of Western countries the self-employed so understood are either covered under universal social security schemes, general schemes for the self-employed or categorical schemes for the self-employed.<sup>16</sup> This rings true also of workers' compensation schemes in certain countries.<sup>17</sup> Informal economy workers would include the wide range

<sup>13</sup> See Chen, Jhabvala and Lund *Supporting Workers in the Informal Economy: A Policy Framework* (ILO Working Paper on the Informal Economy 2002) 5.

<sup>14</sup> Barrientos and Barrientos *Extending Social Protection to Informal Workers in the Horticulture Global Value Chain* (World Bank report, 2002) 18-19.

<sup>15</sup> Lund and Srinivas *Learning from Experience: A Gendered Approach to Social Protection for Workers in the Informal Economy* (2000) 3.

<sup>16</sup> Schoukens (ed) *Social Protection of the Self-Employed in the European Union* (1994) 8.

<sup>17</sup> Fuchs "Structure and Legitimation of Statutory Accident Insurance: A Comparative Legal View" 1997 *International Social Security Review* 17 17-18 and 26-27.

of people who are usually not professionally qualified and who invariably work atypically and informally, often as a survival strategy. Their involvement in the informal economy does not necessarily imply unregistered and tax-evading operations, although unregistered and even illegal activity may be true of some forms of informal work.<sup>18</sup>

For purposes of and to the extent that coverage in terms of existing occupational health-and-safety and workers' compensation legislation is restricted to the employment relationship, it is necessary therefore, to distinguish between those non-standard workers in wage employment and those involved in non-wage employment.<sup>19</sup> The latter category would often be excluded from statutory protection, as is borne out by the discussion below.

Thirdly, it is necessary to understand that there are two further factors that impact on the issue of coverage. The first relates to the fact that there is both a continuum and a fluidity or mobility between the formal and informal economy. People who work are often, and increasingly so, moving between formal economy wage employment and informal economy non-wage employment.<sup>20</sup> As is apparent from the discussion above, this may have severe consequences from the perspective of occupational health-and-safety and workers' compensation protection. The second factor has to do with the phenomenon that people who work informally in non-wage employment or otherwise non-traditionally may nevertheless be bound in a network of dependency relationships. And yet, in the absence of the existence of an identifiable employment relationship, they are often wholly excluded from workers' compensation arrangements and at least partially from the statutory occupational health-and-safety framework.

Furthermore, non-traditional and informal work is often precarious work, and is usually associated with an inappropriate *prevention* regime. Safety-and-health standards are invariably deficient and/or insufficient, partly because of the lack of proper regulation. New risks and hazards are arising in certain forms of non-traditional and informal work and are poorly monitored and reported.<sup>21</sup> In fact, as noted by Quinlan, recent comprehensive reviews found a clear and adverse association between precarious employment and occupational health and safety – these work arrangements are generally associated with inferior occupational health-and-safety standards.<sup>22</sup> The flexible work arrangements often found in non-traditional contexts and in the informal economy pose a serious threat to the

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<sup>18</sup> See Chen, Jhabvala and Lund 11.

<sup>19</sup> Chen, Jhabvala and Lund 5.

<sup>20</sup> See Barrientos and Barrientos 18-19.

<sup>21</sup> Loewenson *Occupational Health and Safety in Southern Africa: Trends and Policy Issues* (ILO/SAMAT Policy Paper No. 8, 1998) 2.

<sup>22</sup> Quinlan 4.

maintenance of existing standards of occupational health and safety.<sup>23</sup> It is in particular in developing countries that occupational health and safety has become problematic – standards are not properly regulated, set and monitored.<sup>24</sup> While this is generally true of occupational health-and-safety systems, it is especially applicable to the large and growing informal economies in most of these countries. Informal economy workers in particular are exposed to health-and-safety risks, given the hazardous nature of the tasks sometimes fulfilled by these workers.<sup>25</sup> Effective *rehabilitation* and *re-integration* mechanisms are usually not available for those who work informally and non-traditionally, either because these are not sufficiently provided for in workers' compensation legislation or because significant categories of non-traditional workers and the informally employed fall outside the framework of the empowering legislation. Much of the weak provision in this regard can be ascribed to the absence of an integrated and unified approach towards prevention, rehabilitation and re-integration, and compensation. These conceptually interrelated elements of a balanced occupational injuries-and-diseases system are often dealt with as separate, loose-standing issues.<sup>26</sup>

Overall the effect of all of the above is that the risks associated with occupational injuries and diseases are effectively shifted onto workers and their families, who invariably are unable to cope with these risks, maintain an adequate standard of living and rise above poverty.<sup>27</sup> In addition, and in particular as a result of diminished workers' compensation coverage, there has been a cost shifting from dedicated workers' compensation schemes to general health care and social security schemes.<sup>28</sup>

### **3 EXTENDING PROTECTION: DEFINING THE PRINCIPLES AND INTRODUCING INNOVATIONS**

From the above exposition it should be clear that the quest for extending occupational health-and-safety and workers' compensation protection to

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<sup>23</sup> Quinlan 7. He further indicates that lower levels of awareness and less willingness to raise occupational health-and-safety issues or to access entitlements are prevalent amongst contingent workers (Quinlan 8).

<sup>24</sup> Loewenson "Globalization and Occupational Health: A Perspective from Southern Africa" 2001 *Bulletin of the World Health Organisation* 864-865.

<sup>25</sup> Chen 17 remarks: "Many informal self-employed persons face significant occupational hazards in the workplace yet are not covered by occupational health and safety (OHS) regulatory and compensatory mechanisms, both because they are self-employed and because they are not legally recognized by the state. For unprotected informal self-employed persons, exposure to toxic chemicals, repetitive strain and muscular-skeletal injuries, poor sanitation, excessive working hours and structurally unsafe workplaces not only threaten personal health and safety but can also impact on productivity and income." See also Chen, Jhabvala and Lund 13.

<sup>26</sup> Loewenson 2.

<sup>27</sup> Canagarajah and Sethuraman *Social Protection and the Informal Sector in Developing Countries: Challenges and Opportunities* (World Bank report, 2001) 19; Chen 19; and Loewenson 2001 *Bulletin of the World Health Organisation* 866.

<sup>28</sup> Quinlan 16. Loewenson indicates that in Southern Africa, *eg*, there is no assessment of the public health burden of occupational injury and illness (Loewenson 5).

non-traditional and informal economy workers is critical yet difficult to obtain. It is suggested that innovative approaches, set within a principled and policy framework, need to be considered. These approaches, it would appear, firstly have to deal with an appropriate definitional or conceptual widening of coverage; secondly with human rights, international standards and standard-setting considerations; thirdly with alternative institutional arrangements and appropriate regulatory responses; fourthly with an increased role for governments and innovative funding options; and in the fifth place with specific prevention, rehabilitation/re-integration and compensation contexts.

### 3 1 Definitional approaches

Definitional or conceptual widening of coverage to include at least certain categories of non-traditional and informal workers is an important step to extend occupational health-and-safety and workers' compensation protection. This is in particular true for those non-traditional and informal work relationships where an identifiable employment relationship is present, that is, where an employer can be identified in circumstances of wage employment. Extending protection to these categories, such as domestic and seasonal workers, may prove to be less difficult than initially thought.<sup>29</sup> For occupational health and safety purposes this is important as it is necessary to identify a person who, or entity which, could ultimately be held responsible for safety and health at the workplace. For workers' compensation purposes this is crucial as historically the employer bears the burden of liability – either directly or on the basis of private or public insurance. In *work relationships of dependence* it may not be easy to determine who the real employer(s) is/are, as a worker could be rendering services in a wide variety of dependent contexts and for different providers of work and/or suppliers. In this regard it may be of help to consider the wider notions of "employee" and "employer" adopted in labour law systems. In many countries, including a number of developing countries, labour law systems have recognised the complexity of modern day work relationships and have therefore extended the conceptual scope of the employee notion to include workers who work in other forms of dependent or assistive relationships (eg, as dependent contractors).<sup>30</sup> And yet, the experience is that many social security systems have not yet adopted this wider frame of

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<sup>29</sup> The extension of unemployment insurance protection to domestic and seasonal workers in South Africa may prove the point. On the basis of the specific statutory mandate to do so (contained in the Unemployment Insurance Act 63 of 2001), these categories were brought within the net of unemployment insurance through flexible arrangements, including flexible contribution payment options. Despite predictions to the contrary, the registration of employers and employees in the industry went remarkably well, with a high rate of compliance on the part of employers.

<sup>30</sup> Eg, in the case of some Caribbean countries, labour-dependent contractors have been included in the protective framework of labour legislation: see Taylor "The Jamaican Labour Relations and Industrial Disputes Act (LRIDA): A Critical Assessment" in Cowell and Branche (eds) *Human Resource Development and Workplace Governance in the Caribbean* (2003) 426-450. See also Barrientos and Barrientos 29-30.



reference, and have by and large retained the historical notion of an employment relationship as the basis of liability and entitlement.<sup>31</sup> In fact, the interrelated terrains of occupational health-and-safety and workers' compensation legislation are fraught with a mismatch in key definitions – for example, labour relations, occupational health-and-safety and workers' compensation legislation may all employ different definitions of key concepts, such as the definition of “worker”.<sup>32</sup>

Innovative recent attempts aimed at extending protection and including non-traditional and informal workers within the statutory framework of social security could also be of benefit for the area of occupational health and safety and (in particular) workers' compensation.<sup>33</sup> Developed countries with their well-developed occupational injuries-and-diseases systems clearly set the trend as is evident from, for example, the position in some of the Australian state jurisdictions – with regard to both occupational health and safety<sup>34</sup> and workers' compensation.<sup>35</sup> However, innovative approaches are

<sup>31</sup> In South Africa, *eg*, most of the social security laws retained the (essentially common law-oriented) notions of employee (or a similar notion) and employer for purposes of establishing social security coverage, entitlement and liability – see, among others, the Unemployment Insurance Act 63 of 2001 and the Compensation of Occupational Injuries and Diseases Act 130 of 1993.

<sup>32</sup> Quinlan 17.

<sup>33</sup> See, among others, Barrientos and Barrientos 37 (in respect of Chile). See also Horn *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* (Paper presented at the EGDI and UNU-WIDER Conference on “Unlocking Human Potential: Linking the Informal and Formal Sectors” 17-18 September 2004) 1.

<sup>34</sup> See, *eg*, ss 22 and 23 of the Occupational Safety and Health Act 101 of 1984 (Western Australia). According to s 22 of the Act an employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the “employees”) are not exposed to hazards. S 23 extends this duty, by providing that a person that has, to any extent, control of: (a) a workplace where persons who are *not* employees of that person work or are likely to be in the course of their work; or (b) the means of access to and egress from a workplace, shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that *persons who are at the workplace or use the means of access to and egress from the workplace* are not exposed to hazards (own emphasis). For provisions similar to s 22 in other Australian jurisdictions see, *eg*, s 10 of the Occupational Health and Safety Act 2000 (NSW) and s 23 of the Occupational Health and Safety Act 1985 (Vic); ss 24 and 30 of the Workplace Health and Safety Act 1995 (Qld) and s 23 of the Occupational Health, Safety and Welfare Act 1986 (SA).

<sup>35</sup> S 5 of the Workers' Compensation and Injury Management Act 86 of 1981 (Western Australia) contains an extended definition of “worker”, which includes “any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services”. While casual workers are specifically excluded from the main provision, this extended definition goes much further than the contract of service notion, as it effectively comprehends a person who would otherwise be classified as an independent contractor or sub-contractor, as long as the remuneration received is in substance for the personal manual labour or services. See *Summit Homes v Lucev* (1996) 16 WAR 566; BC9601264 and Guthrie *LexisNexis Workers' Compensation Western Australia* 1319. For similar provisions in the legislation of New South Wales, see the definition of “worker” contained in s 3 of the Workers' Compensation Act 70 of 1987 and s 4 of the Workplace Injury Management Act 86 of 1998. See also s 8 of the Victorian legislation, the Accident Compensation Act 10191 of 1985. S 175 of the Western Australia Workers' Compensation and Injury Management Act 86 of 1981 contains yet a further example of extended liability. In terms hereof, where a person (*ie*, the principal)

also discernible in the developing country contexts. In India, for example, the Unorganised Sector Workers Social Security Bill, 2005, adopted a deliberately wide notion, firstly, of what is comprehended by the term “unorganised sector”<sup>36</sup> and, secondly, of who is intended to be an employer and a worker for purposes of covering those embedded in a relationship of work in the informal economy. It defines “employer” as “a natural or juridical person, or an association of such persons, by whom an unorganised sector worker is engaged or employed directly or otherwise, for any remuneration”.<sup>37</sup> It attaches a specific meaning to unorganised sector workers, and defines this term with reference to a distinction to be drawn between a self-employed worker<sup>38</sup> and a wage worker, and includes specifically wage workers in the organised sector who do not enjoy social security cover.<sup>39</sup> Of particular importance is the definition of “wage worker”, which evidently aims at including workers with little income who render services in subcontracted capacity, who may work for more than one employer, and who may fall within a range of non-traditional work relationships.<sup>40</sup>

“Wage worker means a person employed for remuneration in the unorganised sector or in the organised sector without any social security cover, directly by an employer or through any agency or contractor, irrespective of place of work, whether exclusively for one employer or for more than one employer, whether simultaneously or otherwise, whether in cash or in kind, whether as a home based worker,<sup>41</sup> or as a temporary or casual worker, or as a migrant, or as a outworker, or, workers employed by households including domestic workers, with a monthly wage of not more than Rs. 5000/- or such limits as may be notified from time to time, but does not include an unpaid family worker.”

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contracts with another person (*ie*, the contractor) for the execution of any work by or under the contractor, *both* the principal and the contractor are, for purposes of the Act, deemed to be employers of the worker so employed and are jointly and severally liable to pay any compensation which the contractor, if he were the sole employer, would be liable to pay under the Act. However, the work on which the worker is employed at the time of the occurrence of the injury must be directly a part or process in the trade or business of the principal. See *Hewitt v Benale Pty Ltd* (2002) 27 WAR 91; [2002] WASCA 163; BC200203416; *Marsden v Unimin Australia Ltd* BC200404087; [2004] WASCA 143 and *Guthrie LexisNexis Workers' Compensation Western Australia* 5367. See also s 10A of the applicable legislation in the state of Victoria, the Accident Compensation Act 10191 of 1985.

<sup>36</sup> “Unorganised sector means all private unincorporated enterprises including own account enterprises engaged in any agriculture, industry, trade and/or business” – clause 2(k).

<sup>37</sup> Clause 2(e).

<sup>38</sup> “Self-employed worker means any person who is not employed by an employer, but directly engages himself/herself in any occupation in the unorganised sector, subject to a monthly earning of Rs. 5, 000/- or such limits as may be notified from time to time” – clause 2(j).

<sup>39</sup> “An unorganised sector worker means a self-employed worker or a wage worker in the unorganised sector and includes wage workers in the organised sector without any social security cover” – clause 2(l).

<sup>40</sup> Clause 2(m).

<sup>41</sup> “Home based worker means a person involved in the production of goods or services for an employer in his/her own home or other premises of his/her choice other than the workplace of the employer, for remuneration irrespective of whether or not the employer provides the equipment, materials or other inputs” – clause 2(d).

In similar but perhaps less elaborated fashion the Social Security Bill, 2005 of Tanzania defines the “informal sector” as the sector which includes workers who work informally and who do not work in terms of an employment contract or another contract contemplated in the definition of employee. A “self-employed person” is defined as a person who works for gain for him- or herself. “Worker” includes a self-employed person and a worker in the informal sector.<sup>42</sup>

Of course, the area of workers’ compensation liability poses particular problems in the non-traditional work and informal economy context. This flows from the fact that in some cases it might be difficult to identify who the employer is and in other cases there may not be an employer at all. Innovative approaches may be required in this regard too. In dependency scenarios, it might be necessary to embark on a contractual tracking exercise to determine who the real employer is (or a combination of employers).<sup>43</sup> It has been suggested that the “real” employer down (or perhaps up) the chain – that is, the unit that has responsibility for the rights and protection of all workers in the chain – is the lead firm that outsources production, even if it is only a retail firm.<sup>44</sup> As regards micro-entrepreneurs producing independently, a pragmatic approach to the application of labour/social security legislation has been proposed – one that seeks to balance the concerns for the health, safety and security of the worker, and the broader community, with concerns for the financial viability of informal enterprises.<sup>45</sup> It should be noted further, that innovative solutions, which include the imposition of special industry levies and government co-funding, are implemented in countries such as India, as reflected on below.<sup>46</sup>

### **3 2 Human rights, international standards and standard-setting**

As regards the second area of innovative approaches needed, namely the area of human rights, international standards and standard-setting, it has to be acknowledged that the absence of minimum labour and social security standards, accompanied by demands for greater labour flexibility and the competition for work, has been undermining occupational health and safety by encouraging hazardous work patterns and practices, and diminishing compliance with occupational health-and-safety and workers’ compensation legislation.<sup>47</sup>

While there is a wide range of international instruments which regulates the position of workers, the truth is that many of the ILO Conventions relating

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<sup>42</sup> Clause 3 of the Social Security Bill, 2005 (Tanzania).

<sup>43</sup> Quinlan 22.

<sup>44</sup> Chen, Jhabvala and Lund 34.

<sup>45</sup> *Ibid.*

<sup>46</sup> Chen, Jhabvala and Lund 39-40; and see also the discussion below.

<sup>47</sup> Quinlan 17.

to social security<sup>48</sup> are generally poorly ratified. This also applies to the more recent ILO Conventions relating to occupational health and safety<sup>49</sup> and workers' compensation<sup>50</sup> – not only is the ratification record dismal, but implementation often deficient.<sup>51</sup> This appears to be the case in particular in the developing world.<sup>52</sup> From a country perspective, therefore, it is clear that this would “signal a need to ensure that a systematic process is set in place of upgrading current OHS law to harmonise it with these major ILO OHS Conventions”.<sup>53</sup> From an international standard-setting perspective, it would appear that a careful reconceptualisation and remodelling may be required to ensure that international norms are suited for the non-traditional and informal work environment of the occupational health-and-safety and workers' compensation context, and are in fact extended to and applied in that context. For example, the ILO Conventions related to occupational injury and diseases are by and large premised on the existence of the employment relationship and on employer liability (even if channelled via the insurance mechanism).<sup>54</sup> Furthermore, some of the specialised non-traditional work and informal economy-focused ILO Conventions may have limited relevance in the areas of occupational health and safety and occupational injuries and

<sup>48</sup> Eg, the “mother” Convention pertaining to social security, the ILO Social Security (Minimum Standards) Convention, 102 of 1952 has only been ratified by 43 countries (updated information obtained from the ILO Website <http://www.ilo.org/ilolex/english/newratframeE.htm> (accessed 2007-09-12)). The ratification record of most other social security Conventions is even worse.

<sup>49</sup> ILO Convention 155 of 1981 (Occupational Safety and Health Convention) has received 50 ratifications; the P155 Protocol of 2002 to the Occupational Safety and Health Convention of 1981 only 4 ratifications; Convention 174 of 1993 (Prevention of Major Industrial Accidents Convention) 11 ratifications; Convention 176 of 1995 (Safety and Health in Mines Convention) 21 ratifications; and Convention 184 (Safety and Health in Agriculture Convention) 8 ratifications. Updated information obtained from the ILO Website <http://www.ilo.org/ilolex/english/newratframeE.htm> (accessed 2007-09-12).

<sup>50</sup> ILO Convention 121 of 1964 (Employment Injury Benefits Convention) has been ratified by only 24 countries; Convention 128 of 1967 (Invalidity, Old-Age and Survivors' Benefits) by only 16 countries; and Convention 130 of 1969 (Medical Care and Sickness Benefits) by only 15 countries. The older Conventions have a better ratification record. Eg, Convention 17 of 1925 (Workmen's Compensation (Accidents) Convention) has received 71 ratifications and Convention 18 of 1925 (Workmen's Compensation (Occupational Diseases) Convention) 61 ratifications, some of which in recent years; Convention 19 of 1925 (Equality of Treatment) (Accident Compensation Convention) has been ratified by 121 countries; and Convention 42 of 1934 (Workmen's Compensation (Occupational Diseases) Convention (Revised)) has received 41 ratifications. Updated information obtained from the ILO Website <http://www.ilo.org/ilolex/english/newratframeE.htm> (accessed 2007-09-12).

<sup>51</sup> Loewenson 2001 *Bulletin of the World Health Organisation* 865. She indicates (866) that, while according to international standards the employer has to pay for occupational injury and disease, inadequate prevention, detection and compensation flout this principle.

<sup>52</sup> For instance, Loewenson indicates that, with some exceptions, ratification of the core OHS Conventions of the ILO is non-existent in the Southern African region (Loewenson 14).

<sup>53</sup> Loewenson 14; she indicates that in relation to Convention 155 of 1981 (Occupational Safety and Health Convention) the major gaps in southern African countries to be addressed in law relate to coverage of all workplaces, setting clear rights and duties for tripartite co-operation, explicitly enabling and setting procedures for the right to refuse dangerous work, overcoming the administrative fragmentation of enforcement systems, strengthening penalties and ensuring greater regional harmonisation of standards.

<sup>54</sup> See generally Loewenson 2001 *Bulletin of the World Health Organisation* 866.

disease rehabilitation and compensation. Article 7 of the ILO Convention on Home Work 177 of 1996 provides that national laws and regulations relating to occupational health and safety shall apply to home work, taking into account its special characteristics, and shall establish conditions under which certain types of work and the use of certain substances are to be prohibited in home work for reasons of safety and health. Though this is an important provision in the occupational health-and-safety context, the limited relevance of this Convention flows from the fact that the Convention has a weak ratification record,<sup>55</sup> does not address workers' compensation issues, and is still premised on the existence of an employment relationship.<sup>56</sup>

The problem also appears to be that occupational injuries and diseases standards do not (yet) form part of *core* international labour standards. While it is true that the decent work agenda of the ILO applies to all workers, including those in non-traditional work and in the informal economy,<sup>57</sup> much more could and should be done to prioritise awareness of occupational health-and-safety and worker's compensation standards, perhaps as part of a targeted drive to encourage the ratification of a number of key social security Conventions, and along the lines of the successful attempt to persuade countries to ratify a number of core labour Conventions.<sup>58</sup> The truth is that unsafe and unhealthy working conditions, and the lack of compensation for injuries and diseases sustained in the process, in particular in non-traditional work and in the informal economy, are human rights issues and need to be addressed as such.<sup>59</sup> And yet, in the developing world, where these problems are exacerbated, there are some encouraging signs that home-grown solutions are developed. It has been reported, for example, that codes of conduct, operating along supply chains in both the formal and informal economy, potentially constitute an important complement to other mechanisms of social protection of workers, also in the area of occupational health and safety. And yet, codes are often voluntary in nature, and cannot replace the need for proper labour and social security

<sup>55</sup> Only five countries have thus far ratified this Convention (updated information obtained from the ILO Website <http://www.ilo.org/ilolex/english/newratframeE.htm> (accessed 2007-09-12)).

<sup>56</sup> Bezuidenhout, Godfrey and Theron with Modisha "Non-standard Employment and its Policy Implications" (A report submitted to the Department of Labour (South Africa), 30 June 2003. Research undertaken by Sociology of Work Unit, University of the Witwatersrand and Labour and Enterprise Project, University of Cape Town) 20.

<sup>57</sup> Barrientos and Barrientos 29.

<sup>58</sup> Adopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work is an expression of commitment by governments, employers' and workers' organisations to uphold basic human values. The Declaration covers four areas: (a) Freedom of association and the right to collective bargaining; (b) Elimination of forced and compulsory labour; (c) Abolition of child labour; and (d) Elimination of discrimination in the workplace. The Declaration makes it clear that these rights are universal, and that they apply to all people in all States – regardless of the level of economic development. It particularly mentions groups with special needs. It recognises that economic growth alone is not enough to ensure equity, social progress and to eradicate poverty. See [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var\\_language=EN](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN) (accessed 2007-09-12). The pace of ratification of the so-called core labour Conventions, in particular since the inception of the Declaration in 1998, has been extraordinary: see the ratification data reflected on <http://www.ilo.org/ilolex/english/docs/declworld.htm> (accessed 2007-09-12).

<sup>59</sup> Chen, Jhabvala and Lund 13.

regulation.<sup>60</sup> Furthermore, fundamental rights provisions in constitutions could contribute to the extension of social protection to vulnerable groups of society, including non-traditional and informal economy workers. The South African Constitution, for example, provides that everyone has the right to access to social security, including, if they are unable to support themselves and their dependants, the right to appropriate social assistance.<sup>61</sup> The potential significance of this provision in the area of workers' compensation is self-evident.<sup>62</sup>

Finally, regional instruments could also play an important role. For example, the Charter of Fundamental Social Rights in SADC<sup>63</sup> provides that "workers have the right to services that provide for the prevention, recognition, detection and compensation of work-related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation-adjusted compensation".<sup>64</sup> The Charter also foresees minimum standards in occupational health and safety, and the harmonisation of the same.<sup>65</sup> Further provisions are contained in the Code on Social Security in the SADC,<sup>66</sup> in terms of which SADC Member States are requested to provide compulsory coverage, either through public or private mechanisms or through a combination of both; to cover all modalities of disablement, irrespective of whether the disablement occurs in the formal or the informal sector; to provide adequate medical care and appropriate benefits via occupational injury and diseases schemes; and to provide for adequate rehabilitation and reintegration measures, in addition to ensuring that appropriate preventive measures are in place.<sup>67</sup>

### **3 3 Alternative institutional arrangements and appropriate regulatory responses**

The third area of innovative reform approaches relates to alternative institutional arrangements, linked to appropriate regulatory responses. It is evident that the exclusion of many of those who work non-traditionally and informally, from occupational health-and-safety and workers' compensation coverage, requires alternative institutional responses and a tightening of the regulatory framework. Concentrating attention on institutionally reforming that part of the social security system which covers only a small part of the labour force active in the formal labour market at the expense of those involved in non-traditional work and in the informal economy, is inherently

<sup>60</sup> Barrientos and Barrientos 33-34 and 38-39.

<sup>61</sup> S 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution").

<sup>62</sup> See also s 24(a) of the Constitution, which provides that "Everyone has the right to an environment that is not harmful to their health or well-being".

<sup>63</sup> Also known as the Social Charter, adopted in 2003.

<sup>64</sup> Art 12(h).

<sup>65</sup> Art 2(f) and art 11(a).

<sup>66</sup> Approved by the SADC Ministers of Labour in 2007.

<sup>67</sup> See art 12 of the Code.

unequal, as it directs the attention of government and other stakeholders away from a huge segment of the population with no or little social security coverage.<sup>68</sup> There is, therefore, a need to investigate ways, means and modalities of extending coverage to these excluded categories, from an institutional and structural point of view.

In particular as far as those in non-traditional work and in the informal economy are concerned, several options are available and need to be considered.<sup>69</sup> Experience from other countries suggests that it is possible to extend social security coverage to non-traditional and informal workers. Two broad approaches have been used in India, a country with 92% of the working population in the unorganised sector,<sup>70</sup> namely bottom-up and top-down approaches. A good example of top-down approaches, apart from the centrally-funded social assistance schemes, is the introduction of welfare funds by the Government of India – at both the national<sup>71</sup> and provincial (state) level. Central funds are administered through the Ministry of Labour for workers in certain occupations for whom no direct employer-employee relationship exists, such as beedi workers. These funds, which cover around 10 million out of an estimated 370 million workers in the unorganised sector, are funded from levies on employers and manufacturers. In the latter case, a tax (levy/cess) is imposed by state governments on the aggregate output of selected industries (eg, the Bidi Welfare Fund financed by a tax on bidis (hand-rolled cigarettes)). In the case of building and construction work, a small cess/levy is collected on the basis of the construction project. The benefits provided by welfare funds include medical care, maternity benefits and assistance with children's education, housing and water supply. A legislative framework for the welfare funds has also been developed.<sup>72</sup> While it is clear that workers' compensation is not as such part of the range of protective benefits available within the framework of these funds, the extension of the benefit regime to cover this particular risk category is in principle possible.

Another example of a top-down approach is the introduction of social insurance schemes by central and state governments in India. These include schemes launched for the benefit of weaker sections of the working population through the Life Insurance Corporation and the General Insurance Corporation of India. Some of these schemes may cover

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<sup>68</sup> Barbone and Sanchez "Pensions and Social Security in Sub-Saharan Africa – Issues and Options" in *Social Security in Africa: New realities* (Thirteenth African Regional Conference, Accra, 6-9 July 1999, Social security documentation, African Series No. 21 International Social Security Association, Abidjan, 2000) 20-21.

<sup>69</sup> See generally Olivier *Acceptance of Social Security in Africa* (Main Report presented at the Fifteenth ISSA Africa Regional Conference, held in Lusaka, Zambia, 9-12 August 2005) 18-20, on which this part of the contribution is partially based.

<sup>70</sup> The percentage of workers employed on regular salaried employment (16%) is small. The majority of the workforce is either self-employed (53%) or employed in casual-wage employment (31%): "Unorganised Sector in India" <http://www.labour.nic.in/ss/UNORGANISEDSECTORINDIA-SocialSecurityandWelfareFunds.pdf> (accessed June 2006) 1.

<sup>71</sup> Five such funds have been set up by the government of India.

<sup>72</sup> See generally "Unorganised Sector in India" 3-7.

accidental death and partial or total permanent disability due to accident. Contributions are paid by beneficiaries and by the government of India.<sup>73</sup>

More recently, in terms of the provisions of the Unorganised Sector Workers Social Security Bill, 2005, a particular arrangement in the form of a dedicated scheme is foreseen for unorganised sector workers. The arrangement is envisaged to provide as a minimum a pension, health insurance for the contributor, spouse and children, maternity benefits for women workers or spouses of men workers, and insurance to cover death and disability arising out of accidents.<sup>74</sup> In addition, central government and state governments may through additional schemes/arrangements provide for additional social security benefits, including employment-injury benefit schemes.<sup>75</sup> Contributions come from the workers (rate dependent on age), employers (where identifiable) and government (in particular where employers are not identifiable). Delivery of social security to these workers will be done either through workers' organisations or through other organisations, like panchayat bodies,<sup>76</sup> self-help groups and trade unions.

The interesting and exemplary experience of the Self-Employed Women's Association (SEWA) in India, is a good example of a bottom-up approach. SEWA became a registered union in 1972 in order to improve the welfare of women in the informal sector. The informal sector workers are divided into four categories, namely vendors, hawkers, home-based workers and labourers. SEWA provides a number of services for its members such as credit, training, child care, health care, pension and insurance. In order to provide these services SEWA has links with private insurance companies. The strength of SEWA is that it responds to the specific needs and priorities of the members and also responds to both immediate and future needs.<sup>77</sup> Workers' compensation is not directly addressed, but health care and pension coverage would partly cover this.

As noted in a recent ILO publication,<sup>78</sup> there is no one solution to the fundamental problem of extending social security coverage to non-traditional and informal economy workers. The first (theoretical) option would be to extend the social assistance system to as many as possible of those who are poor and vulnerable, including those who work informally. It is unlikely that this option would be of much assistance in the areas of occupational health and safety and workers' compensation.

As a second option, the pursuit of social justice ideals demands that coverage of existing social insurance schemes be extended to non-traditional and informal economy workers. However, as noted by the ILO,

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<sup>73</sup> "Unorganised Sector in India" 2-3.

<sup>74</sup> Clause 5(1) of the Unorganised Sector Workers Social Security Bill, 2005.

<sup>75</sup> Clause 5(3) of the Unorganised Sector Workers Social Security Bill, 2005.

<sup>76</sup> Village Councils in India.

<sup>77</sup> "Unorganised Sector in India" 3.

<sup>78</sup> Gillion, Turner, Bailey, and Latulippe *Social Security Pensions: Development and Reform* (2000) 530.



most of the existing social security schemes, at least in Africa, cannot easily be extended to the self-employed and the informal economy, because the threshold of entry in terms of their contribution and benefit structure is too high for most of those excluded, and because the benefits provided are not consistent with the priorities of people living in poor circumstances whose social protection requirements are essentially short-term. Also, it needs to be determined whether the administrative capacity of the existing (public) occupational injury-and-diseases schemes, if in existence, is adequate to take on the task of extending coverage.<sup>79</sup> Tunisia, however, provides an example of how this option can be successfully implemented in the area of workers' compensation. In this country, on an experimental basis, contributions to their employment injury-and-diseases scheme were determined for small farmers, fishermen, the employers of domestic workers and private individuals using labourers for a short period. The contribution was in the form of a lump sum and determined according to the size of the farm, the type of crop, type of fishing or the provisional duration of the work.<sup>80</sup> This is a result of the need to develop innovative ways to extend protection to non-traditional workers.<sup>81</sup>

As a third option, the importance and potential use of existing informal social security arrangements have to be acknowledged. While the family- or kinship-based forms of support may be decreasing due to the disintegration of family-based structures, there is ample evidence that mutuality- or self-organised group-based arrangements offer real solutions to the dilemma of limited formal social security coverage.<sup>82</sup> This does, however, require that these institutions and the role played by them be recognised and supported by governments. Economies of scale can be achieved if proper links are developed between these informal arrangements and the formal social security system. There should therefore be a proper model aimed at developing an integrated approach towards formal and informal social security coverage.<sup>83</sup> This may require a limited measure of formalisation, in particular if government support were to be extended to these informal schemes.

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<sup>79</sup> Gillion *et al* 530; see also Barbone and Sanchez 32. Ghana provides an illustration of a less than successful attempt to use an existing public fund to extend social security coverage to the informally employed. The Social Security and National Insurance Trust Fund (SSNIT) of Ghana covers the self-employed on a voluntary basis. Of its 942,000 active members (10 per cent of the working population) a few years ago, there were only 5,400 voluntary members in spite of the fact that those in the informal sector represent 70 per cent of the working population.

<sup>80</sup> Chaabane "Towards the Universalization of Social Security: The Experience of Tunisia" (Extension of Social Security ESS Paper No 4, ILO, 2002) 17.

<sup>81</sup> The Social Security Bill, 2005 (Tanzania) also makes provision for this possibility.

<sup>82</sup> See, amongst others, Mouton *Social Security in Africa: Trends, Problems and Prospects* (1975) 143.

<sup>83</sup> See, for more details on such an approach, Olivier and Kaseke "Informal Social Security and Formal Social Security: Developing an Integrative Approach" (Paper presented at a SADC Social Security Conference, held in Gaborone, Botswana, November 2004). See also Tostensen *Towards Feasible Social Security Systems in Sub-Saharan Africa* (CMI Working Paper 5) (Chr. Michelsen Institute, 2004) 1.

However, it is doubtful whether the existing informal social security arrangements are able to extend social security coverage to the bulk of the excluded non-traditional and informal economy workers. As a matter of general experience, these institutions reach only a fraction of the essentially unorganised informal economy.<sup>84</sup> Also, the effectiveness, reach and sustainability of informal social security arrangements are limited. These arrangements on their own rarely provide a sufficient and all-encompassing solution to the risks which poor people are confronted with.<sup>85</sup> More importantly, though, for present purposes, is the fact that these community-based social protection schemes do not include occupational health-and-safety and workers' compensation arrangements,<sup>86</sup> presumably because these are not viewed by scheme participants as the most pressing needs to be covered. However, it might be possible to use these institutions as part of the delivery mechanisms for social security benefits, including workers' compensation benefits, payable by a public scheme.<sup>87</sup>

Governments could consider, as a fourth option, the establishment and support (by way of, for example, a subsidy) of a public low-cost social security scheme as a strategy for enhancing coverage and social protection. The scheme should be set up for non-traditional and informal economy workers and for low-income formal economy workers who are not members of one of the existing social insurance schemes. In this way responsibility can be taken on a national basis for ensuring that as many of the non-traditional and informal economy workers and lowly paid formal sector workers as possible enjoy social security protection. The recently suggested unorganised sector workers' social security arrangement in India, referred to above, would be an example of such an approach. As indicated above, such an arrangement could also be used as a mechanism to provide for workers' compensation protection to non-traditional and informal workers. However, a caveat should be expressed. The Indian Unorganised Sector Workers Social Security Bill, 2005 has been criticised by some on the basis that it does not cater adequately for the heterogenous nature of the informal economy, and that it could operate to the detriment of the existing occupation-specific informal economy schemes (with higher levels of protection) (eg, those covered by the social insurance and welfare fund structures referred to above).<sup>88</sup> In this regard it needs to be recalled that workers' compensation systems, as is the case with the South African system, often determine

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<sup>84</sup> However, see the example of SEWA discussed above.

<sup>85</sup> Holzmann "Risks and Vulnerability: The Forward-looking Role of Social Protection in a Globalizing World" in Dowler and Mosely (eds) *Poverty and Social Exclusion in North and South* (2002), par II.

<sup>86</sup> Barrientos and Barrientos 34.

<sup>87</sup> This is the approach adopted by both the Social Security Bill, 2005 (Tanzania) and the Indian Unorganised Sector Workers Social Security Bill, 2005.

<sup>88</sup> Cf Hirway *Unorganised Sector Workers' Social Security Bill, 2005* (EPW Commentary)(2005).

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contributions to workers' compensation on the basis of occupation-specific risk rating.<sup>89</sup>

### **3 4 Increased role for governments and innovative funding options**

The discussion above effectively also highlights the fourth area of innovative approaches, namely an increased role for governments and innovative funding options. As is evident from the preceding discussion, the welfare fund system in India falls outside the framework of a specific employer and employee relationship in as much as the resources are raised by the government on a non-contributory basis: the delivery of welfare services is effected without linkage to the individual worker's contribution.<sup>90</sup> Likewise, in terms of the structure foreseen in the Unorganised Sector Workers Bill, 2005, the position is that contributions are forthcoming from the workers, employers (where identifiable) and government (in particular where employers are not identifiable).

Traditionally, the payment of workers' compensation contributions is an obligation on employers – flowing from the employer's common-law responsibility to provide safe and healthy working conditions.<sup>91</sup> In the event of non-traditional and informal work, an identifiable employer may not easily be discernible. While it is important, as suggested above,<sup>92</sup> that the "real employer" be identified, even in the sense of the lead firm that has responsibility for the rights and protection of all workers in the chain, this may not always be possible. Also, those for whom an employer is not forthcoming may not be able to sufficiently contribute on their own. Additional funding mechanisms, such as government subsidies and/or a levy on the industry concerned, may be viable alternatives to explore.

### **3 5 Alternative approaches to prevention, rehabilitation and compensation**

As a final area of required innovative approaches, there is a need to consider specific alternative prevention, rehabilitation/re-integration and compensation modalities. In the area of prevention much could be achieved by statutorily setting minimum standards of risk assessment and enforcing

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<sup>89</sup> Employers in South Africa who are bound to pay contributions to the Compensation Fund are assessed on the basis of the remuneration paid to employees and the class of industry in which the employer operates. Economic activity has been divided into 23 classes and 102 sub-classes: the assessment rates for these sub-classes vary considerably. See generally s 83 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and Smit "Employment Injuries and Diseases and Disability in the Workplace" in Olivier, Smit, Kalula, and Mhone (eds) *Introduction to Social Security* (2004) 328. An employer's assessment may vary so as to reward the adoption of an active approach to the prevention of accidents; conversely, employers with poor safety records over a period of time may be penalized (see s 85 of the Occupational Injuries and Diseases Act 130 of 1993).

<sup>90</sup> "Unorganised Sector in India" 3-4.

<sup>91</sup> See Smit 326.

<sup>92</sup> See par 3 1 above.

same with the assistance of, for example, the social partners.<sup>93</sup> In some developed countries, such as Sweden, roving safety representatives have been introduced to provide worker representation in smaller workplaces and where subcontractors are involved.<sup>94</sup> In addition, as Quinlan indicates, governments could also take more action to impose and enforce minimum standards in their tender requirements.<sup>95</sup> In short, managing risks requires improved recognition and management of work-related ill-health, improved equipment and procedures and improved inspection systems backed by stronger legal standards.<sup>96</sup>

#### 4 CONCLUSIONS

It is clear that the extension of meaningful employment injury-and-disease protection requires a comprehensive and integrated approach to industrial relations, occupational health and safety and worker's compensation arrangements. Quinlan refers to the New South Wales (in Australia) experience in this regard, in terms whereof a "multi-agency approach to mutually assured standards with contractual tracking mechanisms and workplace/worker registration (to track the flow of work and conditions of employment) has been developed, utilizing the technique of rebuttable presumption (with regard to dispute of wages and workers' compensation claims) to ensure that the top of the supply ... could not escape their legislation responsibilities".<sup>97</sup>

Explicit regulation of supply chains using contract-tracking mechanisms therefore seems to be crucial in the attempt to widen coverage to those who work informally. Workplace regulation played a major role 100 years ago when occupational health-and-safety legislation and workers' compensation legislation were introduced. Some of the non-traditional work arrangements which were prevalent at that time are similar to those found today (such as temporary work). They are in need of proper regulation. A second wave of rigorous but innovative legislative drafting, accompanied by a fresh workplace registration drive, will assist in the endeavour to extend occupational health-and-safety and workers' coverage to those who work non-traditionally and informally in the present day context.<sup>98</sup>

From the discussion above, it is clear that the extension of occupational health-and-safety and workers' compensation protection to non-traditional and informal economy workers requires a comprehensive, varied and integrated approach. No single solution would suffice. The co-ordinated

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<sup>93</sup> Quinlan 20.

<sup>94</sup> Quinlan 21 and 25.

<sup>95</sup> Quinlan 21.

<sup>96</sup> Loewenson 12; and Loewenson 2001 *Bulletin of the World Health Organisation* 865.

<sup>97</sup> Quinlan 22.

<sup>98</sup> See in particular Quinlan 24.

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framework, one would want to suggest, has to be based on considerations such as the following:

- recognising the power or ability of at least some of those who work non-traditionally and informally to save and to contribute to their own social protection, subject to the caveat that arrangements made for non-traditional and informal workers should not impose most of the burden of and responsibility for risk coverage on to poor people themselves;
- taking into account the variety of sectors within the informal economy and the framework of non-traditional work, as different solutions, for example in connection with contribution and funding possibilities, may have to be developed for different sectors, where necessary; and
- involving different role-players and stakeholders, in particular those who are directly affected by the arrangements to be instituted.<sup>99</sup>

Also, from a human-rights perspective, what is required is that workers who are exposed to or suffer from employment-related injuries and diseases are treated without regard to their contractual status.

The comparative experiences and perspectives discussed above provide lessons for the South African context as well. From a definitional perspective, there is much to be learnt from the wider conceptual framework adopted in other developed and developing country jurisdictions, in particular where the sphere of coverage of workers entitled to workers' compensation benefits *is* concerned. The adoption of alternative institutional and accompanying regulatory approaches, as is the case with innovative funding options, may also go a far way to accommodating non-traditional and informal economy workers in South Africa. Approaches such as these, one would believe, would give true expression of the constitutional mandate to extend social security to everyone in the country.

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<sup>99</sup> Chen, Jhabvala and Lund 41-42.