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A Better Future for Women at Work

Meghan Campbell, Sandra Fredman, Judy Fudge and
Shauna Olney*

1. Introduction

Although nearly a century has passed since the International Labour Organization (the ILO) adopted its initial two Conventions on women and work, the barriers to women in the world of work, including accessing the labour market and recognising and valuing the work of women, remain pervasive, stubbornly resisting attempts at change. Explicit laws, invisible structures and cultural norms shape and limit the range of work women undertake. Throughout the developed and developing world, women have difficulty accessing good quality jobs or to the financing and infrastructure needed to establish their own businesses. The result is that women predominate in lower paid sectors of the economy. The majority of the world's women work in the informal economy, characterised by work arrangements and employment relations that fall outside the scope of labour law, collective agreements and social protection. Regardless of the specific type, informal work is marked by insecure working arrangements and difficult working conditions. Even when women work in the formal labour market, they continue to be trapped in non-standard employment¹ or unable to break glass ceilings, with significant repercussions both for their current earnings and future pension entitlements. While progress has been made on some fronts, new challenges are emerging. The increasing fragmentation of labour and the rise of the gig economy, rather than

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¹ Non-standard employment includes temporary employment, part-time work, temporary agency work and other multi-party arrangements, and disguised employment relationships and dependent self-employment. See ILO, 'Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects' (2016)

<http://www.ilo.org/global/publications/books/WCMS_534326/lang-en/index.htm> accessed 16 July 2018.

breaking cycles of disadvantage, can continue to trap women in low paid and low status jobs. Underpinning many of the challenges women face is the fact that women and girls continue to provide the lion's share of unpaid care work.

The scope of the challenge for improving women's access to and progression in the labour market, and to recognise, value and improve the work women undertake, is extensively documented. But we have yet to find and implement comprehensive solutions to these seemingly intractable obstacles. Women have made it clear that they want to work in paid jobs. Yet there are far fewer women than men in the labour market,² and the current situation falls far short of meeting the vast majority of women's needs or aspirations. There is increasing frustration as current legal and policy strategies have failed to break cycles of disadvantage. Anti-discrimination laws, equal pay laws, maternity leave, social security laws, minimum pay and working time laws, and laws governing atypical work have not resulted in women's equality in the labour market. While some women have benefitted, too many women have not. The disappointing conclusion is that law as currently formulated has not worked to fully secure a better future for women at work. This failure has led some to question the potential of law for facilitating the recognition of the value of work undertaken by women, and particularly for addressing the interaction between paid and unpaid work. Is law simply unable to address the complex situations in which women work? Can the law have any meaningful role in reshaping deeply entrenched gender relationships that permeate the economy?

In order to examine these questions and seek out new approaches, the Oxford Human Rights Hub in partnership with the ILO and the University of Kent hosted an international conference: *A Better Future for Women at Work* in May 2017. The conference papers and discussions were an important contribution to the ILO's Women at Work Centenary Initiative, which is seeking to better understand why progress on delivering decent work for women has been so slow and what could be done to accelerate progress. The conference brought together a wealth of experience from practitioners, academics and policy makers from around the world and across disciplines to create a forum in which to explore innovative and transformative legal strategies and policy responses that move beyond traditional debates on women's role in the

² ILO and Gallup, 'Towards a Better Future for Women and Work: Voices of Women and Men' (2017) <http://www.ilo.org/global/publications/books/WCMS_546256/lang-en/index.htm> accessed 16 July 2018; ILO, 'World Employment and Social Outlook: Trends for Women' (2018) <http://www.ilo.org/global/research/global-reports/weso/trends-for-women2018/WCMS_619577/lang-en/index.htm> accessed 16 July 2018.

labour force. The articles in this inaugural issue of the *University of Oxford Human Rights Hub Journal* are the culmination of that conference. They bring together a unique global and interdisciplinary perspective on what is required to guarantee a better future for all women at work.

2. An Unwavering Commitment to Substantive Equality

The driving principle behind this collection has been to ‘think out of the box’, to consider new solutions based on an understanding of the crucial interaction between gendered roles in the family and women’s participation in the paid workforce, in public life and in household decision-making. This challenge requires an understanding of gender equality which goes beyond striving for the same treatment for women as men, on the one hand, and the preoccupation with outcome data, on the other. Instead, a substantive conception of equality, to be capable of achieving a better future for women at work, needs to address women’s inequality in a multi-dimensional way. Substantive equality should simultaneously redress disadvantage (the redistributive dimension); address stigma, stereotyping, prejudice and violence (the recognition dimension); facilitate participation and voice (the participative dimension); and bring about structural change (the transformative dimension).³

The first dimension, the requirement to ***redress disadvantage***, is a frankly asymmetric view of equality. Rather than assuming that men and women should be treated alike, its focus is on the disadvantage that attaches to gender. From this perspective, affirmative action, or special measures to redress disadvantage, do not constitute a breach of equality, but rather a means to achieve it. This conception in turn requires a searching exploration of the nature of this disadvantage. As the articles in this issue show, to understand disadvantage, it is not sufficient to consider only income, especially where it is calculated in terms of

³ Sandra Fredman, ‘The Future of Equality in Great Britain’ (2002) Working Paper No. 5, Equal Opportunities Commission; Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14 International Journal of Constitutional Law 712. This approach has been adopted in domestic and international law. See Equality Act 2010, s.149 (UK); UN Women, ‘Progress of the World’s Women 2015-16: Transforming Equalities: Realizing Rights’ (2016) <<http://www.unwomen.org/en/digital-library/publications/2015/4/progress-of-the-worlds-women-2015>> accessed 16 July 2018; UN Committee on the Rights of Persons with Disabilities ‘General Comment No. 6 (2018) on equality and non-discrimination’ (2018) CRPD/C/GC/11 [11].

household income. It is important to take a holistic approach to disadvantage, examining what access women have both to household income, and to a range of other assets, including social protection, property, and credit. Such an approach in turn requires a consideration of the power relations that impede such access, particularly within the family. Moreover, understanding disadvantage needs to confront women's different social locations, recognizing the interacting roles of class, race, disability, sexual orientation and migration status in creating gendered disadvantage. As Rose-Marie Antoine's article in this volume shows, women in different social locations experience disadvantage in specific ways, which require particular attention in designing legal and policy intervention.

Secondly, substantive equality should **address stigma, stereotyping, prejudice and violence**. One of the primary sources of stereotyping is the assumption that women should take on primary responsibility for care work. Women's stereotyped role in relation to unpaid care work has wide effects. It undervalues caring work on the assumption that such work can in principle be performed unpaid in the home. This assumption has consistently driven down the value attached to caring work performed in the paid labour market. The stereotypes driving women to take primary responsibility for caring and domestic work in the home also create obstacles to women's full participation in work with decent standards. Women with such responsibilities are propelled into part-time and casual work, much of which is excluded from employment protection rights. Women are additionally stereotyped as sexual beings, leading to sexual harassment and violence, in the home, at work or on the streets. These stereotypes are a fundamental negation of women's right to dignity and recognition. Substantive equality therefore requires the proper valuing of care work, as the articles by Elizabeth Hill and Aelim Yun in this volume demonstrate. It also requires concerted and institutionalised initiatives both to combat violence in the work place, as the article by Katherine Lippel in this volume explains, and violence in the home that spills into the workplace, which is the subject of the article by Ludo McFerran, Anna Lee Fos Tuvera and Jane Aeberhard-Hodges.

Addressing stigma, stereotyping, prejudice and violence does not, however, posit a male norm. Instead, it requires proper recognition of the social and personal value of care, and recognition of each individual's dignity and value. The ILO Domestic Workers Convention, 2011 (No. 189) is a striking example of the ways in which a reorientation and characterization of domestic work can change the value attached to such work. It also shows that international law can have a significant role in making visible the invisible. Instead of being regarded as 'part of the

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family' or as a 'servant', the Convention requires domestic workers to be recognized as workers and given appropriate terms and conditions, and has had a significant impact at the national level.

The third dimension requires substantive equality to ***facilitate participation and voice***. This dimension places emphasis on individual agency, as well as collective action through solidarity and social mobilisation, requiring proper participation in decision-making. It is, however, challenging in that it interrogates the representativeness of different voices, and specifically pays attention to intersectionality and the need to give proper space to contested positions and those who are often not heard. For example, as Elizabeth Hill's article in this volume shows, proper provision for child-care for informal workers is not possible without dialogue with women in the informal economy themselves.

The final dimension requires substantive equality to address structural barriers and achieve ***structural change***. This is the transformative dimension of equality. It requires an acceptance that equality does not preclude difference: rather, difference should be accommodated and valued. Structural change for a better future for women at work will need to recognize the dynamic interaction between reproduction and production, not just for women, but also for men. Reconstructing gender relations requires both that women can enter the paid workforce on equal terms, and that men take on caring roles in the home, as well as in the labour market. Similarly, this dimension prompts a radical reconstruction of the public-private divide, which recognizes that the workplace can be at home, in public spaces, in other people's homes and virtual, through the internet. It also requires closer attention to be paid to the provision of public services, ensuring that caring is recognized as a social function, to which everyone should contribute.

The multidimensional approach to equality requires attention to be paid simultaneously to all four dimensions when designing policy intervention or legal change. For example, cash transfers which are conditional on women taking their children to health-care facilities might redress disadvantage but entrench gender stereotypes. Moreover, if the sums transferred are too small, cash transfers might mitigate against structural change because they divert public money away from investment in publicly available services. To achieve substantive equality, cash transfers would need to be unconditional; they would need to include women's voices in their design, and they would need to co-exist with proper investment in public facilities. Similarly, provision of paid maternity leave is essential to redress disadvantage. But it also risks entrenching stereotypes unless it is accompanied by paid paternal leave of an adequate duration, so that childcare responsibilities can be shared. Organization into trade unions or other kinds of mobilization similarly

facilitate voice, but collective organization will not redress disadvantage unless the most marginalized are included. In all these cases, the design of any equality-enhancing intervention should be adjusted to ensure that all the dimensions of equality are addressed.

3. Multifaceted Strategies for A Better Future for Women at Work

To move towards this multi-faceted goal of substantive equality, the articles collected in this volume raise several crosscutting themes. Particularly important is the role of law and legal change. To bring about structural change, it is important to recognize law as having the power both to cause gendered disadvantage, on the one hand, and to facilitate change, on the other. This is clearly seen in relation to precarious work. Precarious work is both a function of the interaction between unpaid and paid work, and of laws that attach employment rights to specific forms of employment relationships based on the contract of employment.⁴ It is primarily because the legal definition of employee for the purposes of employment law often excludes many types of work undertaken by women that such work becomes precarious. Moving towards substantive equality therefore demands legal recognition of rights as inhering in all workers, regardless of their contractual status. Using law to bring about change further necessitates a re-characterization of those who are responsible for securing workers' rights. The contract of employment characterizes the employment relationship as binary, assuming that legal obligations should only fall on the 'employer' who is a party to the contract with the employee. Instead, responsibility should fall, not only on the employer as narrowly defined by a contract, but also on all those who are in a position of power and are capable of securing those rights. As the articles in this volume show, this means that a holistic approach to law should be taken, encompassing not just labour law, but a range of legal constructs and domains, including social security law, urban planning laws and family and property law. In addition, a move towards substantive equality requires recognition of the ways in which existing laws individuate workers, and an alternative approach that facilitates the collective.

⁴ See further Sandra Fredman and Judy Fudge, 'The Contract of Employment and Gendered Work' in Mark Freedland et al (eds) *The Contract of Employment* (OUP, 2016); Sandra Fredman and Judy Fudge, 'The Legal Construction of Personal Work Relations and Gender' (2013) 7 *Jerusalem Review of Legal Studies* 112-22.

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The structure of law as rooted in particular countries raises further challenges. On the one hand, to secure a better future for women through legal change requires attention to local specificities. On the other hand, the interconnectedness of the global labour market, through global care chains, migrant labour and tax avoidance, risks a race to the bottom unless overarching frameworks, such as those provided by the ILO, can be provided. The challenge is then for these standards to navigate the important relationships between local and global norms in order to develop truly transnational legal norms. Furthermore, we need to be sensitive to the limits of law as a top-down mechanism. More attention needs to be paid to discovering the levers for organizational and cultural change.

The second major theme is the role of care work, whether paid or unpaid. Legal strategies have been centrally shaped by the perceived rigid boundary between work in the home and work in the market. Yet it is well known that women's unpaid caring work in the home has a major effect on their ability to achieve decent work in the labour market. Gender norms on care are deeply embedded and stubbornly difficult to modify. Although women's labour force participation has dramatically increased (though the gender gap in participation has not significantly decreased), this increase has not resulted in any significant changes in the gender distribution of paid and unpaid care work. Instead, the growth in women working outside the home for pay has raised even further challenges with respect to women's care work, particularly in the protection of domestic workers, and especially migrant domestic workers. The severe reduction of public services, the weakening of employment protections and the increasing need for elderly care are exacerbating longstanding issues on gender and care work. Moreover, the burden of care work creates self-sustaining patterns. For example, girls' caring responsibilities limit the time and energy they have to invest in education, training and skills.⁵ This knowledge gap negatively impacts their ability to secure a job with just and decent working conditions or to access the financial resources needed to be economically independent and empowered. The articles in this volume show that catering for the needs of carers and care recipients is crucial to any strategy for achieving a better future for women at work.⁶

⁵ UN Committee on the Convention on the Elimination of Discrimination Against Women, 'General Recommendation No 36: girls and women's right to education' (2017) CEDAW/C/GC/36.

⁶ ILO, 'Care Work and Care Jobs for the Future of Decent Work' (2018) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_633135.pdf> accessed 16 July 2018.

A truly transformative legal and policy approach to care work would harmoniously pursue: (i) the *recognition* of care work to ensure that women who work in the formal and informal care sector enjoy fair and just working conditions and that employers develop care friendly policies for women and men; (ii) the *reduction* of care work by properly investing in public services including health care, education and affordable child care services; and (iii) the *redistribution* of care work among multiple actors including the state and men by adopting amongst other things adequate paternity and parental leave policies.⁷ Such an approach would also pay attention to the all four dimensions of substantive equality. The need to redress disadvantage as well as to address stereotyping mean that a proper recognition of the value of care work should be translated into redressing the gendered disadvantage in the labour market resulting from such stereotyping. Reduction of care work requires structural change, the fourth dimension, but this should not ignore the need to redress disadvantage, specifically by ensuring decent work for care workers working in affordable child care services. The redistribution of care work among multiple actors radically changes the stereotype of women as carers, the second dimension, by requiring society as a whole to value and share in the responsibility for caring. In addition, what should not be forgotten is the need for participation by women in many different social locations in decision-making in this context.

Linked to the unequal and gendered division of care work is the third overarching theme – the dominance of women in the informal economy. In parts of the world ‘informal employment accounts for more than half of non-agricultural employment.’⁸ Informal work is not only a characteristic of the developing world. Despite predictions that the informal economy ‘would disappear as developed economies industrialised,’⁹ the changing nature of work has seen a rise in the informalisation of work in the developed world.¹⁰ Informal working relationships deviate from the standard formal employer-employee model and are marked by lack of social protection and labour rights, poor

⁷ UN Working Group on Discrimination Against Women in Law and Practice ‘Discrimination Against Women in Economic, Social and Cultural Life with a Focus on the Economic Crisis’ (2014) A/HRC/26/39 [91]-[97].

⁸ Pamhi Bamu, ‘Extending Occupational Health and Safety Law to Informal Workers: The Case of Street Vendors in South Africa’ (2018) 1 University of Oxford Human Rights Hub Journal 62.

⁹ *ibid.*

¹⁰ Judy Fudge ‘Blurring Legal Boundaries: Regulating Work,’ in Judy Fudge, Kamala Sankaran and Shae McCrystal (eds) *Regulating Work: Challenging Legal Boundaries* (Hart, 2012) 1.

working conditions and low pay.¹¹ Women work in the informal sector in a variety of roles, including as domestic workers, home-based workers and unpaid contributing family workers.¹² Most people do not enter the informal economy by choice, and there is evidence that workers in the informal economy face a higher risk of poverty than those in the formal economy.¹³ They are often part of global value chains, creating even greater challenges for legal regulations across boundaries. Moreover, as Yun and Antoine's articles show, the boundaries between formal and informal work are continually shifting, as women's caring work in the formal economy becomes increasingly informalised, and terms and conditions of such work in the formal economy come to reflect those in the informal economy.

A. Recognising, Rewarding, Reducing and Redistributing Care Work

The articles in this issue evaluate efforts in different parts of the world to transform care work. Elizabeth Hill's article '**Early Childhood Education and Care for Informal Women Workers: Developing an Emancipatory Framework for Better Working Futures**' takes a fresh approach to care work. Hill makes the crucial point that, although a vast majority of women work in the informal sector, child care services have not adapted to non-formal working patterns. She argues that care policies must fully account for informal women workers' poor working conditions, low wages, and their care responsibilities while also paying proper attention to children's wellbeing. Particularly important is the need to ensure decent work for early child care workers. Hill evaluates models of early childcare for informal workers in India, Mexico and Chile to tease out features for successful policies. She concludes that adequate budgets, robust regulatory mechanisms and dialogue with informal women workers are crucial to ensure that care services respond to their needs.

It is also essential to recognize that care is required throughout the life cycle, not just in early childhood years. Moreover, there is an

¹¹ Naoko Otake, 'Gender and the Informal Economy: Key Challenge and Policy Response' (2017) ILO Employment Working Paper No 236 <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_614428.pdf> accessed 9 July 2018; ILO, 'Women and Men in the Informal Economy: A Statistical Picture' (2018) <http://www.ilo.org/global/publications/books/WCMS_626831/lang-en/index.htm> accessed 16 July 2018.

¹² Otake (n 11) 7.

¹³ ILO, 'Statistical Picture' (n 11).

increasing professionalization of care work. It is vital therefore to pay close attention to the working conditions of care workers. Aelim Yun's article '***The State Made Informalisation of Women Workers: A Case Study into Care Work in South Korea***' highlights the extent to which law can construct precarious work, and in particular, how the boundary between formal and informal work is not itself an indication of decent work. She does this by honing in on the increasing challenge of elderly care and care in hospitals. To address this challenge, South Korea is pursuing a combination of formal and informal care work policies. Through an analysis of the narrative around care work and employment policies, she demonstrates that the conditions of formal care work for the elderly mimic informal conditions, concluding that care services in both the formal and informal sector are precarious. The article therefore argues that to improve the conditions of care work, it is essential to raise the minimum wage and to have stronger protection for collective action.

B. Legal Strategies and Informal Work

The dominance of informal work makes it imperative to carefully consider how law and policy can improve the working conditions of informal workers. This requires a departure from an exclusive focus on labour law and the pivotal role of the employment contract as the fulcrum for rights. Hill's article in this volume explores how care policies can support informal women workers. The role of health and safety laws in protecting informal workers in a municipal setting is the crucial contribution made by Pamhi Bamu in her article '***Extending Occupational Health and Safety Law to Informal Workers: The Case of Street Vendors in South Africa***.' Bamu's article is concerned with street vendors, who are predominantly women, operating in public spaces selling goods and providing services. They experience high levels of pollution, severe back pain from standing on their feet for prolonged periods of time, have limited access to sanitary facilities and are often blamed for urban filth. Because their work takes place in the streets, street vendors are excluded from occupational health and safety laws, despite their dangerous working conditions. Indeed, public health laws and municipal ordinances frequently punish street vendors, ostensibly to protect public health. Bamu persuasively argues that occupational health and safety laws must be extended to informal street vendors. She provides examples of how the current laws can be adapted, including dealing with the difficulties raised by unregistered street vendors. Importantly, she emphasizes the participative dimension of substantive equality, demonstrating that informal women workers and

civil society organizations who support them must be key and vocal figures in the process of adapting occupational health and safety laws and policies. While Bamu focuses on a specific sector in a specific country, her article more broadly demonstrates how different branches of law, not traditionally thought of in terms of labour markets, can be powerful tools to ameliorate the working lives of informal women workers.

C. Beyond Equal Pay: Gender Pay Equity

Historically, legally permissible gender-based and unequal wage rates and job segregation based on gender have combined to create deep-seated practices that have resulted in women being paid less than men for the same and comparable work, or work of equal value, and in women's confinement to lower paid jobs with fewer avenues for advancement. These practices have been institutionalised such that they have become invisible and women are characterised as choosing to perform different and 'less valuable' work. In many parts of the world, pay discrimination, (which is more often than not indirect rather than direct), and job segregation on the basis of gender, are still widespread. The result is that women are paid less than men, receive fewer job-related benefits and are confined to dead-end jobs. Not only do these practices and results contribute to women's dependence upon a male earner in order to support children and other dependents, they follow women throughout their life cycle – their pensions and entitlements to social protection are lower than those of men.

The dominant strategies for dealing with what is now characterised as the gender pay gap are legal requirements or policies requiring equal pay for equal work or equal pay for work of equal value. However, the problem with these strategies is that they take the male wage as the norm; they are typically confined to a single employer's establishment; and they require individual women or their representatives to take the initiative to unearth discriminatory pay practices and to fight them. For these reasons, Jill Rubery and Aristeia Koukiadaki in ***Institutional Interactions in Gender Pay Equity: A Call for Inclusive, Equal and Transparent Labour Market*** argue that gender equity and inclusive and transparent labour markets should be pursued as joint goals. What this means is that gender equity concerns should be mainstreamed into inclusive labour market policies and that inclusivity goals should be mainstreamed into gender equity policies within a broader framework of transparent labour markets. The beauty of this approach is that it does not create silos for different elements of pay equity policies, but, instead, approaches them as an integrated whole.

Moreover, inclusive and transparent pay policies should help to reduce any potential backlash from men who blame women, and not their employers or government funders, for reductions in their pay.

Rubery and Koukiadaki begin by providing an elegant synthesis of the range of voluntary, collective and regulatory strategies currently on offer to reduce the pay gap and an analysis of the contributions and shortcomings of these different types of initiatives. The original contribution that they make is to develop a four-dimensional policy heuristic that tackles low wages and their social consequences in general, and discriminatory pay practices in particular. They also develop the idea of a 'gender duty' as a new way of combining legal, collective and voluntary measures for dealing with the constellation of processes, which include pay systems, working time, recruitment and progression, which result in women's low and unequal pay. Instead of dealing with the problem once it has congealed in women's low pay, their strategy is to devise policies that prevent women's low pay from becoming institutionalised.

D. Intersectionality At Work

It is increasingly clear that, while women as a whole suffer from disadvantage in relation to work, there are sharp divisions between women in different social locations. For substantive equality to be achieved, it is crucial that these divisions be acknowledged and addressed. Class, race, disability and migrant status are among the many different axes of disadvantage that intersect to intensify inequalities, creating fissures which are not just quantitative but also qualitative. Since Kimberle Crenshaw's path breaking work cast the spotlight on intersectionality, there have been many attempts to find legal and policy strategies to address this issue. Rose-Marie Antoine's article in this volume, '**An Intersectional Approach to Addressing Gender and Other Forms of Discrimination in Labour in the Commonwealth Caribbean**', shows the value of an intersectionality approach in revealing the multi-faceted and complex dimensions of inequality. Using the Commonwealth Caribbean as her focus, she demonstrates how current inequalities are still influenced by a colonial legacy that, despite a Black majority population, still perpetuates inequality through the intersections of gender, race, class, age and social and geographical origin. Moreover, she illustrates how all of these identities are fractured, with hierarchies within racial and gender categories reflecting the continuing role of intersectional inequality. Anti-discrimination legislation in the region, however, continues to envisage

discrimination as grounded on a single axis framework. Nevertheless, she shows that there is scope for judicial interpretation, properly informed, to produce a more dynamic and realistic frame for addressing discrimination. More importantly, both policy and legal interpretative techniques should be designed proactively to take into account the different challenges, needs and interests of differently situated women, particularly their difficulty in accessing finances and capital, the unequal demands of family and household responsibilities, and social conditioning.

E. Combating Violence and Harassment at Work

Violence in the world of work is not a new phenomenon, but it has been largely invisible until recently. High profile cases and global campaigns have shone a spotlight on violence and harassment, revealing how pervasive and 'normalized' it is across the globe. It affects all countries and all sectors, and undermines efforts to achieve gender equality and decent work. Given the impact of violence on the world of work, the ILO constituents have agreed that the issue should be considered for standard setting, including a possible treaty.¹⁴ Katherine Lippel's article, ***'Conceptualising Violence Through a Gender Lens: Regulation and Strategies for Prevention and Redress'***, examines conceptual and policy considerations through a gender lens. Her article in this volume presents an overview of the literature on occupational violence and the regulatory frameworks to address it. Beyond sexual violence and sexual harassment, there has been little attention given to the nature and extent of violence to which women are exposed at work or because of the nature of their work. The perspective provided by Lippel is long overdue and particularly helpful in supporting the design and implementation of regulation and policies that are gender responsive. She makes a strong case for an integrated approach to regulating violence in the world of work (which extends to commuting to and from work), with a focus on rights and prevention, and calls for approaches that make visible the gendered and discriminatory dimensions.

Lippel tackles a range of definitional issues, including physical, psychological, sexual and discriminatory violence and harassment, technology-based violence, as well as workplace-related intimate partner

¹⁴ ILO, 'Reports of the Standard-setting Committee on Violence and Harassment in the World of Work: Resolution and Proposed Conclusions Submitted for Adoption by the Conference' (2018) Provisional Record No. 8A, International Labour Conference, 107th Session. See also ILO, 'Ending Violence and Harassment Against Women and Men in the World of Work' (2018) Report V(1), International Labour Conference, 107th Session.

violence. She provides a framework for conceptualising violence at work that is attentive to its particular impact on women, and she identifies a series of determinants of violence, including those associated with the structure of the organization and psychosocial risk factors. The high prevalence of violence affecting women in the health care sector and in education highlights the interlinkages between this article and others in this volume regarding care work and its impact on women at work. Noting the wide range of national regulatory approaches, including through criminal, civil, human rights, labour, non-discrimination, occupational safety and health and workers' compensation laws, she argues that protection against violence needs both to be mainstreamed and to cover all workers. Although laws and policies are essential to end violence at work, these initiatives need to go hand in hand with changing workplace culture and the perception that violence and harassment is tolerated. Lippel's work has been particularly important in the preparatory phase of the ILO's standard-setting process.¹⁵

Ludo McFerran, Anna Lee Fos Tuvera and Jane Aeberhard-Hodges's article, '**An Employment Right - Standard Provisions for Working Women Experiencing Domestic Violence**', explores how the impact of domestic violence against women spills into the workplace to impose a double disadvantage on women. Approaches to addressing the impact of domestic violence on women at work range from reforming more general laws on collective bargaining, employment, anti-discrimination and occupational health and safety, to specific violence against women legislation that targets the workplace. In this article, McFerran, Fos Tuvera and Aeberhard-Hodges assess the efficacy of different approaches by focusing on two different strategies, one from Australia and the other from Philippines. Australia has predominantly relied upon domestic violence clauses in collective bargaining agreements, whereas legislation has been the technique adopted in the Philippines. They analyse the factors that have contributed to improved conditions and the implementation of domestic violence rights at work, the role of trade unions in driving advances and maintaining good implementation, and the challenges to further progress. The authors conclude that a vibrant and inclusive trade unionism is necessary both for a broadening of existing workplace anti-discrimination rights to embrace domestic violence to counteract its negative effects for women at work; and for the development, implementation and

¹⁵ See her report for the ILO on which her article in this issue draws: Katherine Lippel, 'Addressing Occupational Violence: An Overview of Conceptual and Policy Considerations Viewed Through a Gender Lens' (2016) ILO Working Paper No 5 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_535656.pdf> accessed 16 July 2018.

institutionalisation of new kinds of employment rights, such as domestic violence leave and the right to request flexible working time so as to attend to domestic violence-related matters.

4. Conclusion

The articles in this volume, and the ongoing discussion they generate, demonstrate that although past legal interventions have only achieved partial success, the promise and potential of law remain. It is important not to dismiss the gains that have been achieved in some spheres and in some jurisdictions, partial as they are. Law still retains a vital role in modifying cultural norms and oppressive structures that underpin women's role in the labour market. Properly structured, legal and policy strategies can and do empower women around the globe. To do so, however, we need to take a holistic view, which breaches the boundaries between work and home, between labour law and other types of law, and which simultaneously redresses disadvantage, addresses stereotypes and violence, facilitates voice and addresses structural change, taking full account of women's different social locations. The articles in this inaugural volume of the *University of Oxford Human Rights Hub Journal* separately and collectively take an important step in opening up new and hopeful possibilities.

Early Childhood Education and Care for Informal Workers: Developing an Emancipatory Framework for Better Working Futures

Elizabeth Hill*

Abstract

Women workers in emerging economies are concentrated in informal employment where work tends to be insecure, poorly remunerated and unprotected by labour law. Vulnerability to informal employment and associated economic insecurity is driven, in large part, by the prevailing gender division of labour that positions women as primary carers and homemakers. Policy interventions for a better future for women in the informal economy must therefore address women's vulnerability as informal workers with limited protection, poor working conditions and low wages, *and* as workers who have care responsibilities. Disappointingly, work/care reconciliation policies for informal workers has been largely ignored. This article considers the role that centre-based Early Childhood Education and Care services play in facilitating a more secure economic future for informal working women in the global south. An analysis of four ECEC services in Mexico, Chile and India demonstrates that while challenging, it is possible to design emancipatory ECEC services that promote economic security and well-being for informal women workers, their children, and the care workforce. Public

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action, regulation and dialogue between government and civil society operators are some of the essential principles of an emancipatory approach.

Keywords: Early Childhood Education and Care, Informal Workers, Care Workforce, Public Action

1. Introduction

Women workers in emerging economies are concentrated in informal employment where work tends to be insecure, poorly remunerated and unprotected by labour law.¹ Women's exposure to informal employment and associated economic insecurity is driven, in large part, by the prevailing gender division of labour that positions women as primary carers and homemakers.² Unpaid family and community care responsibilities limit women's economic opportunities as they seek employment that best accommodates their unpaid care responsibilities. The need for some measure of work/care reconciliation often limits women's economic opportunities to the most flexible, marginal, least dynamic and low paid forms of work. Policy interventions for a better future for women in the informal economy must therefore address women's vulnerability as informal workers with limited protection, poor working conditions and low wages, *and* as workers who have care responsibilities.

Policy research and practice in the global north has identified a range of interventions to reduce the unpaid care burden on women and its negative impact on participation in paid employment. These include national paid parental leave schemes, flexible employment arrangements and the provision of publicly subsidised childcare services. In the global south there has been much less policy debate on work/care reconciliation, even as pressing demographic and economic challenges

¹ Martha Chen, 'The informal economy: definitions, theories and policies' (2012) WIEGO Working Paper No. 1
<http://wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf> accessed 17 April 2018; UN Women, 'Progress of the World's Women 2015-2016: Transforming Economies, Realising Rights' (2015)
<http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf> accessed 17 April 2018.

² Naomi Cassirer and Laura Addati, 'Expanding Women's Employment Opportunities: Informal Economy Workers and the Need for Childcare' (2007)
<<http://www.cpahq.org/cpahq/cpadocs/wcms125991.pdf>> accessed 17 April 2018.

are beginning to force these issues onto the public and political agenda.³ Where progress has been made policy has focused primarily on women employed in the public and corporate sectors of the formal economy. Policy initiatives designed to meet the needs of the hundreds of millions of women working in informal employment, in most cases, has been ignored.

This article shifts the focus of work/care policy toward the specific needs of informal working women in the global south and, in particular, the potential for centre-based early childhood education and care (ECEC)⁴ to support women's improved economic opportunity and security. The article begins with a short analysis of the interface between young children's needs, the specificities of women's informal employment and the institutional context that shape the rewards for informal work. This discussion highlights the way in which women's child care responsibilities in a context of inadequate social care infrastructure underwrite women's concentration in informal work and economic insecurity. Section 3 of the article outlines four models of ECEC services designed to meet the employment needs of informal women workers. Two of the models are large public ECEC programs operating in Mexico and Chile. The others are small civil society providing ECEC programs in India. In Section 4, the article deploys Nancy Fraser's notion of an 'emancipatory' worker experience to evaluate the capacity of these models to deliver emancipatory outcomes for informal working women, their children and the (mostly) women who work in ECEC services.⁵ The final section evaluates the role of public action in the funding, design and implementation of centre-based ECEC systems.

³ Marian Baird, Michele Ford and Elizabeth Hill (eds) *Women, Work and Care in the Asia-Pacific* (Routledge, 2017).

⁴ The term ECEC is adopted from the Dakar Framework for Action and refers to a comprehensive range of services encompassing health, nutrition and hygiene as well as cognitive and psycho-social development, pre-primary education and other forms of care. UNESCO, 'Dakar Framework for Action, Education for All: Meeting our Collective Commitments' (2000) Goal 1, s. 30-31 <<http://unesdoc.unesco.org/images/0012/001211/121147e.pdf>> accessed 17 April 2018.

⁵ Nancy Fraser, 'Marketization, Social Protection, Emancipation: Toward a Neo-Polanyian Conception of Capitalist Crisis' in Craig Calhoun and Georgi Drluguian (eds) *Business as Usual: The Roots of the Global Financial Meltdown* (NYUP, 2011) 137.

2. Informal Work in the Absence of ECEC

The growing literature on women's workforce participation in emerging economies demonstrates that family responsibilities constrain women's participation in the paid workforce. Gendered expectations about women's role as primary carers are ubiquitous, but national approaches to ECEC provision also have a significant impact on women's opportunities for paid employment and access to alternative forms of care. For poor women in emerging economies the interface between cultures of gendered familialism⁶ and a lack of appropriate ECEC services, pose severe limitations on women's opportunities for paid employment and economic security.

A. Limits to Women's Economic Security

Inadequate provision and problems with accessibility, cost and quality of ECEC services are significant barriers for women wanting to access and retain formal employment opportunities. The contingent relationship between ECEC services and women's employment prospects is highlighted as a global phenomenon in Jody Heymann's Global Working Families project⁷ and more recently in the Overseas Development Institute's report on Women's Work.⁸ Heymann's study found that in the absence of adequate ECEC services many women were unable to consider formal employment. Instead they took up informal employment where they could care for children alongside their paid work.⁹ These findings are reflected in other smaller studies. In Guatemala City, 40 per cent of mothers working informally cited the lack of access to childcare services as the main reason why they were not able to consider looking for better paying formal employment.¹⁰ In India, 87 per cent of women working in informal employment reported that they find it difficult to work and take care of children due to a lack of time, inability to work

⁶ Rajni Palriwala and N Neetha, 'Stratified Familialism: The Care Regime in India through the Lens of Childcare' (2011) 42(4) *Development and Change* 1049.

⁷ Jody Heymann, *Forgotten Families: Ending the Growing Crisis Confronting Children and Working Parents in the Global Economy* (OUP, 2006).

⁸ Overseas Development Institute (ODI), 'Women's Work: Mothers, Children and the Global Childcare Crisis' (2016) <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10333.pdf>> accessed 17 April 2018.

⁹ Heymann (n 7) 19.

¹⁰ Agnes Quisumbing, Kelly Hallman and Marie T. Ruel, 'Maquiladoras and Market Mamas: Women's Work and Childcare in Guatemala City and Accra' (2003) Food Consumption and Nutrition Division, Discussion Paper No. 153, International Food Policy Research Institute.

properly, and concerns about the safety and neglect of young children.¹¹ The flexible working times, worker autonomy, opportunity for home-based work, and generally low barriers to entry that are common in the informal economy mean that, in the absence of ECEC services, informal employment is often the only type of work that allows women to combine paid work with care duties.¹²

Informal employment poses a number of significant costs to women's productivity, economic security and children's well-being. Informal home-based, own account or daily/casual employment is typically less productive and lower paid than most formal employment opportunities. Informal relations of employment often embed women in dependent relationships with contractors, suppliers and customers in which asymmetric power relations position women as 'price-takers' with little control over their working day, work conditions or income earned.¹³ In addition, informal employment is not covered by protective labour laws and does not provide workers with even basic social security measures. Together these attributes of informal work underwrite women's socio-economic vulnerability, insecurity and often poverty.

B. Costs to Children's Well-Being

Informal work also has a negative impact on the well being of worker's children. In the absence of ECEC services, informal working women have very few choices about how to organise care for their children. They may take their child with them to the workplace; leave them with an adult relative or a neighbour; leave them to be cared for at home by older siblings; pay a nanny; or organize for their husband to provide care. In a recent survey of 31 developing economies, 44 per cent of poor working women with a child under the age of 6 reported that when they are at work they remain responsible for the care of their child.¹⁴ Where care was provided by someone other than the mother, then it was her relatives (22 per cent) or her other children (23 per cent) who provided care for young children, with girl children more than three times more likely to provide care than boy children (see Figure 1). Only one per cent of the poorest women surveyed reported using organised childcare or nursery

¹¹ Forum for Creches and Childcare Services (FORCES) and Centre for Women's Development Studies (CWDS), 'Need Assessment for Crèches and Child care Services' (2013) 6 <<http://www.forces.org.in/publications/ChildCareReport.pdf>> accessed 17 April 2018.

¹² Cassier and Addati (n 2) 1.

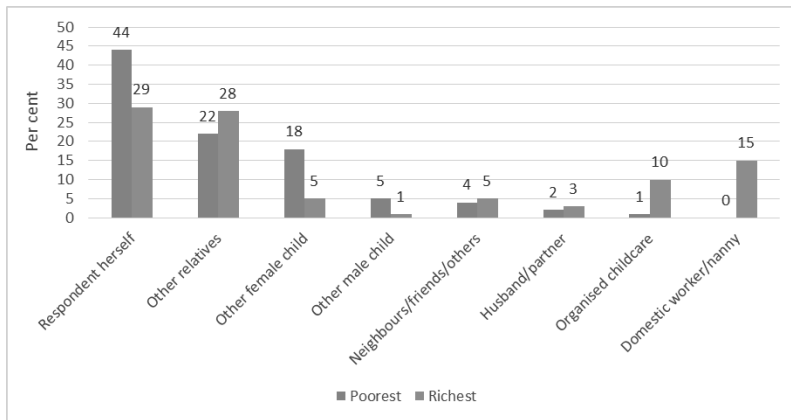
¹³ Elizabeth Hill, *Worker Identity, Agency and Economic Development: Women's Empowerment in the Indian Informal Economy* (Routledge, 2010).

¹⁴ UN Women (n 1) 86.

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arrangements and none hired a nanny. With few alternatives, the majority of the poorest women care for their children at their workplace.¹⁵ This may be on construction sites, in the fields where they work as daily labourers, on city pavements where they work as small scale vendors, or at home where they perform home-based work, sometimes contributing to global supply chains and sometimes as local producers of food, clothing and other consumer products. In India, an estimated 7-8 million children of building labourers accompany their parents to the construction site.¹⁶

Figure One: Typical childcare arrangements for employed women with a child under age six in developing countries¹⁷



Source: UN Women (n 1) 86.

The practice of taking children to the workplace poses enormous challenges to women's productivity and child welfare. In the workplace, children are often exposed to dangerous conditions such as heavy

¹⁵ Other surveys report similar findings. The Global Working Families' Project found 51 per cent of informal workers who were parents brought their children to work regularly (See Heymann (n 7) 22). In Indonesia, 40 per cent of working women are reported to care for their children while working (See Cassirer & Addati (n 2)).

¹⁶ Bureau for Employers' Activities (ACT/EMP) and TRAVAIL, 'Managing Diversity in the Workplace: Training Package on Work and Family' (2008) ILO <http://www.ilo.org/travail/whatwedo/instructionmaterials/WCMS_TRAVAIL_PUB_58/lang-en/index.htm> accessed 28 April 2018.

¹⁷ UN Women (n 1) 86. Un-weighted averages calculated by UN Women using data from ICF International 2015. Note: N=31 developing countries. Surveys were conducted between 1995 and 2002. This indicator corresponds to the percentage of respondents answering the questions – 'who looks after your children while you are at work?'

machinery or toxic fumes. These not only pose the risk of physical injury, but can also trigger a cycle of ill-health and vulnerability.¹⁸ The demands of the working day also mean mothers struggle to take breaks when young children need feeding or sleep. This can compromise a child's overall wellbeing putting further pressure on women who may eventually have to take time off work to care for the sick child. Where children are present in the workplace women are unable to focus exclusively on their work and report feeling stressed and worried about the need to also care for their child. This compromises women's productivity and consolidates low wages.¹⁹

Where women do not take their children with them to the workplace, they leave them in the care of other relatives, older children, neighbours or even alone. In many cases, the care that is provided by others is not adequate and is a source of stress for women. In many cases, women have no option but to leave young children at home in the care of older children – often older girl children (See Figure One). In Mexico, 27 per cent of poor working parents surveyed as part of the Global Working Families project reported they left their young children in the care of another unpaid child, and in Botswana, 48 per cent of parents relied on older children as carers.²⁰ In parts of Ethiopia, 52 per cent of young rural girls aged 5-8 years old are reportedly responsible for childcare, often for three or more hours per day.²¹ In India, the most common practice for domestic workers is to leave children to their own 'self-care' or sibling care, typically a daughter.²²

Where children are left alone, or with those who are unable to provide appropriate care, the risks to children's wellbeing are high. Heymann's study reports that in two thirds of families where young children were left alone at home or in the care of an older child, accidents or other emergencies such as injury, fire or assault were common.²³ Poor child nutrition, ill health and delayed attainment of child development milestones are also associated with inadequate care. These have a

¹⁸ Heymann (n 7) 21.

¹⁹ Dipa Sinha and Vanessa Bhatia, 'Learning from Models of ECCD Provision in India' (2009) Presented to Kusuma Foundation 66

<http://www.forces.org.in/publications/documentsforwebsite/Dipa_Sinha_ECCD_in_India.pdf> accessed 17 April 2018; M Chatterjee, 'Decentralised Childcare Services' (2006) 41(34) Economic and Political Weekly 3660.

²⁰ Heymann (n 7) 24.

²¹ ODI (n 8) 39-40.

²² Rajni Palriwala, and N Neetha, 'Care Practices and Care Bargains: Paid Domestic Workers and Anganwadi Workers in India' (2010) 149(4) International Labour Review 511, 521.

²³ Heymann (n 7) 27.

compounding impact on child well-being and deepen patterns of intergenerational inequality.

Informal employment may be a short-term solution to the work/care nexus that confronts most poor working women, but it has long term costs: for households on account of the vicious cycle of low earnings, poverty and vulnerability; for children whose health and development is compromised by inadequate care; and for society at large on account of women's low workforce attachment, child underdevelopment and sustained patterns of inequality. Policy initiatives that support better reconciliation of work and care, such as organised ECEC services, are therefore critical to disrupting the cycle of economic insecurity and poor well-being that is so prevalent among informal working women. The remainder of this article analyses four models of centre-based ECEC services for informal working women in Mexico, Chile and India, and the policy design that best meets the needs of women workers, their children, and the workers who provide ECEC services.

3. Building Women's Economic Security Through ECEC for Informal Workers

The importance of providing ECEC services to workers with family responsibilities is recognised by the International Labour Organization's (ILO) Workers with Family Responsibilities Convention No.156 and Recommendation No. 165. These call upon all member states – developed and emerging – to take up measures 'to develop or promote community services, public or private, such as child-care and family services and facilities' (Article 5). While only 44 countries have ratified the Convention, UNESCO reports that the level of national commitment to the provision of ECEC services is growing, with data from 2014 showing 40 countries have instituted compulsory pre-primary education.²⁴ This steady improvement is a global phenomenon (although off a very low base), and has been particularly strong in parts of Latin America and the Asia Pacific.²⁵ Programs for 3-4 year olds are rapidly expanding across the global south, although uneven in their coverage and skewed towards those from more wealthy urban households. Services for 0-3 year olds are

²⁴ UNESCO, 'Education for All 2000-2015: Achievement and Challenges: Global Monitoring Report' (2015) 60-1
<<http://unesdoc.unesco.org/images/0023/002322/232205e.pdf>> accessed 27 April 2018.

²⁵ *ibid.*

less common and rarely meet the needs of working parents due to very short operating hours.²⁶

Global efforts to extend ECEC services to all children will need to address the specific requirements of informal workers. Research on ECEC for informal working women has been limited, but interest is growing,²⁷ and in recent years publications compiling data on the global experience have begun to emerge.²⁸ While the data is not comprehensive, a clear finding of the existing literature is that the majority of ECEC services designed explicitly for informal working women are small in scale and limited in reach. Most services are run by small non-government and civil society organisations, or women's trade unions, and focus on women employed in a particular location or industry. Financial viability and

²⁶ *ibid.*

²⁷ See 'Innovative Pedagogical Approaches in Early Childhood Care and Education (ECCE) in the Asia-Pacific Region: A resource pack' (UNESCO, 2016) <<http://unesdoc.unesco.org/images/0024/002460/246050e.pdf>> accessed 17 April 2018; Shraddha Chigateri, 'Quality Day Care Services for the Young Child: Case Studies Synthesis Report' (2013) Institute of Social Studies Trust and UNICEF <https://www.researchgate.net/publication/303880574_Quality_Day_Care_Services_for_the_Young_Child_in_India_Case_Studies_Synthesis_Report> accessed 17 April 2018; FORCES and CWDS (n 10); ILO, 'Brief 8.4: Childcare: An Essential Support for Better Incomes' in *The Informal Economy and Decent Work: A Policy Resource Guide Supporting Transitions to Formality* (ILO, 2013); Silke Staab and Roberto Gerhard, 'Putting Two and Two Together? Early Childhood Education, Mother's Employment and Care Service Expansion in Chile and Mexico' (2011) 42(4) *Development and Change* 1079; P Pereznieto and M Campos, 'Gendered Risks, Poverty and Vulnerability in Mexico: Contributions of the Estancias Infantiles para Apoyar a Madres Tradbajadoas Programme' (2010) ODI <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6248.pdf>> accessed 27 April 2018; Rajni Palriwala and N Neetha, 'Paid Care Workers: Domestic Workers and Anganwadi Workers' (2010) 149(4) *International Labour Review* 511; Chatterjee (n 19); Quisumbing et al (n 10); M T B Ruel et al, 'The Guatemala Community Day Care Program. An Example of Effective Urban Programming: Research Report 144' (2006) International Food Policy Research Institute; P Hernandez et al, 'Childcare Need of Female Street Vendors in Mexico City' (1996) 11(2) *Health Policy and Planning* 169.

²⁸ Rachel Moussie, 'Childcare from the Perspective of Women in the Informal Economy' (2016) Policy Brief for the UN Secretary-General's High-Level Panel on Women's Economic Empowerment <http://www.wiego.org/sites/default/files/resources/files/WIEGO_childcare-informal-economy.pdf> accessed 17 April 2018; Laura Alfes, 'WIEGO Child Care Initiative Literature Review' (2015) WIEGO <<http://www.wiego.org/sites/default/files/resources/files/Alfes-Child-Care-Policy-Employment-Lit-Review.pdf>> accessed 17 April 2018; Laura Alfes, 'Our Children Do Not Get What They Deserve: WIEGO Child Care Initiative Report' (2016) WIEGO <<http://www.wiego.org/sites/default/files/publications/files/Alfes-Child-Care-Initiative-Full-Report.pdf>> accessed 17 April 2018; Debbie Budlender, 'WIEGO Child Care Initiative Institutional Mapping of Child Care Actors' (2015) WIEGO <<http://www.wiego.org/sites/default/files/resources/files/Budlender-Child-Care-Policy-Employment-Mapping.pdf>> accessed 17 April 2018; Cassirer & Addati (n 2).

sustainability is frequently a problem. However, in recent years, concerns about women's low workforce participation and social inequality have seen some governments begin to implement national ECEC programs that are orientated to informal working women.

This section provides a description and evaluation of four ECEC programs that have been designed for informal working women in the emerging economies of Mexico, Chile and India. Programa Guarderías y Estancias Infantiles (Federal Day Care Program for Working Mothers) in Mexico, and Chile Crece Contigo (Chile Grows with You) in Chile are both national public systems of ECEC intended to address the needs of poor working women – most of whom are informally employed. In India, Mobile Crèches and The Self Employed Women's Association (SEWA) childcare cooperatives are examples of ECEC services for informal working women that have been developed and implemented by civil society organisations. These four models of ECEC for informal working women have been selected because they reflect national and local approaches to ECEC provision for informal workers. In addition, all four programs are well-established and have been in operation for a decade or longer. Together they allow for a comparative analysis of existing approaches to the provision of ECEC for informal women workers.

A. Mexico: Programa Guarderías y Estancias Infantiles (Federal Day Care Program for Working Mothers)

The Federal Day Care Program for working mothers in Mexico, or Estancias, is a national ECEC program designed to increase women's workforce participation. The program provides government subsidies for home and community-based ECEC services for low income working women. Mexico has a reasonable history of ECEC provision compared with many countries in the global south. From the mid-1970s, the Mexican Institute for Social Security (IMSS) has provided ECEC for the children of formally employed women, although there has been ongoing concern about inadequate coverage and quality. In 2002, the Ministry of Public Education extended pre-school education to all 3-5 year olds. This half-day program of publicly provided ECEC was child focused and not contingent on parent's work status.²⁹ In 2007, the Ministry for Social Development (Sedesol) introduced a new national program of publicly subsidised child care, called Estancias, for children aged between 1 - 4 years old whose mothers are engaged in informal employment.

The Estancias program provides community-based ECEC services through a combination of publicly funded supply-side incentives for

²⁹ Staab and Gerhard (n 27) 1085.

providers and demand-side subsidies for ECEC users. Potential providers of child care services (individuals or civil society organisations) apply to Sedesol for a cash grant to establish an ECEC centre.³⁰ Providers are not required to have any formal training or previous experience in ECEC to be eligible for the grant, but they must have completed high school, passed a psychological test and attended a simple training program on the basic principles of childcare. ECEC providers must enroll a minimum of 10 children (maximum of 60) and run the service for at least one year, 8 hours per day, 5 days per week. The required staff-to-child ratio is 1:8. Setting-up costs of the ECEC centers are in part covered by the Sedesol grant, but all outstanding operational costs are covered by parent fees. Estancias provides fee relief for parents through a means-tested subsidy on the out-of-pocket cost to parents, up to a maximum of 90 per cent of the total cost. To receive the public subsidy parents must meet a work activity test (be working, looking for work or studying), an income test, and not be eligible for the formal IMSS ECEC program. Single fathers are also eligible for the payment. The subsidy is paid directly to the ECEC provider. National data shows that on average 65 per cent of operational costs of Estancias are met by the government and 35 per cent by parents. So while Estancias is low cost, it is not free for parents. And even with the parent co-payment, not all centers are sustainable.³¹

This public-private partnership funding model was effective in stimulating the establishment of 5000 new centers serving 200,000 children of informal women workers within the first year of the Estancias program. In the second year, 3000 more centers opened, providing ECEC services to 244,000 children. By the end of 2010, there were 9000 centers registered.³² This has now plateaued, with 9201 centers registered on the government website as operating in April 2018.³³ Alongside the rapid deployment of ECEC services for children, the Mexican government also claimed that by 2008 the new centers had provided employment for 46,000 women.³⁴ While these are impressive figures, questions remain about the quality of ECEC services provided to children and their parents, and the quality of employment provided to women working in the new centers.³⁵

³⁰ *ibid* 1086; the cash payment was 35,000 Mexican Pesos in 2011.

³¹ *ibid*.

³² Pereznieto and Campos (n 27).

³³ Programa de Estancias Infantiles para Apoyar a Madres Trabajadoras abril 2018 Dirección General de Políticas Sociales <https://www.gob.mx/cms/uploads/attachment/file/315512/resumen_ei_operacion_abril2018.pdf> accessed 22 April 2018.

³⁴ Staab and Gerhard (n 27) 1087.

³⁵ Pereznieto and Campos (n 27).

B. Chile Crece Contigo (Chile Grows with You)

In 2006, President Michelle Bachelet launched Chile Crece Contigo, a national scheme providing comprehensive social services to vulnerable children 0 to 6 years old. Alongside maternal health and child nutrition, the program provides free access to professional publicly provided ECEC services for all children from the poorest 40 per cent of households.³⁶ Free pre-school education is also available for all 4-5 year olds, not just those from the poorest households. The program aims to promote social inclusion by equalising opportunities for children from low-income households through the right to ECEC.

The Chile Crece Contigo program is based in the Ministry of Education and delivered through two main institutions: the National Board of Kindergartens (JUNJI) and Fundacion Integra, a private not for profit foundation that is part of the President's network of foundations. In the first two years of operation, the program saw a large increase in the number of public centers available and the number of children enrolled, especially children from the two lowest quintile groups. This provided thousands of new jobs for childcare workers in the centers – 16,000 in 2006-07 alone.³⁷ The program aims to provide professional ECEC services delivered by educators, who are required to have a five year university degree in ECEC, and support staff who must hold a technical degree in ECEC from a recognised institution. JUNJI workers are public sector employees, although only 25 per cent of workers are employed as permanent employees – the majority are employed on a fixed term basis.³⁸ Quality ECEC services are supported via ongoing input from professional organisations and associations who advise on nutrition, education and child development.³⁹

Embedded within the national approach, are partnerships with smaller programs that have an explicit aim to support the ECEC needs of particular groups of informal working women. The Childcare Centers for Seasonal Working Mothers (Cuidado a Hijos de Mujeres Temporeras, CAHMT) was operating prior to the establishment of Chile Crece Contigo, and now sits within the broader program providing temporary childcare for women working in seasonal agriculture. Local women's trade unions such as the Association of Seasonal Women

³⁶ This extended to the 60 per cent poorest household in 2011.

³⁷ Staab and Gerhard (n 27) 1091.

³⁸ *ibid.*

³⁹ Marco Kremerman Strajilevich, 'Chile' in Catherine Hein and Naomi Cassirer (eds) *Workplace Solutions for Childcare* (ILO, 2010) 173

<http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_110397.pdf> accessed 27 April 2018.

Workers of Melipilla Province (Agrupación de Mujeres Temporeras de la Provincia de Melipilla) motivated local employers to establish the original ECEC services.⁴⁰ CAHMT centers are run in partnership with local government, business and professional associations with different groups responsible for staffing, food, resources and extra-curricular activities and professional oversight. Centers often use existing government resources such as government school premises that are vacant during the summer holiday months. Centers run full day, 12 hour programs, educator to child ratios are around 1:17, workers are considered public sector workers and their salary is typically 1.25 times the national minimum wage.⁴¹ Educational quality is supported through resources provided by JUNJI. The CAHMT program has run for two decades and women who use the ECEC report they are satisfied with the service.⁴²

C. India: Mobile Crèches & SEWA

India has a number of public programs that deliver care for the children of poor working women.⁴³ The most significant of these is the national Integrated Child Development Scheme (ICDS).⁴⁴ The ICDS provides nutrition, non-formal pre-school education, and primary healthcare to children under 6 years of age and their mothers. Many ICDS clients are women who are informally employed. However, the ICDS program is commonly considered inadequate and unable to meet the needs of informal working women on account of short opening hours, lack of funding for professional staff, poor services, and insufficient services for children under 3 years old.⁴⁵ Dedicated ECEC services for informal working women have instead been provided by a number of civil society groups. Small and limited in scope these organisations have experimented and designed models of centre-based ECEC services that support the specific needs of women engaged in a variety of forms of

⁴⁰ *ibid* 192.

⁴¹ *ibid*.

⁴² *ibid* 196.

⁴³ The Mahatma Gandhi National Rural Employment Guarantee Act 2005 (MNREGA) provides for childcare for women workers employed in the MNREGA, and the Rajiv Gandhi National Crèche scheme for children of low income mothers has a focus on below poverty line households. There are also statutory provisions for employer provided childcare for low-income women employed in a number of organised sectors covered by The Factories Act, 1948/1987; The Plantation Labour Act, 1951; The Mines Act 1952.

⁴⁴ The ICDS is one of the largest integrated family and community welfare schemes in the world.

⁴⁵ Palriwala and Neetha, 'Stratified Familialism' (n 6).

informal employment. Two of the most well-known models are Mobile Crèches and the Self-Employed Women's Association (SEWA) childcare co-operatives.

Mobile Crèches (MC) began in 1969, delivering childcare to migrant women who were employed informally on construction sites in Delhi. After almost fifty years of operation MC has developed a holistic approach to ECEC, that includes shelter, nutrition, health services, and early childhood education. MC operate primarily in Delhi, Mumbai and Pune and since inception has delivered ECEC services to approximately 750,000 children at 650 construction sites and trained approximately 6500 childcare workers.⁴⁶ MC is a non-government organisation (NGO) that relies primarily on private donations (both individual and corporate) from domestic and international sources.⁴⁷

A typical MC at a construction site has three sections: a crèche for children under 3 years of age, a pre-school for the 3 to 6 year olds, and a non-formal education centre for 6-12 year olds. MC centres open 9-5pm, six days a week and do not charge a parent fee. Crèche services are located close to construction sites so that women with very young children are able to continue breastfeeding or check on their young children during work breaks. Space for the MC is normally provided by the building company or developer and must meet minimum requirement including three rooms, a compound wall, tin roof, water and electricity. The company is also asked to contribute to the running of the crèche through the provision of essential inputs and salaries of some of the ECEC staff. Since 1996, The Building and Other Construction Workers Act, 1996 has made the provision of crèches at worksites where 50 women or more are employed mandatory. MC works with construction companies to fulfill their legal obligations.

MC has developed a number of operating models. Some MC centers are fully operated and managed by MC with varying levels of support from builders. Some operate on a tripartite model in which MC negotiates with construction companies for space, infrastructure and finance, and trains another NGO to run the ECEC service with MC providing monitoring, technical and financial reporting support. Other services are fully run by the construction company with MC providing a

⁴⁶Mobile Creches, 'MC Impact' <<http://www.mobilecreches.org/impact>> accessed 17 April 2018.

⁴⁷ In 2015-16, foreign donations provided 55 per cent of MC income and domestic donations 45 per cent. Government aid is negligible. Only 10 per cent of total funds are derived from contractor/building contributions in keeping with The Building and Other Construction Workers Act, 1996. See Mobile Crèches, 'Annual Report: 2015-16' 47-8 <http://media.wix.com/ugd/57f05d_9fadffd08f6f4eb0acd601a9e5bf9cad.pdf> accessed April 22, 2018.

consulting role.⁴⁸ All centers supported by MC provide children with a safe environment, nutritious meals, health care services and age appropriate play and educational activities. MC also works in urban slums where many construction and other informal workers live, providing similar services to those at the construction sites but with all interventions managed by the community.⁴⁹ MC has protocols that support their child-centered approach to ECEC, including a robust supervision regime; low teacher-to-child ratios; monitoring of child development milestones; hygiene, nutrition and immunisation targets; and, parent education and teacher training.⁵⁰

The Self Employed Women's Association (SEWA) is an all-women trade union for informal workers. Established in Ahmedabad 1972, the union has more than two million members spread across India and is one of only 12 Indian Central Trade Unions.⁵¹ From its inception, SEWA has defined childcare as a working woman's right, essential to the economic security of informal women workers.⁵² This led the union to organise workers to provide their own ECEC services through a number of childcare cooperatives.⁵³ The cooperative model of service provision and the inclusion of children from all caste and religious communities reflects the solidarity model of SEWA's approach to ECEC. In 1999, SEWA had 117 centers providing ECEC services for 6000 children and employing 295 teachers.⁵⁴ A smaller number of centers are currently in operation.

The centers run all-day programs for working women from a variety of occupations, with start and finishing times determined by women's working hours: ECEC centers that serve women working as vegetable vendors or agricultural labourers open as early as 6am so women can travel to the fields or wholesale markets, other centers open at 9 am. Each center accommodates between 25-30 children and has 2-3 teachers who

⁴⁸ FORCES and CWDS (n 11) 78.

⁴⁹ *ibid* 79.

⁵⁰ Teacher training includes 35 workshops delivered over 6 months plus a 12 day orientation program focused on the principles, pedagogy and skills of effective child-centred ECEC delivery; see FORCES and CWDS (n 11) 81.

⁵¹ Elizabeth Hill, 'India: The Self Employed Women's Association and Autonomous Organizing' in Kaye Broadbent and Michele Ford (eds) *Women and Labour Organizing in Asia: Diversity, Autonomy and Activism* (Routledge, 2008) 115.

⁵² Chatterjee (n 19).

⁵³ The Shaishav childcare coop in Anand and Kheda districts, Gujarat, was established in 1989 for women working as tobacco and agricultural workers. The Sangini childcare co-op was established in Ahmedabad city in 1992. The Balvikas Mandal provides childcare services for women salt workers in Surendranagar, and in Banaskantha District the Banaskantha DWCRA Mahil Sewa Association runs the centers for rural workers employed in agriculture, dairying and forestry.

⁵⁴ See SEWA, 'Child Care' <http://www.sewa.org/services_child_care.asp> accessed 17 April 2018.

provide education and care services. Children's meals are provided along with developmentally appropriate play-based learning activities, health services and monthly support meetings for parents. Parents are required to pay a small fee for the service they receive.⁵⁵ ECEC workers employed in the cooperatives are from the community, trained by SEWA and are shareholders in the cooperative.⁵⁶ These staff are supported by a cadre of leaders and supervisors who oversee the cooperatives and are responsible for maintaining quality service delivery and community relationships. SEWA has found the cost of running the childcare cooperatives expensive. Parent fees cover approximately 25 per cent of running costs with the remainder coming from partnerships with existing central and local government programs, employers and private donors.⁵⁷

4. Learning from Public and Civil Society Models of ECEC for Informal Workers

There are a number of practical policy orientated lessons we can draw from these four models. The first is that center-based ECEC services for informal working women are being delivered in emerging economies. Secondly, there are a variety of models available: publicly funded systems (Chile); public-private partnership models (Mexico); civil society service models that partner with employers (MC, India); and union cooperative services that partner with government (SEWA, India). Variations in the models suggest there is plenty of scope for innovation in the delivery of center-based ECEC services for informal working women. But all models are not equal. They are motivated by different aims and prioritise different outcomes, such as women's workforce participation or child welfare. Program aims and outcomes shape funding and service delivery design, which in turn has a significant impact on the accessibility, affordability and quality of the ECEC services available to informal working women and their children, and the quality of employment enjoyed by the (mostly) women employed in center-based ECEC. The relationship between the overarching aims of ECEC services for informal working women and the quality of the care and jobs delivered by ECEC services is developed below.

⁵⁵ Chatterjee (n 19).

⁵⁶ *ibid.*

⁵⁷ Sinha and Bhatia (n 19) 65.

A. National Public Systems of ECEC

In Mexico and Chile, a national approach to center-based ECEC services for informal working women was the product of significant political leadership complemented by local level engagement.⁵⁸ However, the rationale and aim of the two programs differ. The Mexican program, Estancias, was designed with the aim of increasing women's workforce participation. In Chile, state provision of ECEC services was driven by a national commitment to social inclusion and poverty alleviation through the provision of 'equal opportunities from the cradle' for children from low-income families.⁵⁹ These different policy aims have shaped the design and quality of the ECEC services provided.

In Mexico, the need to deliver new ECEC services that support women's workforce participation saw the immediate physical care of children prioritised over the development of an early childhood education curriculum, or the employment of well-trained ECEC teachers. A mix of government incentives for service providers and subsidies for 'clients' (parents) created a public-private model of ECEC that is demand driven and able to be rapidly implemented. Women's workforce participation is maximised in policy design as they are positioned as both clients of, and workers in, the new ECEC centers. As clients of Estancias some women have been able to engage in paid employment for the first time, while others have extended the total hours they work.⁶⁰ Estancias also required a new care workforce to be employed in the centers. Within a year of implementation the Mexican government reported 46,000 jobs had been created for women as paid care workers.⁶¹ But these new care workers are employed under informal conditions as self-employed 'care entrepreneurs'.⁶² The conditions of informal employment in the new ECEC services created through Estancias does not provide teachers with formal social security protection, legal protection or the other benefits of formal employment. There has also been a concern that the level of government subsidy to 'care-entrepreneurs' is too low to deliver a decent wage⁶³ and delivers too small a surplus for ECEC service providers to invest in quality inputs.⁶⁴ Unless

⁵⁸ Perezniето and Campos (n 27) 45; Strajilevich (n 39).

⁵⁹ Staab and Gerhard (n 27) 1096.

⁶⁰ Gustavo Angeles et al, 'The Impact of Daycare on Maternal Labour Supply and Child Development in Mexico' (2014) International Initiative for Impact Evaluation (3ie) <http://www.3ieimpact.org/media/filer_public/2014/04/02/ic_6-gustavo-mexico_daycare-top.pdf> accessed April 22, 2018.

⁶¹ Staab and Gerhard (n 27) 1087.

⁶² *ibid.*

⁶³ *ibid* 1086.

⁶⁴ Angeles (n 60) 46.

government subsidies to ECEC providers and parents increase over time there is concern that the reach and sustainability of the program will come under pressure.

The priority given to women's work participation in the design of the Estancias model appears to have compromised the quality of ECEC provided to children and the quality of employment for the new care workforce. Lack of explicit attention to essential quality inputs in the Mexican model has also given rise to concerns about the development of a two-tiered public system that provides a lower quality ECEC service for the children of informal workers in the Estancias program compared to that provided through the social security linked IMSS program available to the children of formal workers.⁶⁵ Concerns have also been raised about the reach of the program, with only 14 per cent of eligible children covered.⁶⁶ This links to the question of planning. While the incentive-based 'quasi-market' funding model has been effective in delivering rapid expansion of ECEC it does not promote a planned approach to service provision. Instead services open wherever a willing care-entrepreneur is located. And the required one year contract of service attached to the government subsidy means ECEC centers can be disbanded almost as quickly as they emerge. Strong uptake of the program does, however, suggest that there has been a good fit between the program design and the needs of women in informal employment. It is also reported that over time concerns about ongoing quality issues and funding issues have been partly dispelled⁶⁷ and that Estancias does deliver improved child development outcomes for children from poor and vulnerable households, particularly for children of single mothers who face additional struggles raising children while meeting the need for paid employment.⁶⁸

In contrast to the Mexican experience, the primary aim of Chile Crece Contigo is to support social inclusion and poverty alleviation through children's education and development. In this model, high quality inputs are prioritised over rapid rollout. Services are provided by public or semi-public institutions, staff is professionally trained and a robust approach to regulation and compliance is supported by government agencies and professional educational and child development authorities.⁶⁹ Teachers are required to hold five year degrees in the education of young children and assistant staff must have

⁶⁵ Staab and Gerhard (n 27) 1087.

⁶⁶ R Mahon, 'Work-Family Tensions and Childcare. Reflections on Latin American Experiences' (2011) 1 *Sociologica* 1, 8.

⁶⁷ Strajilevich (n 39) 197.

⁶⁸ Pereznielo and Campos (n 27); Angeles (n 60).

⁶⁹ Strajilevich (n 39).

technical level certification. Staff-to-child ratios are relatively low.⁷⁰ Differences in the professional training requirements of ECEC staff in the Mexican and Chilean programs are mirrored in their comparative employment status. ECEC teachers in the Chilean program are formally employed as public sector workers with access to associated work conditions, protections and social security measures.⁷¹ While formal employment in the public sector is advantageous for workers, paid care work remains undervalued with public sector ECEC educational staff wages lower than similarly trained teachers employed in schools and similarly trained nurses.⁷²

B. Civil Society ECEC Systems

ECEC services that are delivered by civil society organisations provide a very different lens with which to evaluate ECEC, its design and impact. Both the MC and SEWA models began as grassroots experiments in direct response to the childcare needs of informally employed women. The genesis of both MC and SEWA demonstrate deep understanding of the imperative for poor women to work and the limited childcare options available. Nevertheless, there are significant differences in the aims, funding and design of the MC and SEWA models and the implications for the quality and sustainability of the services provided.

MC was established as a philanthropic response to the dangers faced by young children who accompanied their mothers to construction worksites. The primary aim was to protect the welfare of children which, in turn, would support the well-being of working woman. By the 1980s, MC had developed ECEC services that relied on partnering with the building and construction companies that employed the women. Since then MC has developed a range of service models that rely on varying levels of financial and in-kind support from building companies.⁷³ In recent years, the employer partnership model has been bolstered by two key pieces of legislation. First, The Building and Other Construction Workers' Act, 1996 mandates for the provision of crèche services at sites that employ 50 or more women workers. This has a positive influence on

⁷⁰ Staab and Gerhard (n 27) 1093.

⁷¹ In practice only 25 per cent of ECEC workers are reported to be employed as permanent employees with the majority of workers employed on a fixed term basis. See Staab and Gerhard (n 27) 1091.

⁷² *ibid.*

⁷³ Mobile Crèches, 'Process Documentation on Mobile Crèches' Efforts with Builder Partners' (2017) Submitted to Grand Challenges Canada
<<https://www.slideshare.net/RavisaKalsi/processdocumentationofmcseffortswithbuilder>
s06122016> accessed 17 April 2018.

builder's willingness to engage MC in ECEC provision at their work sites. Second is the introduction of the corporate social responsibility (CSR) mandate under Section 135 and Schedule VII of The Companies Act, 2013 as well as the provisions of The Companies (Corporate Social Responsibility Policy) Rules, 2014. Under the new rules, all very large companies are required to spend between 1 and 2 per cent of their average net profit on CSR activities. This legislation provides a new pool of funds for MC to access.

MC's focus on the welfare needs of highly vulnerable children has supported the development of high quality ECEC services delivered by well trained teachers. MC is a leading trainer of ECEC teachers providing expertise for a large number of non-government organisations involved in children's rights and care.⁷⁴ MC policy is to provide decent wages and conditions to their ECEC workers even though they are informally employed.

SEWA cooperative childcare centers aim to promote a rights-based approach to the needs of working women that is worker-centered and membership-based. This has led to the development of a model of ECEC that advocates an integrated concern for the employment and economic security of the working woman, alongside children's welfare. The solidarity model is run by and for informal working women whether they are employed as home-based workers, daily labourers or small scale vendors, in both urban and rural locations.⁷⁵ While union cooperatives own and run the ECEC centers, the day to day delivery of services is often developed in partnership with existing government programs. Advocating for the delivery of already existing and legislated services to informal workers as citizens with a right to public support has been an important part of SEWA's approach. At times, this has been a successful model of service delivery. However, it has also exposed SEWA to changing government policy and broader political dynamics. Since 1999, the number of SEWA childcare services has declined to only 48 (2012-13), largely on account of the withdrawal of government funding.⁷⁶ But even when SEWA childcare co-ops were at their high point, they were relatively constrained in their reach. As a union SEWA pays its ECEC workers the minimum wage and is able to provide ECEC workers with social security as part of their union membership. Nevertheless, workers

⁷⁴ Mridula Bajaj and Sonia Sharma, 'Scaling-up Early Childhood Centres for Migrant Construction Workers' Children in India' in *Early Childhood Matters: Advances in Early Childhood Development* (Bernard van Leer Foundation, 2016) 74 <<https://bernardvanleer.org/app/uploads/2016/06/Early-Childhood-Matters-2016.pdf>> accessed 17 April 2018.

⁷⁵ Chatterjee (n 19).

⁷⁶ FORCES and CWDS (n 10) 76.

in SEWA childcare cooperatives, like many civil society employees, are informally employed and remain unprotected by formal labour law with limited access to social security.

5. Towards and Emancipatory Approach to ECEC for Informal Workers, Children and the Care Workforce

The provision of ECEC services for informal women workers pose a number of critical questions for feminist law and policy making, one of which focuses on the competing rights of workers with children, children, and the care workforce. The four models discussed above demonstrate that ECEC services must be carefully designed to meet informal worker's needs, and the needs of their children. But women working in the care workforce also have a need for decent work. Efforts to promote better working futures for women in informal employment must attend to the needs and rights of all three groups and transformation for one group should not come at the expense of another. In this complex domain what does feminist law and policy making look like?

In her writing on employment and social justice, Nancy Fraser talks about the challenge to promote a worker experience that is 'emancipatory', that delivers worker recognition, respect and the capacity for 'active citizenship'.⁷⁷ Fraser's idea of emancipation turns on the removal of obstacles 'that prevent some people from participating fully, on par with others, in social life'.⁷⁸ It is this principle of participatory parity that defines Fraser's notion of 'active citizenship'. In this respect, access to ECEC is an essential input for working women's emancipation and active citizenship. But only high quality ECEC services that recognise and respect the value of children and properly reward the work performed by ECEC teachers can simultaneously support the emancipation and active citizenship of informal working women, their children and the (mostly) women who are employed in ECEC services. Policies to extend ECEC services to mothers engaged in informal employment must therefore pay close attention to the quality of ECEC services and the formation of 'care chains'⁷⁹ that can limit the economic

⁷⁷ Fraser (n 5).

⁷⁸ *ibid* 149.

⁷⁹ A Hochschild, 'Global Care Chains and Emotional Surplus Value' in Will Hutton and Anthony Giddens (eds) *On the Edge: Living with Global Capitalism* (Jonathan Cape, 2000) 130.

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security and active citizenship of the care workforce. In this section, I extend the preliminary analysis of the Mexican, Chilean and Indian models of ECEC for informal working women to evaluate their capacity to promote active citizenship through service design that supports women's economic productivity, security and well-being; the provision of high quality ECEC that meets the needs of children; and the provision of decent jobs for ECEC workers.

Each of the ECEC models discussed above are reported to support improved economic opportunities, productivity and security for informal working women. Access to dedicated ECEC services in a safe and secure location by trained staff are reported to provide women with the peace of mind that enables them to freely commit their full attention to paid work,⁸⁰ extend their hours of work,⁸¹ and in some cases seek employment that is more secure.⁸² Ameliorating women's concerns about children's safety and well-being allows women to work more productively and increase their earnings.⁸³ Each of the four models also aim to deliver ECEC services in a location that suits women worker's needs – either close to their workplace in the case of MC and CAHMT, or near their home in the case of some SEWA centers and Estancias.

⁸⁰ Forces and CWDS (n 10).

⁸¹ Chaterjee (n 19).

⁸² Pereznieta and Campos (n 27).

⁸³ *ibid*; Cassirer & Addati (n 2).

Table One: ECEC and ‘Active Citizenship’ for Informal Women Workers and Children

Emancipatory Criteria	Estancias, Mexico	Chile Crece Contigo (CAHMT)	Mobile Creches, India	SEWA Childcare Co-ops, India
Meets the practical needs of informal workers and supports women’s increased productivity, security and well-being	Strong	Strong	Strong	Strong
Provision of high quality ECEC that meet the needs of children	Medium	Strong	Strong	Medium
Provision of decent jobs for the care workforce	Informal Employment: self-employed care entrepreneurs	Formal Employment: public sector employees	Informal Employment: wage workers	Informal Employment: wage workers

However, the quality of the care delivered by the four models is mixed (See Table One). The international literature on ECEC shows that high quality ECEC services have the strongest positive impact on children’s wellbeing and development where quality is determined by key inputs such as trained staff and low staff-to-child ratios.⁸⁴ Nutrition and other health services are critical additional inputs for very poor children. The demand-driven ‘quasi-market’ design of the Estancias program in Mexico creates structural limits on the quality of care provided. This has meant that levels of staff training and professional accreditation are lower than those required by Chile Crece Contigo where professional education and technical training are mandatory for all staff. In the MC and SEWA cases, significant attention is paid to quality control and teacher training which is provided by the organisations themselves. As MC has matured, the attention to training and high quality service

⁸⁴James Heckman and Dimitriy Masterov, ‘The Productivity Argument for Investing in Young Children’ (2007) 29(3) Review of Agricultural Economics 446.

provision has increased and is probably stronger than that provided by SEWA coops.⁸⁵

A challenge faced by all models is the quality of employment in ECEC jobs. Work opportunities for women in the newly created ECEC services that are developed as part of each model do not, on the whole, deliver the conditions of decent work.⁸⁶ In the Mexican case, workers are engaged under highly precarious terms as self-employed, own account workers, or ‘care entrepreneurs’. In the SEWA and MC cases, ECEC workers are informally employed, although the worker-centered values that inform these organisations mean that working conditions are often better than those experienced by the majority of informal workers in India. The exception is the Chilean program in which women employed in the new ECEC centers are engaged as public sector employees with formal access to associated entitlements, conditions and security. Although even here the evidence is that the majority of employees are engaged on fixed-term contracts rather than as permanent employees. Improved employment status for ECEC workers remains the main challenge for the provision of ‘emancipatory’ center-based ECEC services for informal working women.

A. Public Action for ECEC: The Funding Challenge

Global advocacy to extend the reach of ECEC services to all children has been growing and is part of Sustainable Development Goals (SDG) Goal-4.⁸⁷ If the SDG target on ECEC is to be met in a way that meets the needs of women employed in the informal economy, their children and the care workforce, then public action, particularly in the form of funding, will be required.⁸⁸ All four models discussed here highlight the importance of public action in the delivery of ECEC (Table Two).

⁸⁵ Bajaj and Sharma (n 74).

⁸⁶ ILO, ‘Decent Work and the Informal Economy: Report VI’ (2002) International Labour Conference, 90th Session.

⁸⁷ Sustainable Development Goals

<<http://www.un.org/sustainabledevelopment/education/>> accessed 17 April 2018.

⁸⁸ Mouisse (n 28) 9.

Table Two: Models of Public Action to Deliver ECEC for Informal Women Workers

	Estancias, Mexico	Chile Crece Contingo (CAHMT)	Mobile Creches, India	SEWA Childcare Co-ops, India
Public Action	Government funding via demand— driven public subsidies	Government funding from general revenue	Legislative frameworks supporting funding from building companies and other public companies fulfilling their CSR responsibilities Private philanthropy— domestic and international	Government programs and funding to complement union funding
Coverage	Targeted income and work tests applied	Targeted— 40% poorest household (until 2010) then 60%	Constructive industry workers and urban slum dwellers	Union Members
Parent Fees	Yes—income tested	No	No	Yes—small
Sustainability (to date)	Medium	Strong	Strong	Weak

In Chile and Mexico, ECEC programs for informal working women are funded primarily out of general state revenue. This requires significant political will and leadership by presidents and parliaments. Parents in the Mexican scheme are also expected to make a contribution, although this is income tested. In Chile, ECEC is provided free of charge for the poorest households. In the SEWA model, opportunities to link into specific government programs has been an essential way of funding the extension of ECEC services to union members, although as a matter of

principle SEWA charges parents a small fee. Reliance on government for substantive resourcing has left SEWA vulnerable to the transient nature of specific government programs and political will. Government funding for MC services is negligible and most parents do not pay for ECEC services. But this is not to suggest that the MC model does not rely on public action. Instead of government funding, it has been the legislative environment that has provided institutional support for the MC model.⁸⁹ In addition to complementary labour laws, the MC model benefit from corporate laws that require mandatory funding of corporate social responsibility activities. This provides a pool of funds that can be harnessed by MC to extend ECEC services to informal working women. MC also partners with international corporations, philanthropic and development organisations for additional funding support.

The scale of the demand for ECEC services for informal working women is so great that in most cases national governments need to partner in various ways with provincial and local government, employers, trade unions, civil society and community organisations to implement their programs.⁹⁰ These partnerships can help to tailor national programs to the specificities of local contexts.⁹¹ In the Chilean and Mexican models, government is not the sole provider and funder of ECEC services for informal working women. Partnerships with civil society, non-government, and private partners are central to policy design. However, the structure of the partnerships varies and produces different outcomes. In Chile, the government maintains formal control over the ECEC program, partnering with a variety of Ministries, government departments and professional associations to deliver and monitor a high quality service and professional care workforce.⁹² In Mexico, the government partners with individual private ECEC service providers who are incentivized, via public subsidies, to deliver ECEC services that meet only minimal levels of quality control.⁹³

Partnerships are effective in mobilising resources. In many emerging economies there is increasing interest by business and corporate philanthropy in ECEC.⁹⁴ But if private sector involvement is to support emancipatory ECEC services then national legal and policy settings will need to include mandatory regulatory provisions that protect access to

⁸⁹ Mobile Creche, 'Process Documentation' (n 72).

⁹⁰ Cassirer and Addati (n 2)10; Alfes, 'Literature Review' (n 28).

⁹¹ Cassirer and Addati (n 2).

⁹² *ibid* 9.

⁹³ Staab and Gerhard (n 27).

⁹⁴ Sarah Blake et al, 'Starting Strong, Early Childhood Development in India' (2009) New Philanthropy Capital <<http://www.thinknpc.org/publications/starting-strong/>> accessed 17 April 2018.

affordable and high quality ECEC services for informal workers and their children, as well as decent employment conditions for the care workforce. The risk is that ECEC becomes the next market opportunity for profiteering as it has become in a number of developed countries.⁹⁵

Finally, there is the question of sustainability. Each of the models discussed are dependent on government and/or private funding. Public funding for the Chilean model will be sustained as long as the program continues to enjoy political support. The Mexican model has proven relatively sustainable, although the demand-driven model is vulnerable to rapid withdrawal of services by providers who are unable or unwilling to continue to provide services at a low level of government subsidy. SEWA's model has been vulnerable to the withdrawal of state government support which saw the number of centers more than halve.⁹⁶ The MC model has proven sustainable to date, largely because of its single industry focus, the supportive legislative environment, and their ability to attract ongoing funding from international and domestic donors. However, structural shifts in the Indian economy and the declining number of women working on construction sites may challenge the sustainability of the MC model in the longer term.⁹⁷ The funding commitments of private donors are also contingent on broader economic and political factors that can shift quickly.

While public action and especially government funding is essential for the delivery of ECEC services for informal working women at the scale required, civil society organisations have a lot to contribute to the legal and policy debate. In spite of their small scale, civil society organisations, such as SEWA and MC, along with other similar organisations around the world, have established an evidence base for how ECEC services for informal working women operate best.⁹⁸ In India, the contrast between the design of ECEC services embedded in the ICDS, SEWA and MC shows the advantage that civil society organisations have in developing

⁹⁵ Deborah Brennan, 'Home and Away: the Policy Context in Australia' in Alison Elliot, Elizabeth Hill and Barbara Pocock (eds) *Kids Count: Better Early Childhood Education and Care in Australia* (University of Sydney Press, 2007) 57; Deborah Brennan, 'The Business of Care: Australia's Experiment with the Marketization of Childcare' in Lionel Orchard and Chris Miller (eds) *Australian Public Policy: Progressive Ideas in the Neo-Liberal Ascendancy* (Policy Press, 2014) 151; Shahra Razavi, 'Addressing/Reforming Care, But on Whose Terms?' in Shirin Rai and Georgina Waylen (eds) *New Frontiers in Feminist Political Economy* (Routledge, 2014).

⁹⁶ FORCES and CWDS (n 10).

⁹⁷ Mobile Creches, 'Process Documentation' (n 72).

⁹⁸ Alfes, 'What They Deserve' (n 28) 19-21. This includes evidence on operating hours, location (see FORCES and CWDS (n 10)), affordability, education and care inputs – informal workers are aspirational and see education as a key to improved wellbeing for children, nutrition and health inputs, staff: child ratios, governance structures (see Chatterjee (n 19)) and teacher training strategies.

innovative service models that can, in part, be duplicated by larger publicly funded programs. Small civil society programs can also amplify their expertise through public advocacy. SEWA and MC are examples of how grassroots knowledge and innovative practice can be deployed to build public awareness and generate broad-based community-led advocacy for ECEC. SEWA initially advocated for ECEC for informal working women in the groundbreaking 1988 *Shramshakti: Report of the National Commission on Self-Employed Women and Women in the Informal Sector*.⁹⁹ Mobile Creches built upon this legacy and in 1989 was a co-convenor of the Forum for Creches and Childcare Services (FORCES). Through this national coalition MC has played an important role in the formulation of the National Early Childhood Care and Education Policy, 2013 and is currently working to strengthen the Indian government's Integrated Child Development Scheme.¹⁰⁰ Advocacy has an important role to play in building public awareness, interest and commitment for a better future for informal working women through ECEC services, but mainstream provision is ultimately a state responsibility.

6. Conclusions—Policy Principals for Emancipatory ECEC Services for Informal Women Workers

This article began by asking: what contributes to a better working future for women employed in the informal economy? This is not a niche policy question. The large and increasing proportion of informal employment in emerging (and wealthy) economies, and women's disproportionate representation in this type of work means the question is fundamental to global prosperity, equality and sustainability. The conditions of informal employment limit women's economic security and well-being, making policy interventions to promote formalisation of women's employment essential.¹⁰¹ But policy also needs to address the way in which women's

⁹⁹ (Delhi Commission, 1988).

¹⁰⁰ A Mandhani, 'Law Commission of India suggests to make "Right to Childhood Care" a fundamental Right [Read the 259th Report]' LiveLaw.in (Delhi 27, August 2017), <<http://www.livelaw.in/law-commission-of-india-suggest-to-make-right-to-childhood-care-a-fundamental-right/>> accessed 17 April 2018.

¹⁰¹ WIEGO, 'WIEGO Network Platform: Transitioning from the Informal to the Formal Economy in the Interests of Workers in the Informal Economy' (2014) <<http://www.wiego.org/sites/default/files/resources/files/WIEGO-Platform-ILO-2014.pdf>> accessed 17 April 2018; International Labour Conference, 'Recommendation 204 concerning the transition from the informal economy' (2014)

unpaid care responsibilities shape their vulnerability to informal work. Recognition of the interface between women's unpaid care and informal employment makes the provision of high quality ECEC services an important policy intervention that will change women's employment opportunities and improve their working lives. This is not, however a simple proposition. ECEC services revolve around multiple stakeholders including: the worker 'client', their children, and the care workforce. A better future for informal working women must not come at the expense of children's well-being or decent work for ECEC workers. Nancy Fraser's concept of an 'emancipatory' worker experience helps to clarify how we might assess the way in which the aims, policy design, delivery and funding arrangements of centre-based ECEC services for informal workers shape the active citizenship of all stakeholders. Analysis of the four models included in this article suggests three high level policy principles for the development of emancipatory center-based ECEC services for informal working women.

First, public action is essential. Delivery of high quality ECEC that matches the working times of informal workers, the needs of their children, and promotes decent work for the care workforce is costly. Informal working women can often make some financial contribution (eg. SEWA, Mexico's Estancias program), but they cannot pay the full cost. Public action will provide the most sustainable form of funding and is the most efficient means to achieve scale and equity in service provision. The risk is that expanded ECEC services are designed as low-cost community-based models that entrench low-paid, informal, feminised labour.¹⁰² As the four models demonstrate, program design matters. Better working futures for women in the informal economy require funding and delivery mechanisms to be designed in a way that achieves emancipatory outcomes for all stakeholders. The provision of an enabling institutional environment via supportive legislation is also a potentially important role for public action.

Second, public action is often delivered in partnership with private, professional and corporate organisations, as well as civil society organisations such as trade unions and community-based philanthropic organisations. This is the case in all four models. This makes the issue of government regulation – of ECEC quality, access and affordability, and care workforce conditions – an urgent and necessary part of the delivery of emancipatory ECEC. In Chile, the formal link between professional

<http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_377774.pdf> accessed 17 April 2018; ILO, 'Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204): Workers' Guide' (ILO, 2017).

¹⁰² Razavi (n 94) 126.

support, compliance, and government funding stands in contrast to the more limited regulatory requirements of the Mexican program and demonstrates how important it is to embed quality control and other regulatory requirements within the public funding model. Robust regulatory mechanisms will be required to maintain quality care and employment in the ECEC sector.

Third, public action can benefit from the innovative practices and learning embedded in small civil society organisations. Dialogue between civil society and government on ECEC program design has the potential to deliver more appropriately designed services that meet informal working women's needs. SEWA and MC's experience running ECEC programs for informal working women in India over several decades has created an evidence base for enhanced public action that is now gaining traction in public debate and the legislative agenda.

The models of center-based ECEC for informal working women highlighted in this article demonstrate that it is possible to deliver ECEC to informal working women. However, if governments of emerging economies with high levels of informal employment are to meet the global goal to extend the reach of ECEC services to all children, they will need to strengthen efforts to extend services to informal workers. And if these services are to be emancipatory for all stakeholders then they will require substantive forms of public action, backed by robust regulatory and compliance mechanisms, designed in dialogue with grassroots organisations. Good design and adequate funding are essential to the delivery of emancipatory ECEC services for informal working women, their children and the care workforce.

The State Made Informalisation of Women Workers: A Case Study into Care Work in South Korea

Aelim Yun*

Abstract

This article examines the fragmentation of care work undertaken by women in South Korea brought about through the complex interrelationship of the state, the market and the home. The discussion is explored through an examination of the changes introduced by the South Korean government after 2008, which aimed to provide new long-term care benefits to persons over 65 years of age through the social security system, and simultaneously to increase women's labour market participation through creating employment opportunities as caregivers in the labour market. The new government programs are implemented through private service agencies, where these caregivers generally work in precarious forms of employment. This article explores the ways in which the marketisation of social care has impacted women at work; creating and reinforcing fragmented work as normative for women and influencing the proliferation of informal and precarious work. It thus reveals the way in which the intervention of the state in the crisis of care for the aged in South Korea and the subsequent reforms introduced to the labour market reproduce and change the fragmented and gender division of labour.

Keywords: Care Worker, Precarious Work, Informal Employment, Long-term Care Insurance for Older Persons

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1. Introduction

South Korea has been impacted by both globalisation as well as the subsequent Asian economic crisis of the 1990s. Following the policy prescriptions of the International Monetary Fund, the South Korean government pushed ahead with labour flexibilisation. As a result, South Korea has become one of the countries where precarious work or informal employment has increased the fastest. In response to the proliferation of precarious work and low-waged jobs, the government has promoted “productive social safety nets”.¹ As a result, since the 2000s, social care services, including care for the elderly, have become the fastest growing sector.

Women have historically performed care work. This work has been largely unrecognised and unpaid. The growth of *paid* care work raises questions on whether jobs in this sector are replicating patterns of gender disadvantage. In this article, I undertake a case study and examine paid care work through the interrelationship of the state, the rise of fragmented labour in South Korea and gender norms. The discussion explores the changes introduced by the government after 2008 to provide long-term care benefits to persons over 65 years of age, and to simultaneously increase women’s labour market participation as professional caregivers. A further layer of complication in assessing the impact of paid care work is that two types of care workers arrangements have emerged. The public system operated through the Long-Term Care Insurance, although this has a strong element of privatisation within it, and a concurrent system of private employment agencies that work within hospitals.

Has the creation of paid employment in both the public and private sphere for women in care services broken cycles of gender disadvantage? Has the law and state policy promoted decent work for women in care services? And how do narratives around care services and gender impact paid caregivers employment status and relationship? Through a consideration of these questions, I challenge the dominant narrative in South Korea that caregivers in the formal, public system are guaranteed decent work. I demonstrate that women working in care services in both the public and private sector are poorly paid and precariously employed. I further demonstrate the ways in which the intervention of the state in

¹ Since 1999, the government pushed ahead with “Productive Social Security Net” as a new welfare regime. It was also referred to as ‘workfare’ policy instead of ‘welfare’ because the new policy advocated addressing vulnerability through participation in the labour market. See D Hwang (ed) ‘Labour Policy for Productive Social Security’ (Korea Labour Institute, 2000).

the economic and social crisis and the subsequent reforms introduced into the labour market and social security system reproduce and reinforce the fragmented and gendered division of work.

2. Understanding the South Korean Labour Market: The Expansion of Social Care Service

Over the past thirty years the South Korean labour market has been dominated by fragmented labour practices. In South Korea, after the industrialisation under the military dictatorship in the 1960s, the government directly controlled and suppressed trade unions, and wages were set by both employers and the government. Following widespread labour protests in 1987, a new independent trade union movement developed in South Korea, weakening the prior authoritarian industrial relations which exerted military-like control over workplace.² Trade unions achieved wage increases which had been opposed for decades. Since the late 1990s, the gains made in wages have been undermined through the growth of precarious work and subcontracting. The economic crisis of 1997 was another turning point. It resulted in a significant change in the structure of the labour market. Through redundancy, restructuring and outsourcing, regular employment (defined in South Korea predominantly as full-time employment lasting over one year) has been significantly eroded.³ Since 1997, when jobs have been created they have mostly been with precarious conditions.

In a report I have authored for the International Labour Organization (ILO), I have shown how the South Korean government has played a major role in perpetuating precarious work.⁴ It has reduced employment in the public sector and has been contracting out public

² In the wake of the massive protests against the military dictatorship, a new independent and democratic trade union movement emerged in South Korea to challenge the government-controlled industrial relations system and traditional company unionism that had dominated since the Korean War. See Hagen Koo, 'The Dilemmas of Empowered Labor in Korea' (2000) XL(2) Asian Surveys 227.

³ Here, 'regular employment' also includes part of a bilateral employment relationship. See Yoo-Sun Kim, 'Size and the Employment Conditions of Precarious Workers: An Analysis of 2017 Supplement Survey of Economically Active Population' (Korea Labour & Society Institute, 2017).

⁴ Aelim Yun, 'The ILO Recommendation on the Employment Relationship and its Relevance in the Republic of Korea' (2007) GURN Discussion Paper No.4 <http://www.ilo.org/public/libdoc/ilo/2007/107B09_95_engl.pdf> accessed 10 Jan 2018.

services. The government also legalised redundancy and temporary agency work, which previously had been restricted under the law, and enacted a new law in 2006, which institutionalised fixed-term employment contracts. As a result, precarious workers have become the core workforce.⁵ They account for 42.4% of total wage employment. The wage gap between regular and precariously employed workers has also grown. The average monthly wage of precarious workers is half (51%) of that of regular workers. Precarious employment lasts on average for only 2.4 years.⁶ In other words, the majority of workers in South Korea suffer from regular dismissal and unemployment. In addition, the share of low-waged workers among precarious workers is sizeable (41.9 %).⁷

Another crucial trend in the South Korean labour market is the rising participation rates of women. Faced with a proliferation of precarious employment, women have increasingly participated in the labour market in order to supplement household incomes. As we will see below, this motivation shapes the characterisation of paid care-giving work. Employment rates of men have increased slightly, from 69.2 per cent in 1998 to 70.9 per cent in 2008. By contrast, employment rates of women have increased significantly, from 44.4 per cent to 48.7 per cent for the same period.⁸ Despite the employment rates of women increasing in recent decades, South Korea is ranked at the lowest level of labour force participation rates of women among the OECD countries.⁹ In 2016, the economic activity rate of women was 52.1 per cent, with about half of them being wage workers (defined in South Korea as all workers who hold the type of job defined as paid employment jobs).¹⁰ The employment rate of women between 35 and 44 years of age is the lowest. This is likely due to women in this age group taking a career break to have and raise children. It is also noteworthy that 52.4 per cent of female workers are precarious workers, while only 34.4 per cent of male workers are precarious workers.¹¹ The fragmentation of the labour market needs to be understood as a gendered issue.

The government has sought to increase employment through boosting female labour force participation rates. This has been done predominantly through creating jobs in care services. Historically, the

⁵ *ibid.*

⁶ Kim (n 3).

⁷ *ibid.* 'Low-waged worker' refers to as a worker who is paid less than two-thirds of median wage of all workers.

⁸ J Keum and J Yun, 'Changes in Female Labour Market after the Financial Crisis' (Korea Labour Institute, 2011).

⁹ OECD, *OECD Employment Outlook: 2016* (OECD Publishing, 2016).

¹⁰ Korean Statistical Information Service, 'Statistical Database' <<http://kosis.kr/eng/>> accessed 10 Jan 2018.

¹¹ Kim (n 3).

South Korean welfare regime was based on a family care model, which has traditionally placed responsibility for care on family members and, in particular, on women.¹² Creating paid care work enhances the social security system. Care services have been framed as especially suitable for women, on the grounds that the assumed attributes of “femininity”, such as mildness and sensitivity, are required for care work. Because women are the ‘primary carer in the family’, they are assumed by the government to be good at doing low-skilled care work.¹³ As a result of the government initiatives, the numbers of social service workers, service provided in order to meet the socially recognised care needs, increased from 489,902 in 2000 to 754,033 in 2007. Among them, the numbers of women almost doubled, with an increase from 317,802 to 553,645, for the same period.¹⁴

The introduction of the Long-term Care Insurance for Older Persons (LTC) in 2008 is a good example of the expansion of care work employment. The LTC aims to ‘reduce family expenses on elderly care, to create employment for caregivers, and to activate the local economy by increasing care institutions’.¹⁵ Under the LTC, individuals over 65 years old, who have difficulties in carrying on with daily life on their own due to old age or senility, can be provided with long-term care benefits via the social insurance scheme. Although the insurance scheme is administered by the government, the actual care services are mainly provided by private service agencies, which employ the caregivers. In 2015, 78 percent of LTC institutions were private, only 1.22 percent were public.¹⁶ Persons who want to be caregivers under the LTC must finish mandatory educational programmes and pass a qualifying examination. The numbers of licensed caregivers increased from 330,000 in 2008 to 1,300,000 in 2015. Obtaining a caregivers license does not necessarily translate into employment. Only 301,709 licensed caregivers were employed in 2015.¹⁷ As these caregivers do have a contract of employment, for the purposes of this case study they are classified as formal caregivers.

¹² K. Jeong et al, ‘Policy Issues and Strategies regarding Social Services in Korea’ (Korea Institute for Health & Social Affairs, 2006).

¹³ H Kim, S Ahn and Y Cho, ‘Job Creating in Social Services’ (Korea Labour Institute, 2006) 5.

¹⁴ E Oh and D Noh, ‘Policy Study to Improve “Job Creation Policy” in the Social Service Sector (III)’ (Korean Women’s Development Institute, 2009) 38.

¹⁵ ‘Public Long-term Care Security Promoting Committee, Studies on Development of Public Long-term Care Security’ (Ministry of Health & Welfare, 2004).

¹⁶ National Health Insurance Service, 2015 Long Term Care Insurance Statistical Yearbook.

¹⁷ *ibid.*

Alongside the caregivers associated with LTC institutions, there are other types of caregivers who provide personal care services within hospitals, nursing homes or in patients' homes. Most of them are provided by private employment agencies. These caregivers often do not have an employment contract with either institutions (hospital, nursing home or employment agency) or individual recipient, and thus are considered to be informal caregivers. The number of informal caregivers was roughly estimated at 112,400 persons, in 2009.¹⁸

3. The Illusion of Just and Fair Working Conditions for Caregivers

A. Formal Caregivers Under the Long-term Care Insurance System

Given the significant number of people employed in care services, it is imperative to examine the working conditions for both formal and informal caregivers. Starting first with formal caregivers; women accounted for 95 per cent of all formal caregivers under the LTC, in 2016.¹⁹ The majority of caregivers are in their forties (32.7 per cent) or fifties (37.7 per cent).²⁰ While the numbers of licensed caregivers have increased rapidly since 2008, the actual employment rates are very low. In 2015, roughly 24 per cent of licensed caregivers were working under the LTC.²¹

A survey of the National Health Insurance Service (NHIS) reveals the poor working conditions of formal caregivers. Formal caregivers are poorly paid. Home-visit caregivers, caregivers who visit the individual recipient in their home, who accounted for 81 per cent of all formal caregivers, were paid 592,496 Korean Won (approx. USD 557) per month, in 2014.²² In the same year, the average monthly wage of all workers was 2,230,000 Korean Won (approx. USD 2,096). Some factors

¹⁸ H Park et al. 'A Survey on Persons in Special Types of Employment' (Ministry of Employment & Labour, 2011) 160.

¹⁹ National Health Insurance Service, 2016 Long Term Care Insurance Statistical Yearbook.

²⁰ H Lee and S Yoo, 'Analysis of Operation Situation of the Long-term Care Insurance' (Audit and Inspection Research Institute, 2012) 17.

²¹ J Seok, 'Studies on Restructuring of Long-term Care Home-Visit Service' (Ministry of Health & Welfare, 2016) 87.

²² J Kim, 'Analysis of Account Balance of Long-term Care Institutions' (National Health Insurance Service, 2014). In comparison, formal caregivers working within care facilities were paid 1,430,466 Korean Won (approx. USD 1,344) per month.

might explain the low wages of formal caregivers. First, the government has set the wages of formal caregivers close to the legal minimum wage.²³ The average hourly wage of formal caregivers was 7,226 Korean Won, which was slightly higher than the legal minimum wage, 5,210 Korean Won per hour, in the same year. Although formal caregivers' hourly wage is higher than the legal minimum wage, their monthly wage (wages in Korea are usually paid monthly) is usually lower than the average monthly wage of all workers, as their work hours are usually shorter and insecure.²⁴ According to the survey conducted by the NHIS, home-visit caregivers work on average only 82 hours a month. It is increasingly difficult to obtain more working hours, as the numbers of private institutions and home-visit caregivers have reached saturation point.²⁵ What is worse, the government even encourages low wages. As the National Human Rights Commission of Korea noted, even the standard form of employment contract distributed by the Ministry of Health and Welfare included provisions for the evasion of the law, stating that 'all relevant allowances are regarded as being included into the sum of wages'²⁶ or 'working hours exceeding eight hours a day are regarded as a recess'.²⁷ In other words, the Ministry of Health and Welfare provides space for employers to disguise working hours as a recess or cutting overtime pay.

Second, in 2017, the Ministry of Health and Welfare changed the care service time rule from four hours per house-visit to three hours per house-visit. To maintain their wages, caregivers have to increase the number of house-visits which is difficult since the time for travelling and for time between scheduled home visits is not paid. Moreover, the working time regulation forces caregivers to provide unpaid services. In practical terms, it is difficult for caregivers to reduce their service time

²³ In 2010, for example, 5~6,000 KW were evaluated as the "normal" level of hourly wages of formal caregivers. In the same year, the legal hourly minimum wages were 4,110 KW.

²⁴ Kim (n 22).

²⁵ The Campaign Committee for Amending the Long-term Care Insurance Act, 'Forum on a Complete Revision of the Long-term Care Insurance Act' (26 June 2017).

²⁶ Under the Labour Standard Act, an employer shall, in addition to the ordinary wages, pay 50 per cent or more thereof for overtime work, night work, or holiday work. To cut these overtime allowances, employers often force an employee to sign an employment contract which sets in advance the sum of wages regardless of actual working hours, holding that all relevant allowances are regarded as being included in the pre-fixed sum of wages. For example, if a worker worked for 12 hours, employers often claim that all relevant overtime allowances were included in advance into her pay, or that the worker had 4 hours recess while she actually provided her labour for those hours.

²⁷ National Human Rights Commission of Korea, 'Recommendation on the Improvement of Human Rights of Long-term Care Services Workers' (14 Jun 2012).

when they visit an individual recipient's home.²⁸ Care work has relational features and individual recipients usually need and demand the level of care service that they have previously been provided with during a four-hour visit. Consequently, caregivers must either provide unpaid service time or increase their workload within the time limits.

Along with low wages, formal caregivers are, in practice, not able to access labour entitlements. According to the NHIS survey, only 59.4 per cent responded that they had paid holidays, and 51.1 per cent that they were entitled to a holiday work allowance.²⁹ Although their status is of a formal employee, the majority of home-visit caregivers are employed as part-time workers.³⁰ In addition, their contractual working time is usually set at less than 15 hours per week by employers in order to avoid paying legal employment benefits.³¹ Moreover, most formal caregivers suffer from employment insecurity. Caregivers are formally employed on a one-year term contract, but, in reality, they often lose a job whenever one of their individual recipients enters a care facility or dies.

Formal caregivers are vulnerable to exploitation. Many researches recounted that formal caregivers have been frequently exposed to inappropriate requests from individual recipients and sexual harassment. According to a survey conducted by the National Association of Caregivers, 58 per cent of caregivers indicated that they were asked to do household chores, to make *kimchi* or even to do farming within individual recipients' home.³² Thirty-six per cent answered that they were verbally and physically abused, and 17 per cent were sexually harassed.³³

B. Informal Caregivers within Hospitals

Alongside the job creation of formal caregivers under the LTC, informal caregivers provided personal care services within hospitals, nursing homes or in patients' homes. When a patient is in a hospital, the hospital often asks the patient's family to sit by their bedside during the period of hospitalisation. This is due to a shortage of nurses within hospitals. In most cases, female members of family do this work or employ an informal

²⁸ *ibid.*

²⁹ Lee and Yoo (n 20) 74.

³⁰ In 2012, for example, 75.1 per cent of home-visit caregivers answered their employment contract was part-time. See D Seo et al, 'Outlook of Supply and Demand of Long-term Caregivers' (NHIS, 2012).

³¹ Under the Korean labour and social security law, an employee whose contractual working time is more than 15 hours/week is entitled to paid holidays, holiday work allowance, severance pay and employment insurance benefits.

³² National Association of Caregivers, *An Examination and Outlook for Care Work in an Aging Society* (2010).

³³ *ibid.*

caregiver. The number of informal caregivers working within hospitals was estimated at about 36,453 in 2012.³⁴

Most informal caregivers are provided to patients through private employment agencies. The private employment agency, which does not have an employment contract with the caregiver, is not legally deemed an 'employer' but is a fee-charging job placement service agency.³⁵ However, the private employment agency usually assigns jobs to caregivers, provides them with job training and in some cases, even collects fees from patients and gives remuneration to caregivers. Furthermore, many private employment agencies provide caregivers for patients according to an arrangement with a hospital. The arrangement between an employment agency and a hospital usually contains details regarding the personal requirements of care workers, the standard of service fees, working hours, uniform and appearance rules and the method of evaluation. Indeed, caregivers provide their service for patients under the supervision of nurses and other hospital staff. If hospital staff requests that the employment agency replace a caregiver, then she loses her job. Despite the control exerted by the hospital and employment agency, the courts have not regarded either actor as an employer.³⁶ Instead, these caregivers have been regarded as being hired by individuals like an "informal worker" or a "domestic worker".³⁷ This is discussed further below when evaluating the employment status of informal caregivers.

Informal caregivers have similar and different working conditions and characteristics with formal caregivers. In 2010, women accounted for 98.7 per cent of informal caregivers. The majority were slightly older than formal caregiver under the LTC. Informal caregivers are in their

³⁴ Besides, there are informal caregivers working at long-term care hospitals (roughly 19,210), and much more informal caregivers working within patients' homes. H Ahn et al, 'A Study on Institutionalisation of Personal Care Service at Medical Institutions' (NHIS, 2012).

³⁵ Under the Employment Security Act (ESA), 'job placement' means referral services enabling a job offerer and job seeker to enter into an employment contract by searching job seekers and job offerers or recruiting job seekers, in receipt of an application for a job offer or job search (Article 2-2). Most private employment agencies which send caregivers to patients or hospitals, normally register them as the 'fee-charging job placement service' under the ESA. In the legal sense, an entity conducting fee-charging job placement service has not been regarded as an employer of the job seeker, and thus takes no liability as the employer.

³⁶ The Supreme Court, 24 November 2009, 2009-du-18448; The Supreme Court, 12 MAR 2009, 2009-do-311 etc.

³⁷ Article 11 of the Labour Standard Act stipulated that this Act shall neither apply to any business or workplace in which only the employer's blood relatives living together are engaged, nor to servants hired for the employer's domestic works.

fifties (59.3 per cent) or sixties (27.4 per cent).³⁸ Again similar to caregivers under the LTC, informal caregivers are normally required to finish training courses and to get a patient caregiver certificate.³⁹ Care work whether in the informal or formal system are poorly paid. An NHIS survey showed that 36.3 per cent of informal caregivers in hospitals were paid less than 1,000,000 Korean Won (approx. USD 894) per month, and 44.7 per cent were paid between 1,000,000 and 1,490,000 Korean Won (approx. between USD 845 - USD 1,259), in 2010.⁴⁰ Given that they usually worked and stayed within hospitals for very long hours, their average hourly wages were roughly 2,292~2,708 Korean Won (approx. USD 2), which falls below the legal minimum wage (4,110 Korean Won), in 2010.

On the other hand, according to a survey conducted by the NHIS in 2010, 74 per cent of patient caregivers within hospitals worked between 13 to 24 hours per day. In addition, 70 per cent of patient caregivers worked between five and six days a week.⁴¹ While formal caregivers struggle to obtain a sufficient number of working hours, informal caregivers in hospitals usually work for over 12 hours a day, six days a week. Having only one day off a week (usually on Sunday), caregivers return to their own home before going back to the hospital on the next day, bringing their own meals and clothes for a week's work.

This analysis demonstrates that the job conditions of formal and informal caregivers are similarly poor, regardless of their employment status. Their monthly wages have been fixed at very close to, and sometimes below, the level of legal minimum wages. Their working hours are usually long and insecure, and caregivers quite often lose their job, depending on the individual recipients' circumstances. They have been, in effect, excluded from the social insurance system, and have frequently not been entitled to benefits such as paid holidays, overtime pay and severance pay. Although the jobs of formal caregivers under the LTC have been created by government intervention, their working conditions are not far from those of informal caregivers. This is contradictory to previous studies which argued that the state provision of care could

³⁸ Y Shin et al, 'Studies on a Plan for Institutionalising of Patient Care Services' (Korea Institute for Health & Social Affairs, 2010) 34.

³⁹ N Hwang et al, 'A Policy for Institutionalizing of Patient Care Services at Medical Institutions' (Ministry of Gender Equality and Family, 2006).

⁴⁰ Y Shin et al (n 38). More recent survey also reported that the average daily remuneration of informal caregivers was 69,999 KW for 24 hours service, in 2012 (See H Ahn et al (n 34)). It means their hourly wages (about 2,900 KW) are still lower than legal minimum wages (4,580 KW).

⁴¹ C Kwak and M Seong, 'A Survey on Patient Care Services in Hospitals' (NHIS, 2010).

mitigate care work wage penalties.⁴² Even though care services are provided by the social insurance system, care work wages are limited by the legal minimum wage. In particular, when private institutions in effect provide care services under the cost-control of the state, care work wage penalties persist even in public sector employment.

4. Understanding the Employment Status of Formal and Informal Caregivers

The way to justify precarious work in female-dominant jobs is multi-fold. First, the ‘male breadwinner, family model’ has been dominant in the South Korean labour market. Yet, it should be noted that in South Korea, historically, the male breadwinner’s family wages have been provided only for employees working in large corporations. Since the economic crisis of the late 1990s, in particular, the majority of the workforce has suffered from low wages and precarious employment. Even though many such male workers have not earned enough so as to support their family, female workers are still regarded as the ‘second earner’ in the labour market.⁴³ Rather than being valued and recognized as work, care work for the elderly or patients, has been frequently depicted as a middle-and-old aged housewives’ job for pin money.

Second, care work has been devalued as an extension of domestic chores, even when it is done by a paid and professional caregiver. With regard to informal caregivers, their work is essential for inpatients as hospitals have cut down their nursing personnel. Hospitals need informal caregivers in order to make good the shortage of nurses.⁴⁴ However, the caregivers’ work has been deemed an extension of care by family (in particular, by female members of the family), and the exclusion from labour protection is legitimated as such. The Korean Standard Classification of Occupations (KSCO) by the National Statistics Office classifies the jobs of informal caregivers as “requiring a middle school

⁴² Michelle J. Budig and Joya Misra, ‘How Care-work Employment Shapes Earnings in Cross-national Perspective’ (2010) 149(4) *International Labour Review*, 455.

⁴³ In this regard, Kim argued that the Korean gender regime should be named as a “stratified male breadwinner model” rather than a typical male breadwinner model, as male breadwinning in return for female care-giving was only the case for middle-class married women. See Youngsun Kim, ‘The Social Rights of Female Non-regular Workers and the Gender Regime in Korea’ (2009) 26(1) *Korean Social Security Studies*.

⁴⁴ According to the result of a survey, nurses answered patient caregivers were necessary, due to “the shortage of nurses (49.5%)” and “need of care for 24 hours (23.6%).” See Kwak and Seong (n 41).

educational background and a light workload”. The ‘official’ image of care work is presented as unskilled and easy work which is basically an extension of unpaid domestic chores. In this way, the discriminatory discourse on care work has been shaped and reinforced by the state. Although informal patient caregivers are working within public spaces and in hospitals, they have long been treated as domestic workers under the Labour Standard Act, and they have been excluded from labour law protections and the social insurance system.

These narratives on care-giving have impacted the employment status and relationship of caregivers in both the formal and informal sphere. Debates around the legal status of informal patient caregivers working within hospitals have questioned this classification. For instance, in 2003, Seoul National University Hospital decided to shut down its free service of job placement of caregivers for inpatients, and to contract it out to private employment agencies. As caregivers had concerns about intermediary exploitation, they approached the Seoul National University Hospital Trade Union and joined the union soon afterwards. Caregivers and the union conducted various campaigns, demanding that the hospital should maintain the free service for job placement within the hospital. After eight months’ struggle, the union achieved an agreement with the hospital, which let the union run the free service for job placement of caregivers for inpatients.

Through this fight, the poor working conditions of informal caregivers came to public attention, and debates on their legal status arose. While the traditional legal interpretation regarded them as domestic workers, the union argued that informal caregivers’ work was in practice integrated into the business of the hospital, and thus the hospital should take responsibility for their working conditions. Being inspired by fights of caregivers in Seoul National University Hospital, informal caregivers working within other large hospitals joined trade unions one after another, and their fights to bargain collectively with hospitals went on. Unionised informal caregivers have demanded that hospitals should take responsibility for decent working conditions,⁴⁵ and ultimately should have a direct employment relationship with informal caregivers. These arguments have even more salience when we remember that these types of caregivers provide their service not within patients’ homes but within hospitals, and thus their workplace is far from an “informal” or “domestic” space.

⁴⁵ For example, trade unions demanded that hospitals should provide patient caregivers for rest areas for sleep-over, eating and changing uniforms, and appropriate protection from occupational accidents and disease.

Until recently, hospitals and the government have taken a negative view of these demands. The courts have ruled that informal caregivers were hired by individual patients and they did not have an employment relationship with either private employment agencies or hospitals. They noted that a caregiver was technically free to refuse work as offered; she could freely join and leave the agency; she could let another caregiver supplant herself; and the agency did not supervise directly and minutely the performance of work.⁴⁶ The court also denied the existence of an employment relationship with the hospitals as well, holding that the hospital did not have the right to hire and fire caregivers even though it could require the agencies to replace caregivers. The courts also dismissed the argument that patient caregivers' service was an integral part of the business of the hospital.⁴⁷ Relying on the traditional theory of employment as a subordinate relationship,⁴⁸ the courts could not identify an employer in such a work arrangement involving multiple parties, and this led to the denial of employee status to informal caregivers. As a result of the court's ruling, the informal caregivers have been excluded from the protections of labour laws and social security insurance.

Similarly, formal caregivers under the LTC were initially regarded as another type of domestic worker or a type of self-employment. When the LTC was enforced in 2008, the Ministry of Employment and Labour viewed the formal caregivers as self-employed, arguing that they would be free to refuse work as offered, and they would not be subject to detailed supervision over the performance of their work.⁴⁹ After the trade unions representing caregivers raised objections to this administrative interpretation, the Ministry changed its position slightly: a caregiver under the LTC would be deemed an employee of the long-term care institution, only when she is subject to direction or supervision of the

⁴⁶ The Supreme Court, 12 MAR 2009, 2009-do-311.

⁴⁷ The Supreme Court, 24 November 2009, 2009-du-18448; Seoul Administrative Court, 10 June 2010, 2010-guhap-4209 etc.

⁴⁸ In determining whether one is an employee under the Labour Standard Act, the legal precedents have developed the following indicators: the employer decides what work will be performed; the employee is subject to personnel regulations; the employer provides substantial directions/supervision over the performance of work; the employer specifies time and place in which work is done; the employee themselves may employ a third party to substitute the labour; the possession of fixtures, raw material or work tools; the nature of wages as the price for labour, the existence of a basic wage or fixed wage, or the collection of labour income tax through withholding income; the employee provides labour continuously and works exclusively to the employer; the recognition of employee status under other laws such as the Social Welfare Act; and the socio-economic situation of both parties (The Supreme Court, 7 DEC 2006, 2004-da-29736 etc.).

⁴⁹ Ministry of Employment & Labour, 19 AUG 2008, Labour Standards-3266; Ministry of Employment & Labour, 30 APR 2009, Labour Standards-2479.

institution to a 'substantial' extent, and she herself provides the service without employing others and does not bear the entrepreneurial risks.⁵⁰

In sum, as caregivers' work becomes more fragmented, the trajectory of an employment relationship seems like a dotted line, and this becomes disadvantageous in terms of labour protection, which has focused on the bilateral relationship between an employer and an employee. The existence of an employment relationship is contentious, in particular, where the terms of a contract is set by day or even by hour. As explained above, the courts have denied the existence of a subordinate work relationship, on the grounds that a caregiver could provide her labour to several employers. However, the fact that a worker provides her labour to a particular employer for a short term or intermittently does not always indicate that she has the same independence as the self-employed. Rather it might imply that the worker has more precarious conditions such as a day labourer.⁵¹

5. Conclusions

In South Korea, the government has sought low-waged and flexible employment, and attempted to sustain the 'low cost and low benefits' model of care regimes, at the expense of the women who perform care work. Government policies and legislation often play an important role with regard to precarious work as much as employers' strategies. Gender and age, in particular, have frequently become the agenda which justifies precarious employment as a norm. On the premise that women are first the caregiver and only second the breadwinner, jobs dominated by women become more precarious and are more easily devalued by policies which often pursue a quantitative increase of jobs.

Employers' responsibilities have been historically associated with the standard employment relationship and are easily avoided via the use of precarious work. As industrial relations institutions in particular were established within the limits of the scope of the standard employment relationship, employers can shift their cost and risks onto the most vulnerable workers. In South Korea, extremely low union density as well as increasing precarious employment is an output of a repressive labour regime which has attempted to hold down wages. The union density in general was 12.3 per cent in 2017, while that of precarious workers was

⁵⁰ Ministry of Employment & Labour, 30 DEC 2009, Labour Standards-5761.

⁵¹ Aelim Yun, 'Realizing Workers' Rights Beyond Corporate Boundaries in South Korea', in Roger Blanpain and Frank Hendrickx (eds) *The Notion of Employer in the Era of Fissured Workplace* (Bulletin of Comparative Labour Relations, 2017).

merely 2.1 per cent.⁵² The weak union presence underpins a situation in which workers have difficulties in demanding their labour rights, and this is especially harmful for female and/or precarious workers. The most vulnerable workers are not able to have their voices heard, in situations where workers in general are suppressed and deprived of their collective labour rights. Without addressing these unbalanced relations of power, precariousness in the emerging work arrangements cannot be effectively challenged.

Nevertheless, in South Korea, women and precarious workers have formed their own organisations or have taken up their own space inside unions independently, and their organisational spirit has given the impulse for building a more egalitarian culture in the labour movement and across society. They have demanded that hospitals should take responsibility for decent working conditions for informal caregivers, such as protection from occupational accidents and disease and security in employment. Furthermore, the unions have demanded that the state should take responsibility for securing the labour rights of formal and informal caregivers, through enhancing labour standards in the care sector. The first and foremost attempt of the unions is making care work visible and rightly valued in all aspects of their work.

A further area for reform is the low wages in South Korea. The statutory minimum wages have functioned as a “standard” wage rate for precarious and unorganised workers, the majority of whom are women, and thus played a role of maintaining low wages and wage inequality, instead of reducing them. A higher minimum wage and the observance of labour laws provide very simple, but powerful, leverage to improve working conditions, irrespective of employment status or union membership. In conclusion, providing workers with good wages and a platform to champion and mobilise for labour rights needs to become a top policy agenda.

⁵² Kim (n 3) 31.

Extending Occupational Health and Safety Law to Informal Workers: The Case of Street Vendors in South Africa

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Abstract

Workers in the informal economy are equally – if not more – at risk of injury and disease than formal workers. Although international law enshrines informal workers' rights to occupational health and safety protection, national laws largely exclude them from their scope. This article proposes how to align national occupational health and safety laws with international law that protects informal workers. It argues for a context- and occupation- specific approach to extending protection to informal workers, drawing on the case of street vendors in South Africa. It proposes legal reform to, inter alia, adapt the institutional framework for occupational health and safety to accommodate the needs and interests of informal workers. It highlights the importance of coordination between different levels of government and interaction between labour law and different policy fields, including urban planning and workers' compensation. Finally, it argues that legal reforms must be complemented by additional measures, such as organising informal workers and reforming the curricula for occupational health and safety professionals.

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1. Introduction

The informal economy refers to all economic units, economic activities and workers that fall outside the scope of regulation.¹ It comprises two components. The first is the *informal sector*, which comprises the production and employment that take place in unregistered enterprises.² The second is *informal employment*, which refers to employment – whether inside or outside the informal sector – that does not provide employment-based social protection.³ It includes self-employed workers, employers, wage workers and unpaid family workers who work in a diverse range of sectors and occupational groups.⁴

There is growing recognition that informality makes a significant contribution to employment in both developed and developing countries. In some regions in the developing world, informal employment accounts for more than half of non-agricultural employment. It accounts for 82 per cent in South Asia, 66 per cent in Sub-Saharan Africa, 65 per cent in East and Southeast Asia and 51 per cent in Latin America.⁵ Contrary to earlier predictions that it would disappear as developing economies industrialised, the informal economy has persisted and manifested itself in different forms in the developing and developed contexts.⁶ Consequently, law- and policy-makers, researchers, development experts, workers and civil society organisations are paying greater attention to the informal economy.

Statistics from some regions in the developing world show that more women rely on the informal economy as a source of non-agricultural employment than men.⁷ In Sub-Saharan Africa, for example, 74 per cent

¹ Martha Alter Chen, 'The Informal Economy: Recent Trends, Future Directions' (2016) 26(2) *New Solutions: A Journal of Environmental and Occupational Health Policy* 155, 158-9.

² Martha Alter Chen, 'Women Informal Workers' A Policy Brief for the UN Secretary General's High-Level Panel on Women's Economic Empowerment (2016) 1 (unpublished, on file with the author).

³ *ibid* 1.

⁴ Chen, 'The Informal Economy: Recent Trends' (n 1) 158-59.

⁵ Joann Vanek et al, 'Statistics on the Informal Economy: Definitions, Regional Estimates and Challenges' WIEGO Working Paper (Statistics) No. 2 (2014) 7-8. This publication serves as a companion to a publication jointly produced by the ILO and WIEGO, *Women and Men in the Informal Economy: A Statistical Picture* (2nd ed, ILO, 2014).

⁶ Vanek et al (n 5) 3.

⁷ *ibid* 2, 7-8.

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of women non-agricultural workers labour in the informal economy compared to 61 per cent of men, and in Latin America and the Caribbean, 54 per cent of women and 48 per cent of men.⁸ Moreover, women are amongst the poorest informal workers, and they bear a higher degree of economic risk as compared to men.⁹ Consequently, measures to address the challenges faced by workers in the informal economy are essential in addressing gender inequality,¹⁰ promoting women's economic empowerment¹¹ and promoting decent work for women.

Workers in the informal economy experience various forms of insecurity and vulnerability, including exposure to occupational health and safety (OHS) risks. While informal workers' chief asset is their labour, 'their health is compromised by the very work they do'.¹² Occupational hazards have a negative impact on informal workers' work, income security and social security.¹³ Yet, national laws that require health interventions such as hygiene, monitoring of hazards and hazard controls are modelled on industrialised country and focus on conventional workplaces such as factories, mines and shops.¹⁴

Informal workers work in unconventional workplaces such as private homes (either as domestic workers who work in their employers' homes, or subcontracted home workers who produce in their own homes) and in public spaces. Their unconventional workplaces and the fact that many of them are not employees, means that informal workers are often de jure or de facto excluded from OHS laws. Consequently, they face greater risks of injury and disease from the same hazards as compared with formal workers.¹⁵ In addition, they are likely to experience different hazards that arise in the context of their unconventional workplaces.

The absence of legislative OHS protection for informal workers places the burden of preventing and mitigating the risks of occupational

⁸ *ibid* 2.

⁹ Chen, 'Women Informal Workers' (n 2) 2-3.

¹⁰ Vanek et al (n 5) 3.

¹¹ Chen, 'Women Informal Workers' (n 2) 1.

¹² Francie Lund and Rajen Naidoo, 'The Changed World of Work' (2016) 26(2) *New Solutions: A Journal of Environmental and Occupational Health Policy* 145, 146.

¹³ Indian Institute of Public Health Ghandinagar, 'An Impact Analysis of Participatory Design and the Use of Tools to Improve the Health and Productivity of Women Workers in the Informal Economy' Self-Employed Women's Association Project Resource (2013) 1 <http://www.wiego.org/sites/default/files/publications/files/SEWA_Productivity_Impact_Study_2013.pdf> accessed 1 March 2017.

¹⁴ Laura Alfes, 'Occupational Health and Safety for Market and Street Vendors in Accra and Takoradi, Ghana' (2009) WIEGO 2 <http://www.wiego.org/sites/default/files/publications/files/Alfes_OHS_Street_Trade_rs_2009.pdf> accessed 28 April 2018.

¹⁵ Lund and Naidoo (n 12) 146.

health and safety hazards on informal workers themselves.¹⁶ This passes on the costs and risks to poorer workers, and is especially problematic where the costs associated with providing health and safety is disproportionate to workers' income.¹⁷ Women in the informal economy carry the greatest burden, as they dominate the poorest and most vulnerable segments of the informal economy.

This article considers how law can be reformed to meet the OHS needs of informal workers. It assumes that preventing and mitigating occupational hazards in the informal economy will help to improve workers' work environment and thus enable them to work more productively.¹⁸ Arguing that international law requires states to take measures to promote and protect the OHS of workers in the informal economy, this article seeks to explore how a national government can concretely extend OHS protection to these workers. The article provides a contextualised and grounded analysis of the legal issues by considering the occupational health and safety legislation of South Africa.¹⁹ The article explores the South African Occupational Health and Safety Act (the OHS Act)²⁰ and the provisions of the Act that should be extended to workers in the informal economy.

Recognising that different occupational groups and sectors in the informal economy experience different health and safety hazards²¹ that require different interventions, this article focuses on urban street vendors who work in public spaces. It recommends that South African OHS law should be amended to provide for street vendors' access to appropriate infrastructure, training and health assessments. It argues that the law should hold local authorities responsible for these interventions where they own and control the public space and designate it for street vending. These recommendations underscore the need for informal workers to

¹⁶ Laura Alfes and Ruth Abban, 'Occupational Health and Safety for Indigenous Caterers in Accra, Ghana' (2011) WIEGO 13
<http://www.wiego.org/sites/default/files/publications/files/Alfes_Abban_OHS_Indigenous_Caterers_2011.pdf> accessed 28 April 2018.

¹⁷ Francisco Comaru and Edmundo Werna, 'The Health of Workers in Selected Sectors of the Urban Economy: Challenges and Perspectives' ILO Sectoral Activities Department Working Paper No. 288, 17-8
<http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@sector/documents/publication/wcms_208090.pdf>; Francie Lund, Laura Alfes and Vilma Santana, 'Towards an Inclusive Occupational Health and Safety for Informal Workers' (2016) 26(2) *New Solutions: A Journal of Environmental and Occupational Safety* 190, 202.

¹⁸ Chen, 'The Informal Economy' (n 1) 156.

¹⁹ Laura Alfes et al, 'Extending Occupational Health and Safety to Urban Street Vendors: Reflections from a Project in Durban, South Africa' (2016) 26(2) *New Solutions: A Journal of Environmental and Occupational Health Policy* 271, 272-3.

²⁰ Act No. 85 of 1993.

²¹ Alfes et al (n 19) 272-3.

actively participate in the law-making process to enable them to articulate their experiences and their needs.

The article is organised as follows. Section 2 describes the international law provisions concerning informal workers' right to health and safety in the workplace. Section 3 provides a case study of street vendors and the occupational health and safety challenges they encounter, with a view to analysing the OHS legislation's shortcomings in relation to informal workers in the South African context. Section 4 considers the legal and practical implications of extending OHS protection to street vendors. Section 5 considers the practical measures that certain actors can take to promote occupational health and safety of informal workers drawing from examples relating to street vendors. This is followed by a brief conclusion, which reflects on the key lessons that can be drawn from the analysis.

2. The Right to a Healthy and Safe Workplace in International Law

The Universal Declaration of Human Rights (UDHR) protects the right to just and favourable conditions of work,²² which includes health and safety at work.²³ In addition, the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically mentions safe and healthy working conditions as a component of just and favourable conditions of work.²⁴ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) guarantees women's 'right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction' and requires states to provide special protection to pregnant women performing types of work that are harmful to them.²⁵ These rights are extended to 'everyone' or 'every woman', without qualification based on labour market status, sector or occupation.

The International Labour Organization (ILO) has several instruments on occupational health and safety. The principle instrument that establishes employers' obligations to protect workers' health and safety is the Occupational Safety and Health Convention, adopted in

²² (adopted 10 December 1948) UNGA Res 217 A(III), art 23.

²³ Benjamin O. Alli, *Fundamental Principles of Occupational Health and Safety*, (2nd ed, ILO, 2008) 20.

²⁴ (adopted 16 December 1966, entry into force 3 January 1976) 3 UNTS 999, art 7(b).

²⁵ (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13, art 11(1) (f), 11 (2) (d).

1981.²⁶ This requires employers to take measures to ensure that workplaces, machinery, equipment and processes under their control are safe and without risk to workers' health.²⁷ Employers must also provide protective clothing and protective equipment to prevent the risk of accidents or adverse effects on health.²⁸ In addition, they must also provide for measures to deal with emergencies and accidents.²⁹

This Convention presupposes that liability arises in the context of an employment relationship and liability is based on the employer's control of the workplace and activities conducted therein.³⁰ The provisions of the Convention cover workers in an employment relationship where the workplace is owned and controlled by the employer. Therefore, on a narrow interpretation, it excludes workers in the informal economy, including those working on their own account and in public spaces.

Subsequent developments within the ILO have called for a broader interpretation to the right to OHS. In 1999, the ILO adopted the Decent Work Agenda, which encourages global, regional and national efforts to promote its four pillars, namely opportunities for work, rights at work, social protection and social dialogue.³¹ The Decent Work Agenda reiterates the ILO Constitution's call for the improvement of 'conditions of labour' which relate to all those who work.³² The Decent Work Agenda therefore embraces all work, 'whether organised or not, and wherever work might occur, whether in the formal or the informal economy, whether at home, in the community or in the voluntary sector'.³³ A safe working environment is one of the elements that constitute the 'rights at work' pillar of the Decent Work Agenda.³⁴ This means that the ILO envisages that measures should be taken to ensure that workers in the informal economy enjoy a healthy and safe working environment.

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)'s General Survey on Occupational Safety and Health were published in 2009. In this General Survey, the

²⁶ C-155 Occupational Safety and Health Convention, 1981 (No. 155).

²⁷ *ibid* art 16(1).

²⁸ *ibid* art 16(2).

²⁹ *ibid* art 18.

³⁰ *ibid* art 3(b)-(c) read with art 16(1)-(2).

³¹ Report of the Director-General, 'Decent Work' (1999) 87th Session of the International Labour Conference

<<http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>> accessed 28 April 2018.

³² *ibid*.

³³ *ibid*.

³⁴ ILO, *Decent Work Indicators: Guidelines for Producers and Users of Statistical and Legal Framework Indicators* (2nd ed, ILO, 2013) 12.

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CEACR expressly recognised the challenge of extending protection to workers in the informal economy.³⁵ The Committee stressed the need for major efforts to assist the informal economy in implementing at least basic preventative and protective measures.³⁶ It further called on governments to design and implement specific measures to extend occupational health and safety protection to the informal economy, and for workers' and employers' organisations to consider providing support in this area.³⁷

More recently, the ILO adopted the Recommendation Concerning the Transition from the Informal to the Formal Economy, 2015 (No. 204). Recommendation 204 (R 204) requires member states to adopt 'an integrated policy framework to facilitate the transition to the formal economy' in the context of national development strategies.³⁸ This policy framework should address, inter alia, the adoption of an appropriate legal and regulatory framework to promote formalisation.³⁹ Importantly, R 204 exhorts member states to address unsafe and unhealthy working conditions in the informal economy, and to promote and extend occupational health and safety to employers and workers in the informal economy.⁴⁰

The above discussion demonstrates that international law guarantees informal workers, including street vendors, the right to a safe and healthy workplace as a human right. International law requires states to take measures to ensure that informal workers enjoy these rights. There are no clear rules as to how the rights are to be realised in practice or who should be responsible for providing the necessary infrastructure and services for workers falling outside the conventional employment relationship.

3. Extending South African OHS Law to Informal Workers

This section considers how South Africa can recognise and give effect to informal workers' right to occupational health and safety at the national

³⁵ CEACR, 'General Survey on Occupational Safety and Health' (2009) ILO xii <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103485.pdf> accessed 28 April 2018.

³⁶ *ibid* 3.

³⁷ *ibid* 102.

³⁸ Recommendation 204 [10].

³⁹ *ibid* [10(b)].

⁴⁰ *ibid* [17(a)-(b)].

level. It describes the situation of street vendors as a concrete example to highlight the OHS Act's shortcomings in addressing the concerns of informal workers. It then recommends legal reforms and reflects on South Africa's obligations under international law, which requires the extension of occupational health and safety protection to informal workers. It ends by highlighting the challenges related to South Africa's workers' compensation law, which is related to OHS protection.

Street vendors are informal traders who operate in public spaces including streets, pavements, and informal trading markets. They include stationary vendors who operate from a fixed space, and mobile vendors who move from place to place. Their operations include buying and selling goods, producing and selling goods, and providing services.⁴¹ Street vendors engage in this activity as own-account operators, employers, paid employees and unpaid family workers.

Women make up a large proportion of street vendors in a number of countries, including in South Africa.⁴² In South Africa, employment in the informal sector (which includes street vendors) accounted for between 16 and 18 per cent of non-agricultural employment between 2008 and 2014.⁴³ According to the ILO, street vending accounts for about 15 per cent of all urban (formal and informal) employment in the country.⁴⁴ About 70 per cent of street vendors in South Africa are women,⁴⁵ and approximately 67 per cent of them sell food items.⁴⁶

Street vendors all over the world experience several threats to their health and safety at work. They typically contend with air pollution from sources including open garbage and choked drains, which may cause breathing disorders, such as asthma.⁴⁷ Because they stand or sit

⁴¹ Sally Roever, 'Informal Economy Monitoring Study: Street Vendors' (2014) WIEGO 1 <<http://www.wiego.org/sites/default/files/publications/files/IEMS-Sector-Full-Report-Street-Vendors.pdf>> accessed 28 April 2018.

⁴² *ibid.*

⁴³ Michael Rogan and Caroline Skinner, 'The Nature of the South African Informal Sector as Reflected in the Quarterly Labour Force Survey 2008-2014' (2017) REDI3X3 Working Paper No. 28, 2. South Africa is an outlier compared to other countries amongst other developing countries, as it has a higher rate of unemployment and a lower rate of informal employment than other countries in Sub-Saharan Africa and other regions. See ILO, *Women and Men in the Informal Economy* (n 5) 19.

⁴⁴ ILO, *Women and Men in the Informal Economy* (n 5) 45.

⁴⁵ Debbie Budlender, 'Statistics on Informal Employment in South Africa' (2011) WIEGO Statistics Brief No. 3, 3 <http://www.inclusivecities.org/wp-content/uploads/2012/07/Budlender_WIEGO_SB3.pdf> accessed 28 April 2018; ILO, *Women and Men in the Informal Economy* (n 5) 46.

⁴⁶ ILO, *Women and Men in the Informal Economy* (n 5) 46.

⁴⁷ Conchita Tangworamongkon, 'Street Vending in Bangkok: Legal and Policy Frameworks, Livelihood Challenges and Collective Responses' (2014) WIEGO Law and Informality Project 26 <<http://www.wiego.org/sites/default/files/resources/files/Street-Vending-Bangkok-Legal-and-Policy-Framework-Law-Case-Study.pdf>> 28 April 2018.

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uncomfortably for lengthy periods, street vendors also encounter physical and ergonomic hazards, which result in muscular-skeletal disorders, including back ache.⁴⁸ Street vendors are also exposed to weather elements including extreme heat, cold and rain.⁴⁹ Limited access to toilet facilities results in urinary infections and other disorders.⁵⁰

Street vendors are often blamed for operating under unhygienic conditions, for the dirt in urban areas and for the spread of diseases.⁵¹ To the extent that laws and policies governing street vending mention health and safety, they focus on protecting public health and safety and punishing street vendors for working under unhygienic conditions.⁵² Consequently, they fail to recognise that insofar as street vendors operate under unhygienic conditions, this is partly a result of structural and infrastructural constraints such as limited access to clean water and toilets, and inadequate or no refuse collection.⁵³ Access to these facilities is determined by local governments (also known as municipalities or local authorities) regulating the spaces where street vendors trade, and is largely beyond street vendors' control.

A. Analysis of Provisions on OHS Protection for Informal Workers

The OHS Act provides for the occupational health and safety rights and obligations in the workplace. It aims to eliminate health and safety risks in the work systems, plant and machinery and risks associated with all work-related activities. The discussion below analyses key provisions of the OHS Act and demonstrates: (i) the scope of the Act is limited to the standard employment relationship in a conventional workplace such as a large-scale factory; (ii) the institutional framework for implementing the Act does not accommodate informal workers' organisations; and (iii) the enforcement machinery does not apply to workers outside the employment relationship. The analysis ends by demonstrating that the Compensation for Occupational Injuries and Diseases Act No. 130 of

⁴⁸ Comaru and Werna (n 17) 6.

⁴⁹ *ibid* 10.

⁵⁰ Self Employed Women's Association, 'Street Vendors' Laws and Legal Issues in India' (2014) WIEGO Law and Informality Project <<http://www.wiego.org/sites/default/files/resources/files/Street%20Vendors%E2%80%99Laws%20and%20Legal%20Issues%20in%20India.pdf>> accessed 28 April 2018.

⁵¹ Sally Roever and Caroline Skinner, 'Street Vendors and Cities' (2016) *Environment and Urbanization* 359.

⁵² See s 9 of the OHS Act (n 21) which requires self-employed workers to take measures to protect people who are not their employees (eg. customers) against health and safety hazards. See Lund et al (n 17).

⁵³ Lund et al (n 17) 198-9; Alfors et al (n 19) 280-1.

1993 (COIDA) which is related to the OHS Act, does not cover informal workers.

First, the Act's scope is limited to workers who are in an employment relationship, and who work on property that is controlled by the employer. Employers must provide the information, instructions, training and supervision necessary to ensure employees' health and safety.⁵⁴ They must take the necessary precautions to safeguard their health and safety before allowing employees to perform work.⁵⁵

The Act does not recognise the situation of self-employed workers such as street vendors, who do not have an employer, and who operate in public spaces. It also does not recognise the fact that the obligations on employers are not appropriate for street vendors' assistants, whose employers cannot provide the necessary infrastructure and facilities to safeguard their health and safety. The Act does not provide a basis for holding the local authorities liable for protecting the health and safety of informal workers who operate on public space.

Second, the Act's institutional framework for occupational health and safety does not recognise or provide for the participation of informal workers' organisations. At the macro-level the Act establishes the Advisory Council for Occupational Health and Safety (the Advisory Council) which advises the Ministry of Labour on policy matters relating to occupational health and safety.⁵⁶ In terms of the Act, the Advisory Council comprises representatives of government, employers' organisations, trade union federations and experts on occupational health and safety.⁵⁷ This does not accord with R 204, which calls on member states to consult with and promote the active participation of organisations that represent workers in the informal economy.⁵⁸

At the micro-level, the Act provides for health and safety representatives and health and safety committees in each workplace. An employer must appoint health and safety representatives, whose role includes reviewing health and safety measures, identifying potential hazards, examining causes of accidents, investigating employee complaints and making representations to the employer.⁵⁹ An employer must establish a health and safety committee in a workplace where two or more health and safety representatives have been appointed.⁶⁰ The committee's mandate is to make recommendations to the employer or

⁵⁴ OHS Act (n 21) s 8.

⁵⁵ *ibid.*

⁵⁶ *ibid* s 3-6.

⁵⁷ *ibid* s 4.

⁵⁸ Recommendation No 204 (n 38) [34].

⁵⁹ OHS Act (n 21) s 18.

⁶⁰ *ibid* s 19(1).

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the labour inspector on any matter affecting health and safety at the workplace,⁶¹ and to report on workplace incidents involving and resulting in injury, illness or death.⁶²

The provisions governing these workplace representatives and committees are modeled on a conventional workplace where many employees are working for the same employer. They do not recognise the diversity of situations that may exist in the informal economy. For example, they do not cover workers operating independently in a public space. It does not provide for these structures to address occupational health and safety concerns in the context of another arrangement, for example, a property owner such as a local authority and the street vendors whom it sanctions to operate in the space.

Third, the legal framework for promoting compliance does not recognise work outside the employment relationship. The Act empowers inspectors to conduct searches, inspections, investigations and formal enquiries into actual or potential situations that threaten the health and safety of employees. Their primary means of securing compliance is to issue orders requiring employers to take specific action or prohibiting them from taking specific actions.⁶³

The provisions presuppose that the only (natural or legal) person that has a duty to promote and protect workers' health and safety at work is an employer who has a formal employment contract with the workers involved. The Act does not allow inspectors to exercise their statutory powers in other situations, including a local authority managing property where informal traders are operating. This is at odds with the provisions of R 204, which requires member states to adopt adequate and appropriate labour inspection systems that cover workplaces in the informal economy.⁶⁴

B. Recommendations for the Extension of OHS Protection to Informal Workers

The foregoing analysis demonstrates the Act's failure to recognise and accommodate workers who are outside the employment relationship, but nevertheless encounter occupational risks and safety hazards at work. This position does not accord with South Africa's obligations under

⁶¹ *ibid* s 20(1).

⁶² *ibid*.

⁶³ *ibid* ss 27-35 govern the designation and functions of inspectors responsible for enforcing occupational health and safety provisions.

⁶⁴ Recommendation No 204 (n 38) [27].

international law.⁶⁵ South Africa has ratified the ICESCR, CEDAW and the ILO Occupational Health and Safety Convention, which require member states to extend OHS protection to informal workers. In addition, the UDHR and the Decent Work Agenda arguably form part of customary international law,⁶⁶ which is also binding on South Africa.⁶⁷

It is recommended that as a point of departure, the Act must be amended to expressly include workers in the informal economy. Thus, its scope should be extended beyond ‘employees’ to cover ‘workers’. In addition, the references to employers should be amended to cover persons who own or otherwise control the workplace and who sanction workers to conduct their work in the workplace.

Recommendation 204 exhorts member states to develop tailored approaches to addressing ‘the diversity of characteristics, circumstances and needs of workers and economic units in the informal economy’.⁶⁸ The legal framework must therefore accommodate the specific occupational health and safety needs of diverse groups of informal workers. Street vendors, for example, require access to clean water; access to clean toilets; provision of lighting and access to electricity; protection against fire hazards and access to fire extinguishers; regular cleaning of trading areas and collection of refuse.⁶⁹ In addition, street vendors should be entitled to periodic health assessments and training on good hygiene and safety practices.

It is submitted that the OHS Act already provides a framework to address the specific risks and hazards that various categories of informal workers encounter. The OHS Act empowers the Minister of Labour to issue regulations on matters related to occupational health and safety.⁷⁰ The Minister of Labour has issued several such regulations, some of

⁶⁵ International agreements become binding upon ratification by the country’s legislature; Constitution of the Republic of South Africa Act No. 108 of 1996, s 231.

⁶⁶ Customary law comprises two elements: the practice of states and states’ acceptance that the practice is binding on them. See Tullio Treves, ‘Customary International Law’ in the *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, 2006) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?prd=EPIL>> accessed 20 February 2017.

⁶⁷ Constitution (n 65) s 232.

⁶⁸ Recommendation No 204 (n 38) [7(a)].

⁶⁹ Francie Lund, ‘Women Street Traders in Urban South Africa: A Synthesis of Selected Research Findings’ (1998) CSDS Research Report No. 15 <<http://www.wiego.org/sites/default/files/publications/files/Lund-women-street-traders.pdf>> accessed 28 April 2018; Roever, ‘WIEGO Informal Economy Monitoring Study’ (n 41) 32-6. See Pamhi Bamu, ‘Lessons Learned from the WIEGO Law Project: The Case of Street Vendors’ (Forthcoming) WIEGO Law Resource 15 for a summary of street vendors’ demands identified during the WIEGO Law Project between 2009 and 2014.

⁷⁰ OHS Act (n 21) s 43.

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which outline the rules to promote occupational health and safety of workers who operate specific equipment and machinery or who engage in specific occupations and activities. Arguably, the absence of regulations that specifically cover workers in the informal economy is due to the Act's narrow focus on employees. Amending the Act to cover all workers would therefore provide the foundation for activity- or sector-specific regulations to address the specific health and safety of workers in the informal economy.

It is also recommended that section 3 of the Act be amended to state that the functions of the Advisory Council expressly include advising the Department of Labour on health and safety issues concerning the informal economy. It is further recommended that the Advisory Council should include representatives nominated by informal workers' member-based organisations (MBOs) and experts on the informal economy. In addition, the Advisory Council should establish a technical committee to advise it on occupational health and safety in the informal economy.⁷¹ Furthermore, the composition of the technical committee should include MBOs and experts working in the informal economy. These changes would give effect to the provisions of R 204, which exhorts member states to create an enabling environment for the consultation and active participation of MBOs that represent workers informal workers.⁷²

South Africa's social dialogue structures already include informal workers, albeit to a limited extent. The National Economic Development and Labour Council (NEDLAC) operates on a 'tripartite plus' basis, whereby the community constituency participates in some of NEDLAC's structures.⁷³ StreetNet South Africa is an umbrella body of street vendors' organisations in the country and represents the informal economy in the community constituency. Arguably, including informal workers' MBOs in the Advisory Council on OHS would be in line with the position relating to NEDLAC and would strengthen informal workers' voices on issues affecting them.

A reconstituted Advisory Council, which includes representatives of informal workers and experts on informal work, and a technical committee responsible for the informal economy could advise the Minister on developing regulations to cover the informal economy. The

⁷¹ *ibid* s 6. It allows the Council to establish technical committees to advise the Council on any matter. The Council can appoint members of technical committees based on their knowledge on the relevant matter for which the committee is established. Members of technical committees need not be members of the Council.

⁷² Recommendation No 204 (n 38) [32], [34].

⁷³ The community constituency is not represented in the Labour Market Chamber but is represented in the Development Chamber. See National Economic Development and Labour Council <www.nedlac.org.za> accessed 7 July 2017.

membership of the technical committee could be adjusted according to the specific groups of informal workers or occupational health and safety issues under discussion. The selection of appropriate representatives for informal workers could be controversial, given the diversity of informal workers MBOs that organise in different sectors. It would therefore be prudent to adopt transparent selection criteria and processes to ensure the selection of legitimate and representative MBOs.

It is further recommended that the Act be amended to allow the Minister to issue regulations to establish appropriate measures to secure the representation and participation of informal workers in efforts to promote occupational health and safety in their workplaces. These measures should take account of the workers' employment status, the nature of the workplace, and the nature and extent of organising amongst the workers.

Finally, it is recommended that the scope of the Act's provisions on inspections should be amended to expressly cover informal workers, including those who are not employees and those who work in unconventional workplaces. This would give effect to R 204's call for a policy framework to address efficient and effective labour inspection in the informal economy and for member states to guide the labour inspectorate on how to address the OHS challenges that informal workers encounter.⁷⁴ In order to achieve this, the Minister could issue regulations that elaborate the modalities of inspections and enforcement in relation to specific workers or activities.

While this article focuses on OHS protection, it would be remiss not to mention workers' compensation. The latter seeks to provide redress to workers who are injured or who contract diseases during the course of, or because of, their work. The scope of South Africa's Compensation for Occupational Injuries and Diseases Act (COIDA) is limited to employees, and therefore does not cover informal economy workers.⁷⁵ It would be necessary to complement OHS reforms with legal and practical measures to extend the scope of the COIDA to workers in the informal economy. This would entail the adaptation of administrative procedures, benefits and contributions and due consideration of the workers' capacity to contribute.⁷⁶

⁷⁴ Recommendation No 204 (n 38) [11(q)], [27].

⁷⁵ Taylor Commission on a Social Security System for South Africa Report, 'Committee Report No. 11: Coverage Against Employment Injuries and Diseases' (2002) 452 <<https://sarpn.org/CountryPovertyPapers/SouthAfrica/taylor>> accessed 1 March 2017.

⁷⁶ See Recommendation No 204 (n 38) [20] which refers to the extension of social security to informal workers.

4. The Implications of Imposing Liability for Street Vendors' OHS on Local Governments

The discussion in Section 3 used street vending to illustrate the OHS Act's limitations in relation to informal workers. It ended with recommendations for legal reforms to extend OHS protection to workers in the informal economy. These recommendations give effect to South Africa's obligations under international law and the guidelines under ILO Recommendation 204. In considering how to tailor OHS protections to specific groups of workers, this section proposes how to realise the OHS protections for workers who do not have an employment relationship with the owner of the workplace and who work on public space.

The point of departure is the proposal that the obligation to provide for these rights should rest with the local authorities that own the public spaces on which street vendors operate. Local authorities own and control public space and are responsible for policies and actions governing the urban environment and infrastructure.⁷⁷ This becomes more significant where local authorities designate the space for a specific work-related purpose and are (or should be) aware of the health and safety risks that arise therein.

The discussion considers the legal and practical implications of holding local authorities responsible for extending OHS protections to street vendors. What are the implications of the proposed legal changes for the interplay between different levels of government and different policy spheres? Should the enforcement provisions applicable to employers in terms of the OHS Act be extended to local authorities? How are the costs of providing OHS-related services justified? Should unregistered street vendors receive OHS protections? I discuss these issues in turn to highlight the questions that need further consideration and make some recommendations on how these can be addressed by extending legislation to the informal economy. Sections A to D explore how these issues can be addressed in the South African context.

A. Implications of the Interplay between Different Jurisdictional Levels and Policy Spheres

The proposed imposition of OHS liability on local authorities raises questions about the interaction between different levels of government

⁷⁷ Comaru and Werna (n 17) 17-8.

and different policy spheres. First, the proposals raise constitutional issues about the interplay between local and national spheres of government where national law requires local authorities to implement national imperatives. Second, the protections required, and the involvement of local authorities necessitates interplay between labour law and other spheres of regulation, namely urban planning, economic development and health.

Recommendation 204 underscores that the integrated policy framework to facilitate formalisation must recognise the role of different levels of government and must promote cooperation between them.⁷⁸ It also stresses the need for ‘coherence and coordination across a broad range of policy areas’ and for cooperation between the relevant bodies.⁷⁹ It is therefore necessary to explore the possibilities for giving effect to R 204’s provisions within the context of South Africa’s constitutional and institutional framework.

The Constitution of South Africa established a system of cooperative governance, comprising three distinctive spheres of government, namely, national, provincial and local government.⁸⁰ Significantly, local government is not a subordinate ‘level’ of government, but constitutes a sphere of government with executive and legislative powers to govern specific issues stipulated in the Constitution. The Constitution prohibits national and provincial government from ‘compromis[ing] or imped[ing] a municipality’s power to exercise its powers or perform its functions’.⁸¹ Nevertheless, the three spheres of government are ‘interdependent and interrelated’,⁸² and the Constitution provides that municipal by-laws that are inconsistent with provincial and national legislation are invalid.⁸³

South Africa’s Constitution empowers local government to regulate inter alia cleansing, local amenities, markets, public places, refuse collection and solid waste disposal, trading regulations, municipal planning, street trading and municipal health services.⁸⁴ These issues relate to the provision of OHS-related facilities and services for street vendors. Municipalities in South Africa typically regulate street vendors’ issues under informal trading or street vending policies.

An analysis of a sample of fifteen South African municipalities’ policies on informal trade or street vending reflect divergent positions on

⁷⁸ Recommendation No 204 (n 38) [7(d)], [12].

⁷⁹ *ibid* [10], [12].

⁸⁰ Constitution (n 65) s 41(1).

⁸¹ *ibid* s 165(3) read with 151(4).

⁸² *ibid* 41(1).

⁸³ *ibid* s 165(3) read with 151(4).

⁸⁴ *ibid* s 156(1) read with Part B of Schedule 4 and Part B of Schedule 5.

the provision of infrastructure. On one end of the spectrum are policies that mention physical infrastructure as a benefit for vendors who pay trading fees. These municipalities charge differentiated fees based on the level of service provision in the different trading spaces.⁸⁵ Most of the policies analysed for this article adopt this approach. On another end of the spectrum, Durban's Informal Economy Policy (2001) expressly recognises that a clean and healthy working environment is a basic need for all, including workers in the informal economy.

The local authorities' divergent approaches to street vendors' OHS has disparate impacts on the working conditions of street vendors operating under different authorities. Given that the extension of OHS to workers in the informal economy is an important national imperative, it is necessary to promote the harmonisation of local policies. One way of harmonising local policies is enacting or amending national legislation or policies that require local authorities to recognise and fulfill street vendors' basic need for a healthy and safe environment. In this light, it is recommended that the Minister issue regulations in terms of the OHS Act. These regulations would cover street vendors and include the above suggested protections to street vendors.

National policy documents also encourage local governments to take measures to provide infrastructure for street vendors. This includes the Integrated Urban Development Framework (2014), which exhorts local governments to implement national policies for the informal economy, including street vendors. It urges local governments to consider the informal economy in urban planning, infrastructure development, spatial planning and land use regulation. These examples show that it may be permissible, and sometimes necessary, for national government to guide local government on how to regulate issues that it is primarily responsible for.

Having established that national government may (and sometimes should) regulate issues for which local government is primarily responsible, it is necessary to consider how to promote policy coherence amongst local authorities. The South African Local Government Association (SALGA) is a voluntary and autonomous national association of all 257 local governments in the country.⁸⁶ SALGA is a platform for local authorities to share information and experiences and to promote good practice on policy issues. SALGA's mandate is to develop common policy positions and to represent local governments in policy dialogue at

⁸⁵ See the City of Cape Town Informal Trading Policy No. 1264 (2013).

⁸⁶ It comprises one national office and nine provincial offices. Membership of the association is voluntary. SALGA is a statutory public entity. See South African Local Government Association <www.salga.org.za> accessed 1 July 2017.

national level. At the time of writing, SALGA had held a meeting to consider the possibility of developing guidelines on providing infrastructure for street vendors.⁸⁷ The discussions in this regard provide an opportunity for progressive municipalities to promote the recognition of OHS as a basic need for street vendors.

A good practice example is Durban's Informal Economy Policy (The Policy), which provides that street vendors fall under City's Department of Environmental Health.⁸⁸ The Policy mentions the Department of Environmental Health's role in training street vendors⁸⁹ and its contribution to area-based management.⁹⁰ The Policy calls for an integrated approach to OHS for street vendors, to ensure that 'environmental health considerations are built into all aspects of changing policy and management regarding the informal economy, and especially the siting and development of built markets and sites for street trading'.⁹¹

It is necessary to promote dialogue between national government and local government on issues relating to OHS for street vendors. It is therefore recommended that the OHS Act be amended to include representatives of SALGA in the membership of the OHS Advisory Council to ensure its participation in discussions involving work in public spaces. SALGA's participation in the Council would foster an appreciation of the national imperative to promote OHS in the informal economy and an understanding of the benefits of doing so at the local level.⁹² In addition to promoting dialogue amongst the different levels of government, it would also be necessary to promote national level dialogue across different policy spheres. These would include workers' compensation and health care, both of which are related to occupational health and safety.

⁸⁷ Email from Caroline Skinner to author (24 June 2017).

⁸⁸ Durban's Informal Trading Policy (2001) 22-3.

⁸⁹ Thailand adopted a similar approach, with the Ministry of Public Health extending OHS services to informal workers through primary care units. See Tsuyoshi Kawakami 'Participatory Approaches to Improving Safety, Health and Working Conditions in Informal Economy Workplaces – Experiences of Cambodia, Thailand and Vietnam' (Interregional Informal Economy: Enabling Transition to Formalisation Symposium, Geneva, November 2007) 3-4.

⁹⁰ Durban's Informal Trading Policy (n 88) 22-3.

⁹¹ *ibid.*

⁹² See Pat Horn, 'Street Vendor Licenses and Permits' (Forthcoming) WIEGO Technical Brief 6. She highlights the need to address the challenges that arise where local government lack political will to implement national imperatives.

B. Should Existing Enforcement Provisions be Extended to Local Authorities?

The OHS Act makes it an offence for an employer to do or to fail to do an act, if the act or omission results in a person being injured at a workplace.⁹³ It also mandates an inspector to enforce the Act by ordering non-compliant employers to comply with the relevant provisions of the Act or its regulations that apply to them.⁹⁴ It also empowers an inspector to order an employer to take measures to protect the health and safety of any person whose health and safety is threatened by the employer's failure to take reasonable OHS measures.⁹⁵ The OHS Act makes failure to comply with such an order or notice an offence.⁹⁶ An inspector may investigate or conduct a formal enquiry into any OHS-related incident, report on their findings⁹⁷ and, if necessary, submit the report to the Attorney-General for further action.⁹⁸

In principle, these provisions could be extended to cover local authorities in relation to street vendors operating under their authority. It would, however, be worth re-considering the extent of local authorities' liability, given that their role in street vending involves regulation and facilitation, as opposed to profit-making enterprise. Law-makers could, for example, consider alternatives to the threat of imprisonment and heavy fines to secure compliance.

Stakeholders should also consider the practical challenges that the inspectorate experiences even in the context of conventional workplaces. These primarily relate to financial, technical and human resource constraints to carry out its functions in relation to formal employees, who are currently covered by the OHS Act.⁹⁹ This suggests the need for campaigns and advocacy to secure the allocation of additional resources to reach workers in the informal economy such as street vendors.

⁹³ OHS Act (n 21) s 38(2).

⁹⁴ *ibid* 30(4).

⁹⁵ *ibid* 30(3).

⁹⁶ *ibid* s 38(1)(b).

⁹⁷ *ibid* s 31-32.

⁹⁸ *Ibid*.

⁹⁹ Department of Labour, 'Strategic Plan for the Department of Labour 2012-2017' 28-9 <<http://www.labour.gov.za/DOL/documents/annual-reports/departement-of-labour-strategic-plan/2012-2017/departement-of-labour-strategic-plan-2012-2017>> accessed 7 July 2017.

C. How are the Costs of Providing OHS-related Services Justified?

One could question why local authorities should bear responsibility for the costs of occupational health and safety for street vendors where the local authority is not engaged in the business of street vending and does not employ street vendors.¹⁰⁰ One obvious justification is street vendors' contribution towards local and national revenue through various taxes, and levies.¹⁰¹ Research shows that street vendors' fees make a significant contribution towards local revenue in many African countries.¹⁰² The revenues so generated contribute towards local economic development and help to strengthen the city economy.¹⁰³

In addition to revenue, street vendors make other contributions towards the local economy. Street vendors operate on public spaces such as streets and sidewalks, and thus provide consumers with convenient and accessible retail options.¹⁰⁴ They also bring economic diversity to local economies, and make public spaces and city life more vibrant.¹⁰⁵ Their various commercial activities can transform public spaces into 'multi-use destinations' where commercial activity attracts people to a locality. Through their long-term establishment in a location, vendors maintain enduring relationships with those living and working in that locality.¹⁰⁶ In this way, they contribute to 'residents' and business' social ties, [local] character, commercial attractions and a sense of ... safety'.¹⁰⁷ Street vendors also contribute towards direct employment, as well as indirect employment through ancillary services, including security guards, market porters, and transport services.¹⁰⁸

Street vendors' economic contribution provides sound justification for requiring local authorities to cover the costs of protecting their OHS. Furthermore, providing health and safety facilities contributes to a safe and hygienic environment in public spaces where street vendors operate. The availability of these facilities enables street vendors to provide goods and services in a clean and hygienic manner and enhances customers'

¹⁰⁰ OHS Act (n 21) s 8.

¹⁰¹ WIEGO 'Why Should Occupational Health be a Concern of Local Government?' (2016) <www.wiego.org/resources/why-should-occupational-health-be-concern-local-government> accessed 1 March 2017.

¹⁰² Horn (n 92) 4-5.

¹⁰³ WIEGO 'Key Messages on Public Space: Inclusive Public Spaces Create Vibrant Cities' <www.wiego.org/sites/wiego.org/files/resources/files/WIEGO-Key-Messages-on-Public-Spaces.pdf> accessed 1 March 2017.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ Roever, 'Informal Economy Monitoring Study' (n 41) 3.

experience and safety. This in turn makes it possible for street vendors to contribute more meaningfully to the economy.

D. Should Unregistered Street Vendors Receive OHS Protection?

The issue of unregistered vendors has two dimensions. One is whether local authorities have obligations towards (unregistered) traders operating on space that is not designated for street vending. It is recommended that the obligations of local authorities should only arise in relation to spaces that they have specifically designated for trading. This would mean that a local authority would not be responsible for the health and safety of street vendors operating on land that it did not designate for vending.

Another dimension is whether local authorities have obligations towards unregistered¹⁰⁹ street vendors operating on space that has been designated for street vending. On the one extreme, one could argue that the local authorities should provide health and safety facilities and services (see section 3B) to all street vendors operating on designated space. While this would accord with the unqualified expression of the right of ‘everyone’ or ‘every worker’ to a safe and healthy workplace, it would make it difficult to determine the extent of the local authorities’ liability at the outset.

The other extreme would be to deny unregistered vendors access to any of the services and facilities. This would limit local authorities’ liability in advance. However, it would raise the cost and administrative burden of policing access to certain necessary public facilities, such as clean water and toilets. Consequently, a compromise that acknowledges the need to extend basic services to all traders and reserves access to services such as training to registered street vendors may be apposite.

5. Additional Measures to Promote OHS Protection for Informal Workers

This article has thus far argued for legal reforms to reframe certain established concepts, rights and responsibilities as they relate to informal workers. This section aims to show that extending occupational health and safety to informal workers will require more than legal reforms. It discusses the importance of organising, advocacy, research, training and

¹⁰⁹ The reference to registered vendors refers to vendors who are generally allowed to operate without a license, and have a permit to trade on a particular space. See Horn (n 92) 1.

sensitisation to promote the enactment and implementation of legal measures. The discussion builds on the lessons about street vendors to make recommendations about the extension of OHS protection to informal workers more broadly.

The extension of OHS to informal workers requires the involvement of strong MBOs representing informal workers. This requires systematic efforts to organise them around OHS by engendering and reinforcing a consciousness of their identity as workers and an appreciation that the place where they work is a workplace with associated rights and responsibilities.¹¹⁰ This is especially significant for street vendors, who are largely self-employed, and who work in unconventional workplaces.

Effective organising should include efforts to build workers' capacity to understand the shortcomings of existing laws and demand legal change. MBOs have a crucial role to play in demanding legal and other measures to promote the extension of occupational health and safety to street vendors. MBOs should present their members' views and experiential knowledge in dialogues on laws and policies that affect them.¹¹¹ MBOs should represent street vendors on the Advisory Council on OHS and the proposed technical committee addressing OHS in the informal economy.¹¹² In addition, they must appoint health and safety representatives and health and safety committees to represent street vendors in dialogue with local authorities on health and safety matters.

Raising street vendors' consciousness about their status as workers will also enable them to demand the allocation of state resources and support for OHS in accordance with their economic contribution.¹¹³ Wherever possible, MBOs must engage in participatory budgetary processes to influence national and local government budgets that potentially affect OHS-related allocations.¹¹⁴ MBOs could use their collective strength to demand that political parties and candidates undertake to allocate resources to provide OHS related services.¹¹⁵ MBO

¹¹⁰ Alfors et al (n 19) 275.

¹¹¹ UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 'Annual Report' (2015) A/HRC/29/33, 9-10.

¹¹² This recommendation is also discussed in Section 3 of this article.

¹¹³ Poorima Chikarmane, 'Public Space, Public Waste and the Right to the City' (2006) 26(2) *New Solutions: A Journal of Environmental and Occupational Health and Policy* 296, 300.

¹¹⁴ Debbie Budlender, 'How to Analyse Government Budgets from an Informal Economy Perspective' (2009) WIEGO Technical Brief No. 1.

¹¹⁵ In 2015 and 2016, WIEGO partnered with organisations of street vendors and market head load porters to develop a platform of demands which they presented to political parties and candidates. The National Patriotic Party included commitments to address head loaders' concerns, and honoured this commitment when it came into power. Email from Dorcas Ansaah to the author (1 January 2017).

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leaders and members would need the capacity to understand and articulate their economic contribution and to participate fully in budgetary processes.

It is further necessary to train and sensitise professional communities that can promote informal workers' health and safety at work. The protection of street vendors' health and safety extends beyond labour law and requires a multi-disciplinary approach that covers issues such as urban planning, health services, and local economic development. Critics argue that an inter-disciplinary approach may result in the loss of the 'worker-focus' of OHS, arguing that health professionals, for example, see street vendors as citizens, as opposed to workers.¹¹⁶ Similarly, urban planners do not 'see' them when planning the urban environment.¹¹⁷

Relevant training institutions such as medical schools and environmental health training institutions, should revise their curricula to incorporate the different groups of workers in informal economy.¹¹⁸ This will sensitise aspiring professionals about informal workers' significance and their OHS needs. In addition, organisations working in the informal economy can influence qualified professionals by engaging with the relevant professional bodies and through exposure dialogue programmes. The latter expose professionals to informal workers' daily experiences at work and provide a platform to reflect on their learnings and to engage in a technical dialogue.¹¹⁹

The introduction to this article highlighted the limited availability of research on the occupational health and safety challenges of workers in the informal economy. It further pointed to the dearth of research on specific national legal interventions to extend occupational health and safety laws to informal workers. This points to the need to promote research in this area to inform legal and policy formulation, budgetary processes, and the monitoring and evaluation of OHS laws.¹²⁰ This suggests the need to engage with institutions and researchers to pay attention to occupational health and safety for informal workers.

Researchers in different disciplines including social sciences, economics and law should collaborate to promote the holistic analysis of the challenges and possible solution. As far as possible, researchers must

¹¹⁶ Email from Francie Lund to the author (14 June 2017).

¹¹⁷ Lund et al (n 17) 202; Alfors et al (n 19) 283-5.

¹¹⁸ Lund et al (n 17) 205.

¹¹⁹ See Namrata Bali, Martha Chen and Ravi Kanbur, 'Bridging Perspectives: The Cornell SEWA-WIEGO Exposure Dialogue Programme on Labour, Informal Employment and Poverty' (2012) SEWA Academy Report <http://www.wiego.org/sites/default/files/publications/files/Cornell-SEWA-WIEGO_EDP_Bridging_Perspectives.pdf> accessed 17 July 2018.

¹²⁰ UN Special Rapporteur on the right to health (n 111) 11.

adopt participatory research methods, where the community (informal workers) collaborates with the researchers.¹²¹ Such research approaches build the capacity of the community and affirms the value of the community's experiential knowledge.¹²²

An example of such an approach was the Phephanathi (Be safe with us) Project, which involved street vendors in Durban, South Africa. The research incorporated training courses, policy engagements, health screenings, urban design work, and hazard mapping work.¹²³ The project was led by a local and a global NGO, Asiye eTafuleni (AeT) and Women in Informal Employment Globalising and Organising (WIEGO) respectively, in partnership with street vendors' MBOs and local government.

The above discussion underscores the need for other initiatives to protect workers in the informal economy. It also shows the role that a range of actors – especially MBOs – can play in promoting these measures. Resource and capacity constraints may hamper the implementation of these measures. This calls for stakeholders to adopt collaborative strategies to incrementally extend OHS protection to the informal economy.¹²⁴

6. Conclusion

International law has long recognised that OHS protection is a human right for both formal and informal workers. More recently R 204 has provided an impetus for governments to strive to provide for informal workers' OHS. These developments are significant for women, who dominate amongst the poorest and most vulnerable informal workers. The article explored how national law in South Africa can give effect to the international right to OHS and recommended that the OHS Act be amended to expressly include informal workers within its scope and adapt the provisions in line with informal workers' circumstances and needs. It also recommended that informal workers' MBOs and their allies should participate in law- and policy- making processes that affect them.

Recognising that the OHS needs of informal workers differ according to sector or occupational group, the article focused on street vendors and recommended specific reforms to extend OHS protection to street vendors. In arguing that local authorities should be responsible for the

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ Alfors et al (n 19) 272.

¹²⁴ See Lund et al (n 17) 202.

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recommended measures, the article pointed *inter alia* to the need for coordination across the different levels of government and across different policy spheres, including workers' compensation.

Other jurisdictions whose OHS laws exclude informal workers may draw inspiration from this article's recommendations to extend OHS protection to the informal economy. It is worth noting two caveats in this regard. First, the reforms to extend OHS protection to the informal economy should be shaped by the national context and the constitutional and legal landscape of the relevant jurisdiction. Second, extending OHS protection to the informal economy requires organising, advocacy, training, sensitisation and research in addition to legal reform.

An Intersectional Approach to Addressing Gender and Other Forms of Discrimination in Labour in the Commonwealth Caribbean

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Abstract

Commonwealth Caribbean legal frameworks challenging discrimination have not as yet utilized intersectionality approaches. The paper argues that in understanding and addressing discrimination against women in the region, the intersectionality lens is a useful and dynamic one to approach what are multi-faceted and complex dimensions of inequality. Such enduring inequality is still influenced by a colonial legacy that, despite resulting in Black majority populations, perpetuate experiences of marginalization and inequality through the intersecting realities of gender, race, class, social and geographical origin. For the still fairly new anti-discrimination laws to be effective, they must embrace such intersectionality approaches. Within the historical continuum of the Commonwealth Caribbean, the “single axis framework,” currently envisioned by all anti-discrimination legislation in the region (but discredited by Crenshaw, the proponent of the intersectionality analysis) is of limited value and must be re-imagined.

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Keywords: Intersectional Discrimination, Commonwealth Caribbean Gender, Race, Socio-Economic Status

1. Introduction

This article adopts an exploratory stance to the issue posed at the A Better Future for Women at Work conference hosted by the Oxford Human Rights Hub, International Labour Organization and the University Of Kent.¹ It explores the question whether intersectionality is a useful concept for identifying and addressing patterns of discrimination and disadvantage in relation to women in the labour environment in the Commonwealth Caribbean. This is a new line of inquiry and research for the region. It will examine this question with reference to targeted categories of women in work relationships, in particular, women differentiated by race or ethnicity, religion, class, rural or urban, women in the informal sector and alternative livelihoods, including the drug trade and sex-workers.

Intersectionality theory emerged as a practical attempt to re-engineer traditional grounds-based discrimination law so as to provide a remedy for racialised women (Black, Afro-Caribbean, Indigenous and Indo-Caribbean), because of their particular multi-level experience of disadvantage which was not contemplated within the law. Crenshaw, the originator of the concept (though not the concern), examined actual cases of discrimination law, where applicants for relief were unable to claim discrimination as a new, distinct group, 'Black women', since this was not a separate enumerated category of discrimination.² Crenshaw argued that the discrimination that such women experienced was more than simply their race, being Black, or their gender, being female. Rather the two identities intersected and coalesced to form a hybrid experience of discrimination and disadvantage, which deserved to be viewed as a separate category in and of itself. The result of intersectional discrimination is, therefore, 'qualitatively different, or synergistic'.³ Without such an approach, particular planes of discrimination, for example, race or poverty, would be invisibilised. Since Crenshaw's article, intersectionality theory has expanded to include many more

¹ Held at Pembroke College, Oxford on May 18-19, 2017

² Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 8(1) University of Chicago Legal Forum 140.

³ Sandra Fredman, *Discrimination Law* (2nd ed, OUP, 2011) 140.

frames of reference for intersecting, multi-layered discrimination, although gender continues to be a common reference point.⁴

There are legitimate complaints that intersectionality theory has moved away from 'practical questions of legal and political strategy exemplified in Crenshaw's work, towards more abstract consideration of the nature of identity and its (mis)representation in legal discourse.'⁵ Crenshaw's concern was to more accurately reflect how discrimination is experienced so as to provide more adequate legal remedies for the disadvantaged. The first task therefore, is to go back to basics. A pragmatic approach is needed to determine whether Commonwealth Caribbean anti-discrimination law, such as it exists, can indeed accommodate such multi-layered understandings of discrimination. The correlative issue is whether constructing a framework to examine gender discrimination using an intersectionality analysis is ultimately more meaningful in bringing social justice to Commonwealth Caribbean societies. In this article, I first address the complexity of the intersectionality analysis and thereafter examine how intersectionality impacts on different key sectors of the economy. Although this article explores the Commonwealth Caribbean in general, for convenience, and because, arguably, it permits a more comprehensive analysis of the intersectionality variables at play, it focuses particularly on Trinidad and Tobago.

2. The Commonwealth Caribbean: Gender and Complex Axes of Difference

The Commonwealth Caribbean is, of course, not a homogenous grouping. It is made up of thirteen states within an economic, political grouping called the Caribbean Community (CARICOM), which exhibits significant differences in terms of ethnic makeup and cultural realities. In all of the countries, Afro-Caribbeans are either in the majority or one of two majorities. Two countries, Guyana and Trinidad and Tobago, have more complex racial constructions, in that Indo-Caribbeans (of East-Indian descent), and Afro-Caribbeans (of African descent) are the dominant ethnic groups. As Ralph Premdass notes, '[b]elow the veneer

⁴ See Anne McBride, Gail Hebson and Jane Holgate, 'Intersectionality – Are We Taking Enough Notice in the Field of Work and Employment Relations?' (2015) 29(2) *Work, Employment and Society* 331-41; Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Emily Grabham et al (eds) *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond* (Routledge, 2008) 9.

⁵ Conaghan (n 4) 16.

of Caribbean homogeneity lurks numerous identities around the axes of race culture, language, religion, region etc. Political mobilization has played on these cleavages so that ethnic sensitivity and assertiveness pervade these states...'.⁶ Yet, throughout the Commonwealth Caribbean, there are striking similarities when one examines gender issues, whether in isolation, or within the context of intersectionality.

Women's experiences in the region may also be differentiated by industry emphasis in the particular country. For example, in some countries, tourism is a vibrant sector, while in others, the rural-urban divide, which is similar throughout the region, might be further complicated by variables of race or ethnicity. Thus, race and gender intersectionalities may have implications for industry specific variables. It is therefore vital to consider the impact of race and gender on agriculture, energy and other economic sectors. For example, as discussed further below, Afro-descendant women are more typically found in the informal sector, whereas Indo-Caribbean women are prominent in the agricultural sector.⁷ All of these factors may have particular significance when the variable of class or low income grouping is added to the equation.

A. Finding an Appropriate Axis in the Intersectionality Framework

In the Caribbean, the constructions of gender are complex and intricate and may involve pertinent intersections with race, socio-economic status and religion. These should be examined closely to develop more nuanced and meaningful matrixes to understand and address discrimination in the work environment.

It is the more nuanced version of intersectionality analysis that views the concept not as focusing on rigid identities or groups, but relationships of power, which is most useful in the context of this article. Gender remains the central axis to interrogate power relationships, but these are seen as being infused by multi-layers of social injustice. It is acknowledged that majority/minority status and racial identity (white vs black) is the main theme in most intersectionality literature. Intersectionality theory does permit a framework of analysis that is not dependent upon this particular emphasis. In conceptualizing intersectionality within the lens

⁶ Ralph Premdass, 'Ethnicity in the Caribbean: Decentering a Myth' (1996) Kellogg Institute Working Paper No. 234, 4
<<https://pdfs.semanticscholar.org/da4d/3e0672b8760742e0c9b3a14baf70704b8c35.pdf>> accessed 30 May 2018.

⁷ Due to the historical patterns that have to do with indentureship. See Rhoda Reddock, 'Indian Women and Indentureship in Trinidad and Tobago 1845-1917: Freedom Denied' (2008) 54(4) Caribbean Quarterly 35.

of relationships of power, other frames of disadvantage and marginalization may be identified. Carbado et al explain that ‘scholars and activists have broadened intersectionality to engage a range of issues, social identities, power dynamics, legal and political systems, and discursive structures in the United States and beyond.’⁸ Broadening the scope of the intersectional analysis can ensure that experiences, such as class, which do not fit neatly into identity categories, can also be taken into account.⁹

This wider approach to intersectionality is taken in this article because it is recognized from the outset that racial identity, in a region where there is a black majority population, causes the issue of intersectionality to be translated differently from its meaning of origin in the US and other countries where women workers of African descent are in the minority. This is not to suggest that race and the traditional understandings of white hegemony do not exist in the Commonwealth Caribbean region. They do. However, the issue of race is intricately bound up with that of social class, socio-economic status and even religion and culture. Yet, in a complex cycle, for historical and enduring sociological reasons, these factors are themselves based on racial subjugations and discrimination. How this translates into an intersectionality framework, requires careful calibration. For example, a poor Black woman from a rural background, or an Indigenous woman, is situated differently from a middle-class Black woman living in the city in the discrimination matrix.¹⁰ Thus, in the Commonwealth Caribbean, intersectionality varies with context and geography. Given that intersectionality is a tool to examine power relationships, it can interrogate polarities that go beyond race and gender variables within power dynamics that are just as, or even more impactful.

It is recognized, however, that even if one starts from the premise of social class or socio-economic status, race analysis is unavoidable since class and socio-economic status in the region were constructed from societies born out of racial stratification and power relationships from the slavery and colonial eras. While the region has come a long way in creating more equitable societies than those stratified purely along race lines, primarily because of free education models which served as elevators to the racialised majority, the spectre of race has not been entirely overlaid. Indeed, sociologists point to the phenomenon of a ‘pigmentocracy’ or ‘browning’ in Commonwealth Caribbean societies

⁸ Devon Carbado et al, ‘Mapping the Movements of a Theory’ (2013) 10(2) *Du Bois Review* 304.

⁹ Conaghan (n 4) 9.

¹⁰ Mitu Gulati and Devon W Carbado, ‘Working Identity’ (2000) 85 *Cornell Law Review* 1259, 1300.

where lighter complexioned persons are typically more privileged than others.¹¹ Black women who exhibited characteristics deemed more stereotypical 'Black racial signification' in 'accent, hair, political identity, social identity, marital status, residence and religious affiliation' were found to be discriminated against in access to employment.¹² Consequently, while in the Commonwealth Caribbean, the filter of race in the power dynamic may translate differently, race remains relevant in a multi-racial society, or even those with racialised majorities. Indeed, Roy Cree explains how white race hegemony can endure in black majority populations such as those that exist in the region, through dominant culture and other factors and be perpetuated through colour gradations and class.¹³ The intersectionality prism is a useful tool for understanding how enduring colonial legacies have entrenched inequality and discrimination in the Commonwealth Caribbean.

These dynamics therefore require a repositioning of the power lens such that its pivot point of power is not merely race, but infused with gender and class. Race becomes merely one of the filters that distinguish the experience of gender discrimination for women in the region. Thus, while I accept that women experience oppression in varying configurations and in varying degrees of intensity, I suggest that in racially homogenous societies or pluralistic Black majority societies like the Commonwealth Caribbean, race becomes a more complex (even intrasectional) construct which must be viewed within the context of other variables in order to truly illuminate women's discrimination.

The notion of structural discrimination is also significant in explaining how or whether women in the Commonwealth Caribbean experience discrimination and disadvantage in the broad labour context. As such, the ways in which the location of racialised women at the intersection of race and gender (and all of its derivatives) translate into the labour socio-economic context and make experiences and attempts at remedial reform qualitatively different from men or white women, are notable. Issues such as the enduring disadvantage of poverty, with the inability to make adequate provision for family and child-care obligations, pregnancy, child marriages, women excluded from the job market because of gender/ ethnic stereotypes, predatory work relationships, sexual harassment, lack of job skills, all consequences of

¹¹Richard Lynn, 'Pigmentocracy: Racial Hierarchies in the Caribbean and Latin America' (2008) 8(2) *The Occidental Quarterly* 28.

¹² Gulati and Carbadó (n 10) 1300.

¹³ Roy McCree, 'Race, Colour and Class in Caribbean Society' in Shirley A Jackson (ed) *Routledge International Handbook of Race, Class and Gender* (Routledge, 2015) 233.

gender, ethnicity and class, are pertinent examples of persistent patterns of structural discrimination.¹⁴

Further, work-environments which frown upon women wearing ‘natural’ hairstyles (currently only superficially understood as indirect race discrimination), or where there are high levels of sexual harassment, might tell us something about power relations and gender/ race stereotyping even in Black majority societies and deserve to be interrogated directly. Nevertheless, these complex patterns of discrimination are seldom explored or fully understood.

Indeed, mistaken assumptions are often made about relevant issues. For instance, there is a prevailing myth that urban males have the highest school drop-out rates that influence employment and industry incomes, an assumption disproved by a new study by Kissoon.¹⁵

B. Legislative Framework for Anti-Discrimination and Intersectionality Analysis

There is relatively little legislation on non-discrimination in the Commonwealth Caribbean, with only Saint Lucia, Guyana and Trinidad and Tobago enacting specific anti-discrimination laws.¹⁶ Indeed, discrimination law in general is in the embryonic stages. Some countries have, alternatively, incorporated certain non-discrimination provisions in their general employment laws.¹⁷ The legislation that exists tends to rely on the traditional grounds of discrimination: sex or gender, race, political affiliation, religion and disability. However, social origin is also included, which permits consideration of class stratification. Trinidad and Tobago’s Equality Opportunity Act 2001, Chapter 22:03 is different as it denotes ‘origin’ as opposed to ‘social origin’ as a category of non-discrimination, the meaning of which includes geographical

¹⁴ One of the obstacles in formulating a comprehensive intersectionality analysis in the Caribbean is the serious lack of adequate disaggregated data on which to base the analyses.

¹⁵ Priya Kissoon, ‘National Survey of Early School Leavers’ School-to-Work Transitions and Livelihoods in Trinidad and Tobago’ (2016) UWI-Trinidad and Tobago Research and Development Impact Fund.

¹⁶ Equal Rights Act 1990 and The Prevention of Discrimination Act of Guyana, No. 26 of 1997; Equality of Opportunity and Treatment Act 2000, now incorporated into the Saint Lucia Labour Code, 2006; and The Equality of Opportunity Act, 2000 Trinidad and Tobago.

¹⁷ For example, Barbados, Employment Act 2012, ss. 24-28; The Employment Act 1997 of Grenada; Protection of Employment Act, Dominica; and The Protection of Employment Act, St Vincent; and the Antigua Labour Code 1997; s 7 of the Saint Lucia Labour Act Guyana’s Prevention of Discrimination Act.

origin.¹⁸ This gives a platform to better pursue the significant issues of socio-economic status and the rural/urban divide which may be significant in an intersectionality analysis. Notwithstanding, this ground is little understood or noticed, far less litigated. Indeed, anti-discrimination legislation in the Commonwealth Caribbean is fairly new and there are very few cases testing or even utilising such legislation.

Anti-discrimination statutes also encompass notions of indirect discrimination, whereby seemingly neutral actions or policies may be discriminatory or disadvantageous in their impact, regardless of intent. For example, in rural communities or a particular sector, it will be relevant if persons in such communities are predominantly of one ethnic group.

In all of these legislative formulas however, discrimination is envisaged in unitary terms, contemplating only single, separate grounds of discrimination. For example, under section 4 of the Trinidad and Tobago Equal Opportunity Act, discrimination is linked to the ‘ground of status’. The Act applies to:

(a) discrimination in relation to employment, education, the provision of goods and services and the provision of accommodation, if the discrimination is—

(i) discrimination on the ground of status as defined in section 5; . .

“Status” is defined in section 3, in relation to a person, to mean (a) the sex; (b) the race; (c) the ethnicity; (d) the origin, including geographical origin; (e) the religion; (f) the marital status; or (g) any disability of that person;

Further, section 5 states:

For the purposes of this Act, a person (“the discriminator”) discriminates against another person (“the aggrieved person”) on the grounds of status if, by reason of

(a) the status of the aggrieved person;

(b) a characteristic that appertains generally to persons of the status of the aggrieved person; or

¹⁸ Saint Lucia’s Labour Code is also unique in that it specifically protects against discrimination on the ground of sexual orientation.

(c) a characteristic that is generally imputed to persons of the status of the aggrieved person, the discriminator treats the aggrieved person, in circumstances that are the same or are not materially different, less favourably.

While no cases exist to test the hypothesis, it is likely that courts in the Commonwealth Caribbean will be challenged in similar ways to those in US courts that Crenshaw described, which were unable to imagine intersecting categories of discrimination as actionable grounds. A Black (Afro-Caribbean) lower income woman or an Indian woman would need to choose separate categories, whether gender or race, or possibly lower income status (origin), to argue her case of social injustice. However, as Campbell demonstrates in relation to the interpretation of Convention on the Elimination of All Forms of Discrimination Against Women, it is possible to include an intersectional approach to a grounds based legislative framework.¹⁹ A similar approach could be pursued in the Commonwealth Caribbean.

C. Perpetuating Disadvantage in the Gender Axis

There is a particular paradox in Caribbean societies in that they are characterized as matriarchal societies.²⁰ Yet this concept of the iconic, strong Black Caribbean woman has not translated easily into the Caribbean work-sphere identifying women as breadwinners, deserving of job security and equal remuneration. In fact, the statistics throughout the region reveal that women still earn less than men, and are hired last and fired first, despite the prevalence of female headed households. This is consistent with the enduring models of social and cultural stratification built on ideas of the woman and of the family. These perpetuated the view that ‘women were secondary breadwinners and dependent on men, enshrining a normative vision of female morality that continues to

¹⁹ Meghan Campbell, ‘CEDAW and Women’s Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination’ (2015) 11(2) *Revista Direito GV* 479.

²⁰ Joycelin Massiah, ‘Women as Heads of Households in The Caribbean: Family Structure and Feminine Status’ (1983) UNESCO

<<http://unesdoc.unesco.org/images/0005/000557/055763eo.pdf>> accessed 30 May 2018.

permeate all strata of society.’²¹ This includes a historical notion that defined “respectable” women as non-working.²²

Several studies in the Commonwealth Caribbean demonstrate that women face endemic and sustained structural patterns of discrimination and disadvantage which translate into deep, particularised vulnerabilities that are trans-sectoral. For example, data illustrates clearly that women still earn much less than men across the board. The 2016 Global Gender Gap Report indicates that Trinidad and Tobago ranks 51st in economic participation and opportunity; ranks 88th on labour force participation; 76th on wage equality for similar work; 91st on estimated earned income and 1st in professional and technical workers.²³ Except for professional and technical workers, gender parity is lacking across key indicators.²⁴ This inequity is in fact, a paradigm common in the region. Interestingly, however, there is a perception that the gender gap is closing.

In addition, female headed householders are among the poorest.²⁵ Male headed households are TT \$1,741 (USD \$275) gross per month better off than female headed households, even when they have the same average number of children.²⁶ There are more male headed households than female headed households, but more single parent female headed households with children (7.1%) than single parent male headed households with children (1.1%). The single parent female headed households with children have on average more children and are TT \$585 (USD \$80) a month worse off (gross) than male headed ones. Single parenthood has a negative impact on job opportunities.

Participation in the workforce by females is also lower than men across all age groups in Trinidad and Tobago.²⁷ As a percentage of the labour force who are unemployed, there are more females than males

²¹ D Alissa Trotz, ‘Behind the Banner of Culture? Gender, “Race” and the Family in Guyana’ (2003) 77(1-2) *New West Indian Guide* 17; Bridget Breton, ‘Family Strategies, Gender and the Shift to Wage Labour in the British Caribbean’ in Bridget Brereton and Kevin Yelvington (eds) *The Colonial Caribbean in Transition: Essays on Post-Emancipation Social and Cultural History* (University of the West Indies Press, 1999) 76-107.

²² *ibid.*

²³ World Economic Forum, ‘Global Gender Gap Report’ (2016)

<<http://reports.weforum.org/global-gender-gap-report-2016/economies/#economy=TTO>> accessed 30 May 2018.

²⁴ *ibid.*

²⁵ See Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations: Trinidad and Tobago’ (2016) CEDAW/C/TTO/CO/4-7.

²⁶ Central Statistical Office <<http://cso.gov.tt/statistics/?Subject=Employment>> accessed 12 July 2018. Also reported in Republic of Trinidad and Tobago, Ministry of Planning, Economic and Social Restructuring and Gender Affairs Report (2010).

²⁷ Central Statistical Office, ‘Labour Force Survey’ (2015) Table 4. <<http://cso.gov.tt/statistics/?Subject=Employment>> accessed 12 July 2018.

(4.2% female compared to 2.9% male).²⁸ Significantly, there are many more male employers than female employers (26,500 males and 7,500 females). For example, in Trinidad and Tobago, males dominate in the self-employed worker category (74,200 males and 28,200 females).²⁹ These figures suggest that men are better able to negotiate the free market enterprise environment, which typically requires access to capital and investor confidence.

There is also considerable evidence of occupational segregation in relation to women in terms of the types of occupations, benefits and the seniority in relation to those occupations. Females dominate in three areas: (1) wholesale, retail, restaurants and hotels; (2) financing, insurance, real estate and business services; and (3) community, social and personal services. These are all gender stereotyped areas that are likely to be lower-paid in comparison to other industries such as energy.³⁰ For example, in the lucrative energy sector where males dominate, the majority of women are employed within the sector as clerks. Despite their overall domination in the numbers of employees in the community, social and personal services sector, women still cluster in lower-paid positions. There are 23,300 female clerks compared to 6,300 male clerks. Males dominate within this sector as legislators, senior officials and managers (5,200 males and 4,600 females). As Edwards & Chase observe, 'this would suggest that even in a sector dominated by women with far higher numbers of female professionals (12,300 females and 8,200 males), management and leadership are still male dominated.'³¹ This pattern is also instructive in considering how women will fare in innovative enterprises that attract higher income and rely on managerial and entrepreneurial skills.³²

World Economic Forum data and analysis show that women's estimated earnings are almost half those of males.³³ This is despite their increased academic qualifications and the popular perception that

²⁸ These statistics are helpfully collated in a new Report, J Edwards and B Chase, 'A Gender Analysis of the European Union's Focal Sectors, Trinidad and Tobago' (2017) EU, AECOM (on file with author).

²⁹ Central Statistical Office (n 27). There are also more male government employees than females across the government/public service/statutory board and government state enterprise groups.

³⁰ *ibid* Table 11.

³¹ Edwards and Chase (n 28) 20.

³² There are also more female professionals, technicians, service workers and clerks than males. Males predominate in areas such as legislators, senior officials and managers, agriculture and fishery workers, craft and related workers, plant and machine operators, *ibid*.

³³ World Economic Forum (n 23) Appendix D.

women are doing better than men.³⁴ This points to a reality that prioritises maleness over femaleness before all other characteristics such as education or skill, which should ostensibly function to level the playing field. Inequality is perpetuated because of inherent gender bias. These characteristics are reproduced throughout the region, pointing to inherent structural deficiencies and enduring patterns which have deep sociological and historical rationales.³⁵ What is striking from all of these statistics is that women are situated in disadvantaged positions even in the face of seemingly neutral benefits of free education and across all sectors. The prisms of privilege continue.

What needs to be interrogated further is the extent to which this dismal picture for women is further amplified by other simultaneous levels of discrimination, such as race, class, poverty and the like. It is clear that women do not form a homogenous group; and groups of women may be situated differently along the vulnerability plane because of further stratifications based on race, class and geography. Further, poor women are less able to succeed in obtaining formal qualifications and also lack the social networks to obtain the best jobs, factors which may often be connected to race/ ethnicity or geographical location. O' Connor concludes that despite 'higher levels of participation and performance in education, women's access to education in the Caribbean has done little to change their subordinate position in their societies [...] The patriarchy coexists within a system of matrifocal and matrilocal families, as well as the state patriarchy coexisting with the economic independence of women [and] . . . is most strongly developed within the lower-class Afro-Caribbean group.'³⁶

These structural patterns mean that women, in particular, racialized women, are in general, poorer than men, leading to concepts such as the 'feminisation of poverty'. The phenomenon speaks to structural gender inequities which result in disproportionate patterns of poverty affecting

³⁴ Reshma Mahabir et al, 'Understanding Wages in a Small Open Economy: The Case of Trinidad and Tobago' (2013) The Central Bank of Trinidad and Tobago Working Paper 11/2013, 15 <<https://www.central-bank.org.tt/sites/default/files/page-file/uploads/Understanding%20Wages%20in%20a%20Small%20Open%20Economy%20The%20Case%20of%20Trinidad%20and%20Tobago%20Mahabir%20Jagessar%20Neptune%20Cox%20-%20Feb%202013.pdf>> accessed 30 May 2018.

³⁵ Leith Dunn et al, 'Gender and Women's Rights Analysis of Economic Partnership Agreements: The Implementation of Trade Liberalization Jamaica' (2009) <<https://www.scribd.com/document/32716804/Gender-and-Women-s-Rights-Analysis-of-Economic-Partnership-Agreements-the-implementation-of-trade-liberalisation-Jamaica>> accessed 30 May 2018.

³⁶ Erin O'Connor, 'The Patriarchy's Role in Gender Inequality in the Caribbean' (2014) Student Publication 258 <http://cupola.gettysburg.edu/cgi/viewcontent.cgi?article=1335&context=student_scholarship> accessed 30 May 2018.

women, thereby identifying poverty itself as a symptom of gender discrimination. Poverty is both a cause and a result of gender discrimination.³⁷ This poverty has a cyclical effect; rendering women more susceptible to continued discrimination, for example, in relation to adequate child-care arrangements to access training, to access micro-financing, to avoid hazardous work etc. Law and policy must be engineered to attend to the needs of different groups of women.

D. Intersecting Race and Ethnicities

The Caribbean is often described as a pluralistic society, with many different races evident in its societal make-up. However, there are racial stereotypes, conflicts and biases which influence the labour infrastructure. Such laws often speak to indirect or hidden discrimination which are not easily captured by law.

Further, race and ethnicity are uncomfortable subjects for discussion and even research in the region. This is particularly the case in Guyana and Trinidad and Tobago, where racial tensions are not only between black and white, but between Indo and Afro-Caribbean ethnicities, typically evidenced in the make-up of partisan politics and patronage. The result is that the issue of race discrimination or disadvantage, whether direct or indirect, is invisibilised. There have been few serious attempts to collect data and determine to what extent, if any, such variables impact labour development. Yet, most scholars agree that race is a factor relating to class and empowerment. For example, Coppin concludes that '[r]ace continues to be a very important predictor of income...'.³⁸ Some racialised women have experienced upward occupational and social mobility, which 'reconfigured the composition of the middle class [...] However, while this transformation [...] might have diminished the former isomorphic primacy or salience of the colour code, it was never completely dismantled [...]'³⁹

Some of these issues of race and ethnicity factors are influenced by geographical context—the rural-urban divide discussed below—with particular impact on agriculture. Others speak to the likely make-up of

³⁷ UN Special Rapporteur on extreme poverty and human rights, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights' (2012) A/HRC/21/39 [31].

³⁸ Coppin Addington, 'Color in the English-Speaking Caribbean Labour Market' (1997) 31(3) *Journal of Developing Areas* 399.

³⁹ Roy McCree, 'Race, Colour and Class in Caribbean Society' in Shirley A Jackson (ed) *Routledge International Handbook of Race, Class and Gender* (Routledge, 2015) 238 where McCree defines racial hegemony in the Caribbean to mean 'the dominance of a particular set of ideas based on the differential valorization of skin colour, which valorizes whiteness/ fairness and devalorizes blackness/ darkness'.

industry or of the private sector. Some studies have been done which reveal these racialized variables.⁴⁰ Reddock suggests that industry patterns whereby persons of African descent are more prevalent in the public sector and persons of Indian descent, mixed race or Caucasian in the private sector may be traced to political patronage, cultural attitudes and other historic and sociological rationales.⁴¹ These must be confronted for effective policy planning. This is particularly the case because high earning opportunities for entrepreneurship is more easily facilitated in the private sector.

The issue of race or ethnicity is more complex than the black/white stratification and power relations common in other countries. These factors may all be relevant in how opportunities for training and access to employment and enterprise development may unfold, or more subtly, the cultural attitudes and approaches which impact them. For example, as seen above, available statistics indicate that female headed households are the poorest of all groupings. This is not merely a gender statistic since female headed households, comprising unmarried or single mothers are, in Trinidad and Tobago, as in the rest of the region, typically of African descent, so that the issue is one of gender intersecting with race. This is due to historic, cultural and sociological reasons. For instance, one study reveals how lenders in Caribbean microfinancing projects, even female lenders, made negative, moralistic, cultural, racial, gendered assumptions about single, female parent applicants, in particular, those with several fathers for their children.⁴² The discrimination suffered by such women encompasses deep, intersecting elements to do with race, status and gender.

In order to address these disadvantages, therefore, their particular conditions must be confronted and specific strategies employed to address them. These may be simple, such as child-care arrangements, sensitively coordinating times for training or more sophisticated measures, such as targeted credit-financing and mentoring.

⁴⁰ For discussions on the race variables in industry in the region, see Rhoda Reddock and Roy McCree, 'Race, Class and Gender in Trinidad and Tobago: A Study of Social Stratification, Social Mobility and Social Interaction' a research report prepared for the Ford Foundation as part of 'The Future of the Caribbean Project' (1992) UWI St Augustine, Institute of Social and Economic Research; see also McCree (n 39) 233-39.

⁴¹ Reddock and McCree (n 40) See also Rhoda Reddock, 'Radical Caribbean Social Thought: Race, Class Identity and the Post-Colonial Nation' (2014) 62(4) *Current Sociology* 1; Cecilia Green, 'Gender, Race and Class in the Social Economy of the English-Speaking Caribbean' (1995) 44(2-3) *Social and Economic Studies* 65.

⁴² Caroline Shenaz Hossein, 'Using a Black Feminist Framework: A Study Comparing Bias Against Female Entrepreneurs in Caribbean Micro-Banking' (2013) 2 *Intersectionalities* 51.

E. Competing Power Relationships Among Disadvantaged Races

As noted above, race relations in some parts of the region where there are competing racialised women majorities, specifically Trinidad and Tobago and Guyana, where there are large populations of Indo-Caribbeans, provide a further intricate layer to the analysis of complex power relationships. Considering where a racialised woman is placed in the intersection of race and gender will therefore require consideration of horizontal power relationships, between two groups of subordinate race groups, while both continue to exist within vertical power relationships when measured against white minority dominant groups of workers.

One of the ways in which this plurality and multi-ethnicity must be explored in the context of intersectionality is the inquiry into the situation of women who are stratified in terms of these further ethnic divisions, which may also intersect with religion, in particular, Caribbean Muslim and Hindu women. Paradigms of subservience and disempowerment (a woman's place is in the home and to be protected) recently brought again to the fore with the debate on child marriage, suitable jobs for Hindu women in the music industry and the wearing of the hijab, Muslim dress, are important lines of inquiry. The importance of empirical tools such as disaggregated data stratified along these key indicators will have to be advanced to further such goals. Such data can lead to models of interpretation to improve the current traditional legislative framework, empowering it to be more purposive and dynamic in its approach to discrimination by utilizing an intersectionality lens.

Work in the music industry provides instructive examples of intersectionalities between race and gender and speaks to visions of subservience and subordination of the Indo-Caribbean women and the racial tension between Afro and Indo-Caribbeans. For example, as Kavyta Raghunandan puts it, Indo-Trinidadian singer Drupatee Ramgoonai's 1988 saucy chutney soca song "Lick Down Me Nani"⁴³ 'outraged many Indian conservatives'.⁴⁴

⁴³ Shalini Puri, *The Caribbean Postcolonial Social Equality, Post-Nationalism, and Cultural Hybridity* (Palgrave Macmillan, 2004) 197. Chutney soca is a form of Trinidad's indigenous music, a version of the better known calypso. It is a fusion of Afro-Trinidadian culture, from which calypso emerged, with the East Indian music of Trinidad. Before the emergence of this genre Indo-Trinidadians did not participate in calypso, which is usually quite liberal in character.

⁴⁴ Kavyta Raghunandan, 'Hyphenated Identities: Negotiating 'Indianness' and Being Indo-Trinidadian' (2012) 6 Caribbean Review of Gender Studies 12.

Ramgoonai describes the creation and reaction to the song as:

an example of cultural hybridity that is far from Bhabha's "empowering" state, or at least, the marginalised people that it empowers are split along generational and gendered lines. Drupatee, far more than her male chutney-soca counterparts, was the subject of harsh criticism from Indian religious groups in Trinidad and Tobago ... As Puri observes "policing the behaviour of women is a means of policing the construction of the Mother Culture".⁴⁵

F. Indigenous People

Indigenous populations are significant in Guyana, Belize and Dominica, with a small socio-economically active population in Trinidad and Tobago. Indigenous peoples are typically the poorest ethnic group in the region. Women face particular vulnerabilities, especially with respect to access to employment, often perpetuated by less accessibility to quality education and training. They are often located in separate geographical districts, typically rural communities, so that the disadvantages that accrue to labour in rural areas, discussed below, apply here also. In Guyana, in particular, there is persistent anecdotal evidence of the susceptibility of indigenous women to sex work, especially along the border with Brazil, and the attendant vulnerabilities, including sexually transmitted diseases (STDs) and other health risks.

Agriculture, eco-sustainable and heritage tourism have emerged as important avenues for income generation and Indigenous women are actively engaged in, or, as in Trinidad and Tobago, attempting to develop, these sectors. However, the limitations identified with regard to finance, training and managerial skills development, apply here also. Like other countries in the world, Indigenous peoples claim disadvantaged treatment. On the one hand, care must be taken to ensure that agriculture and tourism innovations do not harm the fledgling enterprises already emerging in the Indigenous peoples' community and further exacerbate the marginalization of Indigenous women. On the other hand, non-discriminatory policy is needed to provide realistic opportunities for their advancement and meaningful participation in the economy. This might mean land reform policy and special community financing to correspond to the concept of collective title characteristic of Indigenous law and practice which can hinder loan financing.

⁴⁵ Puri (n 43) 196; Kavyta Raghunandan (n 44) 12.

G. Girl Child Labour

Poor, racialised girl children in rural areas or touristic sectors are the subjects of particular vulnerabilities in the existing social and industrial environment of the region, which may benefit from an intersectionality analysis. Some key issues are their increased propensity to health and safety risks in a variety of sectors, from agricultural to energy based, whether due to pollution, harmful chemicals or damaging industry practices.

Such children are also exposed to child labour. Secondary sources indicate that between 1.5% and 4.1% of children aged 5-14 years in Trinidad and Tobago are working.⁴⁶ Children in rural communities are often rendered more vulnerable because of the relative lack of employment opportunities for their parents. This forces them to be engaged in exploitative child labour.⁴⁷ This is particularly visible in the agricultural, fishing and tourism sectors. This is a gendered phenomenon and may also be racialized. A girl's education is typically seen as less important than that of boys. Such pressures may account for the fact that the highest percentage of school drop outs in Trinidad and Tobago is not, as is often incorrectly assumed, urban male youth, but children, in particular, girls in Victoria.⁴⁸ It is not a coincidence that Victoria is a farming community in South Trinidad. Such children lose important education opportunities which, in turn, undermine their future employment prospects and their opportunities to engage meaningfully in the labour sphere.

As Dunn observes, '[l]imited awareness of children's rights and perceptions of children as the property of their parents also create an enabling environment for child labour.'⁴⁹ The main forms of child labour were reported to be vending, and work in trades, services, agriculture and fishing. Vending involves children selling food, fruit, craft, clothing and locally-produced sweets. Children in services were working as packers in supermarkets, as cosmetologists, child care providers and car washers.

Children's involvement in illicit activities included the cultivation and sale of marijuana, the sale of cocaine, working as drug lookouts and stealing, with boys being mainly involved. Children's involvement in

⁴⁶ See Leith Dunn, 'Tobago, The Situation of Children in the Worst Forms of Child Labour in a Tourism Economy: A Rapid Assessment' (2003) ILO Subregional Office for the Caribbean
<https://www.unicef.org/easterncaribbean/spmapping/Implementation/CP/National/RABarbados_ILO_2002.pdf> accessed 31 May 2018.

⁴⁷ *ibid.*

⁴⁸ Kissoon (n 15).

⁴⁹ Dunn, 'Worst Forms of Child Labour' (n 46) 4

hazardous activities included work that affected their education and development, such as catching crabs and shrimps. Sexual exploitation and involvement in illicit activities is also high on the agenda of hazardous work for girls, as they increased health risks (HIV/AIDS, teenage pregnancy, abortion), damaged children's morals and exposed them to violence, criminal behaviour and possible incarceration.⁵⁰

Not surprisingly, in Tobago, as in other Caribbean countries, poverty emerged as an important factor contributing to child labour and some children worked to support themselves and their family. Many children lived in single female-headed households, with parents who had low levels of education, who were unemployed, seasonally employed, self-employed or worked in low-income occupations. Several children worked to supplement family income or to meet their own personal needs.⁵¹ The findings for Tobago mirror that for Jamaica, the Bahamas and other countries in the region and can establish structural patterns of vulnerability particularly in traditional sun, sea and sex tourism economies, of particular significance for girls, discussed below, which must be confronted and addressed in policy and development.

H. The Rural-Urban Divide and the Significance of Race

Women in rural communities may experience particular disadvantages and have unique discernible needs which may be very different to women in urban communities, or even men in rural areas. Moreover, geographical location often intersects with race. For example, in Trinidad, many Indo-Trinidadians live in the Southern and Central districts, largely constructed as rural, and persons of African or other racial make-up typically live in urban areas. Guyana exhibits a similar pattern.

Research in the Commonwealth Caribbean reveals that rural populations face higher levels of poverty and unemployment. They are also more susceptible to health and safety hazards. They are deprived of equitable or adequate social services and infrastructure which exacerbate their poverty and life chances and increase vulnerability. Women and children who live in rural communities are doubly disadvantaged, given their particular existing vulnerability ratios.⁵² While statistics are again difficult to access, the Survey of Working Conditions 2014 reports that the county of St. Patrick, a rural community in the south of Trinidad,

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² See Alicia Mondesire and Leith Dunn, *Towards Equity in Development: A Report on the Status of Women in Sixteen Commonwealth Countries* (Caribbean Community Secretariat, 1995) 1708. They note over 65 % of Jamaica's poor reside in rural communities.

had the highest indigent rates, 36%. This compared drastically with the next highest 24% and 12% for the city, Port of Spain.⁵³ Of particular note to this Survey are rural communities' lack of equal access to training and education; economic opportunities and access to agricultural land, credit, loan and marketing. Positive measures need to be taken to invest in rural development to eliminate discrimination against persons living in rural communities and provide for greater opportunities for them if social justice programs are to be meaningful and to bring about equality.

Since women represent the majority of the rural poor, increasing their economic productivity will depend on enabling women to realise their socio-economic potential more fully to improve their lives and that of their families. Important components of this strategy involve agriculture, renewal energy projects and environmental policies. Women living in poverty, in particular rural inhabitants are also more susceptible to the most negative impacts of climate change, natural disasters and environmental hazards. In a region known for its prevalence of natural disasters and negative climate change effects, this is a significant intersectional vulnerability.

3. Economic Sector, Women and Intersectionality

A. Intersecting Dimensions and Vulnerability of Tourism

The Caribbean is a high tourist destination which has been characterized as one that places a premium on recreational, beach vacation type tourists and traditional commercial tourism. The vulnerabilities that such an emphasis has for certain groups, in particular, women, especially racialised women and children, have been well documented. The over-reliance on tourism in these countries—it being the main source of foreign exchange and an important source of employment—exacerbates these vulnerabilities. Notably, it involves the reinforcement of gender and race sexual stereotypes and sexual exploitation with the accompanying health risks.⁵⁴ The current sector model is also characterized by local

⁵³ Kairi Consultants, 'Survey of Living Conditions in Trinidad and Tobago' (2014) ILO <http://www.ilo.org/caribbean/events-and-meetings/WCMS_304860/lang-en/index.htm> accessed 12 July 2018.

⁵⁴ See Kamala Kempadoo (ed) *Sun Sex and Gold: Tourism and Sex Work in the Caribbean* (Rowman and Littlefield, 1999); Lauren Johnson, 'Money Talks: Female Sex Tourism in Jamaica' (LASA Conference, Brazil, 2009).

employees holding largely unskilled positions with low social and income statutes, yet high turnover rates.⁵⁵ Notably, such workers are rendered more vulnerable in the labour law infrastructure.⁵⁶

It has also been described as 'gendered tourism', given the significant proportion of women employed in the sector, especially at the lower rungs of the industry. However, a closer examination illustrates that gender is closely intertwined with race and class in this sector. The character of the tourist industry, therefore, reveals interesting elements in the intersectionality analysis. Managers in the industry tend to be white or 'brown' and the 'face' of tourism is largely of the same complexion. The socio-economic structure of tourism focused industries has been identified by Dunn as increasing the risk of the harmful effects of tourism on women and children. She states:

High inequality between the island's Eastern and Western regions, [is] combined with low-levels of education, inadequate health facilities, a high incidence of HIV/AIDS and low female participation in the labour market. In addition, in such countries, the labour force is concentrated in elementary and service occupations, which contribute to poverty, estimated at between 17% and 24%.⁵⁷

The fact that the tourist sector is largely unregulated, comprising small, non-unionised businesses and informalised business activity, exacerbates identifiable vulnerabilities.

The infrastructure of tourism and the hospitality sector may also reveal some limitations. Given that women, particularly racialised women, are typically located at the bottom of the sector and are poor, industry arrangements such as split-shifts (two shifts in one day) or transport deficiencies can have disproportionately harmful impacts on such women. Apart from their own health and safety risks, as primary caregivers who are unable to hire help, these can lead to the breakdown of the family unit and other sociological hazards (such as crime). Indeed, crime is an important social problem in modern Commonwealth Caribbean societies, although no significant study has been done to trace its roots to the negativities of the disempowered labour market, informed by vulnerabilised intersectionalities.

⁵⁵ Dunn, 'Worst Forms of Child Labour' (n 46).

⁵⁶ See, Rose-Marie Belle Antoine, 'Rethinking Labour Law in the New Commonwealth Caribbean Economy - A Framework for Change' (2011) 32 Comparative Labor Law & Policy Journal 303; Rose-Marie Belle Antoine, 'Mapping the Social in Caribbean Regional Integration', in Adelle Blackett and Christian Lévesque (eds) *Social Regionalism in the Global Economy* (Routledge, 2010).

⁵⁷ Dunn, 'Worst Forms of Child Labour' (n 46).

Of particular note are the several documented studies on the harmful impact of traditional tourism on children, part of the wider problem of child labour relating to vulnerabilised children, in particular girls, discussed above.⁵⁸ Given that traditional commercial tourism is often the main economic sector in many countries in the region and that there are few other employment or enterprise opportunities, its impact is significant.⁵⁹ Many of the risks and discriminatory attitudes and practices noted in the discussion on gender and race are duplicated here with respect to girls and increasingly, boys. These negative consequences include sexual exploitation, such as prostitution and pornography, reinforced negative sexual stereotypes for racialised women and girls and the worst forms of child labour. These in turn have their own health and safety risks such as STDs and HIV/AIDS.

B. Intersecting Dimensions of Agriculture

Women and the rural poor present the most emphatic vulnerabilities in relation to agriculture, particularly within the context of the kind of modern, sustainable agriculture desired by the region. Further, as explained above, women are also the poorest in the rural sector, so rural women are particularly vulnerable. Attempts must be made to mainstream gender into the sector. The social location of women in agriculture, typically rural, poor, racialised women, or Indian women, is significant to the intersectionality analysis. Given that many women in agriculture belong to the Indo-Trinidadian community due to historical reasons, the element of race must also be considered and addressed, which may be apparent in attitudes to applying for loans, independent projects etc.

Information provided by the Agricultural Society of Trinidad and Tobago (ASTT) indicates an expected larger proportion of males to females in a ratio of 3:1 based on their membership. Only 22% of the registered farmers are women.⁶⁰ According to ASTT, most farms were family oriented with the man playing the leading role and the woman a supportive role. An analysis of family farms shows that some 53.5% of the total agricultural establishments in Trinidad and Tobago were family

⁵⁸ *ibid*; Kempadoo (n 54); Christine Barrow, 'A Situational Analysis of Children and Women in Twelve Countries of the Caribbean Region' (2001) UNICEF (on file with author); Beverly Mullings, 'Globalization, Tourism and the International Sex Trade' in Kamala Kempadoo (ed) *Sun Sex and Gold: Tourism and Sex Work in the Caribbean* (Rowman and Littlefield, 1999).

⁵⁹ Dunn, 'Worst Forms of Child Labour' (n 46).

⁶⁰ No empirical data was available.

farms.⁶¹ Of the 3,826 farmers who accessed the government's Agricultural Incentive Programme only 12% were women;⁶² and 90% of the applicants for agricultural lands from the state were men.⁶³ The poor participation of women in agriculture, even where financing was ostensibly available to them, is cause for concern. As discussed earlier, sociological patterns in the largely Indo community which entrench 'female' and 'family' roles for women, may be significant.

In other paradigms, for example, for single women involved in agriculture (typically Afro-Caribbean), other discriminatory patterns related to occupational segregation are present. For example, women attached to the Network of Rural Women Producers of Trinidad and Tobago are often single heads of households with limited resources and therefore it is a challenge for them to attend training due to lack of funds.⁶⁴

The sector is dominated by men, except for horticulture. Further, women appear to be excluded from training that could convert them to more productive enterprises, apparently from a perception that they would not do so. While women participated in the training, they were not among the top 20 farmers chosen to receive greenhouses and seedlings to produce for the market.⁶⁵

Women in agriculture also face difficulty in accessing markets, so that efforts must be made to move women from subsistence production, in which they are mainly engaged, to market-oriented production. Women are also considerably disadvantaged in relation to financial services.

C. Intersecting Vulnerabilities in the Informal Sector

Throughout the region, women are disproportionately situated in the informal sector, usually amidst low income livelihoods. Moreover, there has been an increasing push toward greater informalisation in the job market, even of formerly traditional livelihoods. The casualization of labour, paralleled by the feminisation of the informal sector and the increasing vulnerability it brings to women has been well documented.⁶⁶ Important intersecting variables to be noted are of course, socio-

⁶¹ Sergio Schneider, 'Family farming in Latin America and the Caribbean: Looking for New Paths of Rural Development and Food Security' (2016) International Policy Centre for Inclusive Growth of the UNDP and UN Food and Agriculture Organization Working Paper (2016) <<http://www.fao.org/3/a-i5534e.pdf>> accessed 7 March 2017.

⁶² The sex disaggregation was done based on names and not actual male female information sex disaggregated data is not collected.

⁶³ Edwards and Chase (n 28) field notes 24 March 2017.

⁶⁴ *ibid.*

⁶⁵ Edwards and Chase (n 28) 27.

⁶⁶ Antoine, 'Rethinking' (n 56).

economic status and often, the underlying factor of race. The trend toward franchising or ‘contracting out’ jobs which have employee benefits, rendering them informal, independent contractor type work with no benefits, is part of this phenomenon. This is particularly prevalent in the all-important tourist sector and women, particularly, poor, typically Black women, have been the worst affected.

The informal sector is not only unregulated but also unsupported by formal policy, financing and capital infusion. The tendency for even formerly traditional jobs to become informalised is common in the service sector, whereby work is franchised out (cleaners etc). In fact, it is very much a hidden economy and informalisation typically means lower earning capacity, benefits and the abolition of formal avenues of redress for workplace violations. Neither anti-discrimination law nor labour law has been able to keep pace with this ‘race to the bottom’ type of market reorganisation, given that the law is still wedded to the pure ‘contract of labour’ model, which places an unhealthy emphasis on a narrow definition of an ‘employee’. Apart from concerns about entrenched and persistent poverty, the large slice of women in the informal sector also has implications for opportunities for enterprise development, whether in capital support or simply designing programs that accurately reflects the reality of the market.

Women’s businesses also tend to be more micro in nature.⁶⁷ These factors have a negative impact on equal opportunity in projects and enterprises, which typically target the formal sector, in terms of financing and organizational support, unless specific programs are created to reflect the reality of the market and focus on the economic empowerment of women. Such programs must include mentoring women to convert technical expertise (which they often have) into entrepreneurial business activity. Indeed, the breadth of the informal sector has been identified as an obstacle to innovation development.⁶⁸

At the other end of the spectrum, studies have shown that women of African descent predominate in the informal trading sector (hucksters/hagglers) and have demonstrated independence and entrepreneurial skills against the odds, even able to trade across the region.⁶⁹ They have been vulnerable because of prejudicial loan arrangements that stigmatise cultural characteristics, making

⁶⁷ This is also supported by the latest findings in the Edwards and Chase (n 28) 35.

⁶⁸ Sylvia Dohnert, ‘Five Obstacles to Overcome for a More Productive Caribbean’ (2017) *Compete Caribbean*, <<https://blogs.iadb.org/caribbean-dev-trends/2017/04/05/5-obstacles-to-overcome-for-a-more-productive-caribbean/>> accessed 7 May 2018.

⁶⁹ Hossein (n 42) 51. This was a study of 491 interviews in Jamaica, Guyana and Haiti, using a Black Feminist framework.

assumptions about reliability etc. Specific gender/cultural sensitive mainstreaming have to be in place to overcome such biases.⁷⁰

Non-traditional forms of work, such as alternative livelihoods, contract labour, casualised labour, sex work/human trafficking and the drug trade are also important as particular manifestations of intersectionality. Here again, the analysis relies on considerations of the intersectionality of class, race, gender and even place of origin. While, as explained above, race may not be the pivotal identity issue in the Commonwealth Caribbean, the construction of race globally operates such that it is racialized women who are disproportionately situated in such vulnerabilised work activity, which is typically underpaid, marginalized and even illegal.

D. Intersecting Dimensions of Innovative Enterprises

Gender differences also appear in relation to how women access and participate in innovative enterprises that often prioritise technology and market access. As in other sectors, there is little disaggregated data available. However, there are trends that women are disproportionately less involved in enterprises involving innovation, science and technology in particular. In one study on the information and communication technology (ICT) sector, results showed disadvantages in ICT access for women which resulted in gender differences in sector involvement. This was felt to be due to gender socialization and the resulting discrimination and employment which undermined commitments to inclusive development. Ultimately, this means ‘untapped opportunities for innovation, efficiency and business along the ICT value chain relating to development.’⁷¹

Despite attaining superior educational qualifications to men, Commonwealth Caribbean women and girls have fewer opportunities to excel in the ICT sector, especially in senior positions and as business owners. Studies document gender biases in occupational choices for men and women, gender wage, gaps, ‘gender glass ceilings’ which deny women equal access to higher leadership and technology positions and in business ownership.⁷² Access to ICTs related to gender, class, literacy and poverty have also been examined and revealed significant inequities

⁷⁰ *ibid* 59.

⁷¹ Ayanna Samuels and Leith Dunn, ‘Gender, Equity and Access in the Caribbean ICT Sector’ in Laura Robinson, Jeremy Schulz and Hopeton S. Dunn (eds) *Communication and Information Technologies Annual (Studies in Media and Communications Volume 12)* (Emerald Group Publishing, 2016) 65.

⁷² Eudine Barribeau, *The Political Economy of Gender in the Twentieth Century Caribbean* (Palgrave, 2001).

which negatively impact development.⁷³ These differences have also received world-wide attention at the World Summit on the Information Society. That Summit noted: ‘Persistent large disparities in access to information and knowledge, particularly in relation to geographical, socioeconomic, gender, age, rural-urban differences and the need to understand how traditions, local customs and perceptions can affect ICT access.’⁷⁴

While these studies targeted ICT enterprises, they are relevant to other science, technology based innovative enterprises. More gender based analyses need to be done of these other sectors in order to more effectively plan to integrate women into these sectors as managers and business owners in particular.

The region is turning to renewable energy as a form of diversification to boost the informal economy. Here too, an intersectionality analysis is useful. Examples of failed products during the ‘Green Revolution’ in the 1960’s and 1970’s hold important lessons for gender and cultural appropriate policy. The medium and long term effects of these projects were frequently negative because little account was taken of cultural, sociological patterns and gender variables.⁷⁵ Because technologies were aimed at male household heads that already controlled legal and cultural rights to land, water, hired labour and credit access, they exacerbated vulnerabilities. Male tasks, such as land preparation and planting were mechanized, whilst female tasks, such as weeding, harvesting, transport, food processing, were not. In addition, the initiative to mechanise wage labour, labour intensive tasks done mainly by women, ended up merely displacing women with men, who now did these new mechanized jobs. Green energy simply meant the masculinisation of jobs, with men taking over the now more efficient jobs in what used to be traditional women’s industries.⁷⁶ Technology usually brings upgraded skills and higher returns, which means more incentives for men at the expense of women.

Given the identified vulnerability of women with regard to access to capital and finance and disproportionate lack of land for collateral, this is a considerable hurdle that must be overcome.

⁷³ Hopeton S. Dunn and Leith Dunn, *Ringtones of Opportunity: Policy, Technology and Access in Caribbean Communications* (Randle, 2012).

⁷⁴ UN World Summit on the Information Society (2003)
<<https://www.un.org/press/en/2003/pi1549.doc.htm>> accessed 12 July 2018.

⁷⁵ Elizabeth Cecelski, ‘The Role of Women in Sustainable Energy Development’ (2000) National Renewal Energy Laboratory vi
<<https://www.nrel.gov/docs/fy00osti/26889.pdf>> accessed 31 May 2018.

⁷⁶ *ibid* 27-8.

E. Cross-Cutting Patterns in Intersectionality Analysis

From the above discussion, the following factors are identified as impacting on the gender wage gap: (1) women's work may be undervalued because women's economic lives follow different patterns; (2) women tend to have lower reservation wages than men; (3) gender-bias in wage setting institutions may have uneven gender effects; and (4) women are often disadvantaged by independent workplace effects (i.e. by workplace specific practices).⁷⁷ In the Commonwealth Caribbean, these continue to be overlaid by other variables such as race, class and the rural/ urban divide.

These factors underline gender stereotypes and roles which inform women's unequal status which impact significantly on their ability to negotiate innovative industry or participate to their full potential in development. Such inhibiting attitudes may be shared by women workers, deeply embedded in the psyche. For example, it makes it more difficult for them to enter scientific fields and enterprises (renewable energy, ICT), engage in entrepreneurship, including agricultural enterprises, access capital and loans and limits their accessibility to land for farming.

The issue of financing and in particular micro-financing, is one important element that greatly influences how women are socially located. Women continue to have unequal access to financing and capital and to land, which itself may be important for capital accumulation. Moreover, anecdotal evidence suggests that in some sectors, even when microfinancing was available for innovative enterprises in agriculture,⁷⁸ enterprise development and renewal energy projects, women did not take advantage of these opportunities. This appears to be informed by stereotypical attitudes of the lenders, but some concern should be noted about the factors that may inhibit women's participation in such innovation schemes. More research needs to be done using disaggregated data and specific training, incentivisation programs and mentoring designed to counter what may be conditioned attitudes about enterprise and the much sought after innovation.

Whether it is modern, sustainable agricultural projects, small and medium sized enterprises, or renewal energy projects, financing will be needed. Available research suggests financing is often influenced by race, or class, the latter often being a derivative of race and is not free from racial stereotyping or loyalties.⁷⁹ The phenomenon of 'racial browning',

⁷⁷ Mahabir et al (n 34).

⁷⁸ Edwards and Chase (n 28) 27.

⁷⁹ Hossein (n 42).

whereby lighter complexioned persons are viewed by unaware or untrained lenders as more responsible or credit-worthy, or where cultural judgements are made about single women's multiple partners in determining micro-financing decisions, are also relevant factors in inclusive policy-making.⁸⁰ There is also evidence that when women do receive loans they borrow smaller amounts.⁸¹

Similarly, the fact that the agricultural sector is typically made up of Indo-Trinidadian women, who tend not to be household heads, might help explain the low incidence of loans for agricultural projects applied for by women in that sector.

The reality that race is also linked with partisan politics, which may also be a factor in financing arrangements and other forms of benefits for enterprise and entrepreneurship, is a pertinent consideration to policy and planning.⁸² These inter-relating factors have been noted by studies in Guyana, but very little work has been done in Trinidad and Tobago to interrogate any discernible patterns.⁸³

F. Transnational Influences on the Intersectionality Paradigm

An intersectionality analysis in the Commonwealth Caribbean is incomplete without considering the external relationships that influence the axes of discrimination. Commonwealth Caribbean societies have always been and continue to be outward looking, 'plantation economy' types,⁸⁴ and cycles of disadvantage are exacerbated by and continuously created from the region's unequal trade relations as a so-called 'Third World' country, existing in a state of persistent poverty. Globalisation has deepened such inequities. Contemporary globalization is recognised as a gendered phenomenon and its impact on the (in) equity women, in particular, racialised women and poor women experience is significant.⁸⁵

⁸⁰ Edwards and Chase (n 28) 40.

⁸¹ *ibid*

⁸² Selwyn Ryan, Roy Mc Cree and Godfrey St. Bernard, *Behind the Bridge: Poverty, Patronage and Politics in Lavantille, Trinidad* (University of the West Indies, 1997).

⁸³ Alissa Trotz, 'Red Thread: The Politics of Hope in Guyana' (2007) 49(2) *Race Class* 71.

⁸⁴ The term 'plantation economy' is attributed to George Beckford, *Persistent Poverty: Underdevelopment in Plantation Economies of the Third World* (OUP, 1972). He described Caribbean economies as clinging to the model of the sugar plantations of colonial times, extracting outputs for the benefit of an external, imperialistic 'mother country' and market.

⁸⁵ Ann Denis, 'Globalization, Women and (In)Equity in the South' (2003) 18(3) *Constraint and Resistance in Barbados* 491; Rose-Marie Antoine, 'Constructing a Legal Framework for Securing Economic, Social and Cultural Rights for Women Workers, with Particular Reference to Structural Adjustment and the Caribbean' (1997) 7(2) *Caribbean Law Review* 534.

Poor, Black women often bear the sacrifice of the pressures of globalization.⁸⁶ The dominance of multi-national enterprises, whether in the original agricultural based economics or the more recent commercial tourist industry and typically foreign owned and self-interested, has served to cement such unequal power relationships. The face of happy, successful, tourism, for example, like that of the sugar plantations of the past, is white, while the menial, subservient, underpaid and sex-exploited is that of the poor, Black woman.

4. Conclusion—Charting a Legislative Intersectionality Framework

The question whether an intersectionality analysis may be useful to exploring and alleviating planes of inequality relating to women in the work environment of the Commonwealth Caribbean has been explored in this paper. The short answer is in the affirmative. Traditional anti-discrimination law and labour law are inadequate to reveal the deep complexities of women's inequality in the Commonwealth Caribbean workplace and can indeed benefit from the more piercing lens of the intersectionality framework. Yet, despite the important intersecting axes of discrimination and disadvantage, there is a lack of gender or vulnerability awareness, analysis, or mainstreaming in policy formation in the region which can properly inform anti-discrimination law or labour law.⁸⁷

While the anti-discrimination/equality legislation in the region does not specifically reference intersectionality approaches, such legislation does not exclude such a route. Taking a purposive approach to such laws, which attempt to generate enhanced equality to women and other disadvantaged persons, would permit a court to consider the broader intersectionality lens. Indeed, the objectives of such legislation prioritise broad equality. For example, the Trinidad and Tobago Equal Opportunity Act, in the Long Title, describes the statute as: 'An Act ... to promote equality of opportunity between persons of different status...'. While it may be difficult to intersect grounds of discrimination that are not listed in the enumerated grounds of the various equality statutes, at

⁸⁶ Leith Dunn and Alicia Mondesire, 'Poverty and Policy Coherence: The Case of Jamaica' (2002) The North-South Institute
<<http://www.nsi-ins.ca/wp-content/uploads/2012/10/2002-Poverty-and-Policy-Coherence-Jamaica.pdf>> accessed 31 May 2018.

⁸⁷ Edwards and Chase (n 28) 46.

minimum, the existing grounds may be intersected to produce a more dynamic and realistic frame for discrimination which is prohibited. Courts should be encouraged to do so.

Commonwealth Caribbean legal frameworks challenging discrimination have not as yet utilized intersectionality approaches, and therefore fail to adequately understand and address discrimination against women in the region. The intersectionality lens is a useful and dynamic one to approach what are multi-faceted and complex dimensions of inequality. Such enduring inequality is still influenced by a colonial legacy that, despite resulting in Black majority populations, perpetuate experiences of marginalization and inequality through the intersecting realities of gender, race, class, social and geographical origin.

The proper approach to addressing the simultaneous and multi-levelled planes of women's vulnerabilities which include race, socio-economic status and geographical location should be a proactive one. Policy and legal interpretative techniques and strategies must be designed with the identified vulnerabilities in mind to achieve particular targets for redress, if such initiatives are to succeed. Currently, such policies and developmental programmes are not formulated taking into account the different challenges, needs and interests of women, including their difficulty accessing finances and capital, societal conditioning and the unequal demands of family and household responsibilities. Unsurprisingly, without such awareness, existing law, even anti-discrimination law, is ill suited to address these axes of vulnerability and disadvantage and remain poor models for social justice.

Within the historical continuum of the Commonwealth Caribbean, the 'single axis framework' currently envisioned by all anti-discrimination legislation in the region, but now discredited by Crenshaw and others, is of limited value and must be re-imagined.

Institutional Interactions in Gender Pay Equity: A Call for Inclusive, Equal and Transparent Labour Markets

Jill Rubery and Aristeia Koukiadaki*

Abstract

Closing the gender pay gap is not proving to be a linear process as the changing environment is resulting in constantly moving goalposts. This article, therefore, focuses on identifying institutional arrangements and policies that may promote an environment conducive to gender pay equity. A review of institutional mechanisms and outcomes in wage setting, covering legal, collective and voluntary initiatives, finds that such an environment involves three characteristics, namely: labour market inclusiveness in order to narrow not widen overall wage inequalities; policies to generate the political will to achieve gender equality, which may require aligning gender pay equality issues with wider progressive equality agendas; and more transparent systems of wage setting and outcomes. The contention that gender pay equality is more likely to be achieved in more inclusive labour markets and societies also implies that there are strong interactions across policy domains and mechanisms; action on one front may not be successful if it is not supported by complementary policies and reinforcing mechanisms. Four main policy areas are identified and discussed: these are aimed at extending regulatory coverage, raising minimum standards, promoting fairness and

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developing more proactive and holistic mechanisms of implementation, for example through a 'gender duty'.

Keywords: Gender Pay Equity, Institutional Framework, Inclusiveness, Gender Equality, Transparency.

1. Introduction

The central argument developed in this article is that the socially-progressive goals of gender equity and inclusive and transparent labour markets should be pursued as joint goals. This means mainstreaming gender equity concerns into inclusive labour market policies and also mainstreaming inclusivity goals into gender equity policies within a broader framework of transparent labour markets.

The case for developing a joint approach stems from the synergies between a gender pay equity strategy and an institutional wage setting environment that is conducive to inclusive and transparent labour markets. The focus here is on changing the structural conditions to assist in closing the gender pay gap and we do not address the role of the efforts, preferences and behaviour of women in closing the gender pay gap which has tended to dominate the research landscape. This is because women's efforts may be made against an environment in which gender inequality is embedded and which may even develop in ways that inhibit, rather than promote gender equality.¹ Consequently, our focus is on changing the institutional environments through changing the behaviour of both employers and the state, which together shape the opportunity structures for women.

Through a review of institutional mechanisms and outcomes in wage setting, covering legal, collective and voluntary initiatives, the argument is made that a supportive environment for gender pay equity involves three characteristics, namely: narrower not wider wage inequalities; policies to generate the political will to achieve gender equality which may require aligning gender pay equality issues with wider progressive equality agendas; and more transparent systems of wage setting and outcomes.

The case for greater wage equality is that gender equality measures should not have to compensate for general widening wage inequalities.²

¹ Jill Rubery and Damian Grimshaw, 'The Forty Year Pursuit of Equal Pay: A Case of Constantly Moving Goal Posts' (2015) 39(2) *Cambridge Journal of Economics* 319.

² Francine D. Blau and Lawrence M. Kahn, 'The Gender Earnings Gap: Learning from International Comparisons' (1992) 82(2) *American Economic Review* 533.

These not only slow progress in closing the aggregate gender pay gap but may also increase wage inequalities among women as well as between women and men. Women's average position may even be improving while inequality among women is increasing, thereby calling into question whether the average gender pay gap provides an adequate measure of progress on gender equality for all women. There is a need, therefore, to build in 'intersectional sensibility' to policy considerations, to take into account the implications for gender and social class³ and, where appropriate, other dimensions of inequality. Furthermore, a socially progressive approach to closing the gender pay gap requires a more equal distribution of pay, requiring redistribution not only from men but also from capital as the wage share in societies has declined⁴ just as more labour- and mainly female labour - has entered the labour market. The push for gender equality has the capacity to try to reverse this trend by limiting the availability of cheap labour to drive down the wage level. However, there is still a danger that it could intensify distributional struggles among already relatively disadvantaged workers, particularly if the focus is on reducing gender pay gaps at a micro level, within individual firms and industries, rather than a more macro level redistribution, relating to the relative value attached to whole sectors and occupations.

There are two reasons why we also need policies likely to provide the political will to push for gender equality. First, as gender pay equality involves redistribution, resistance to its achievement can be anticipated. Second, because the struggle for gender equality has been so long-term, interest among the wider public may be declining in part because there is a belief that it has already been achieved. New momentum is needed to generate the political will needed for renewed progress. Aligning gender equality with other progressive equality agendas should extend support and synergies, particularly in a context of general stagnating or declining real wages. However, alignment requires a double form of gender mainstreaming; that is, mainstreaming gender equity concerns into inclusive labour market policies and mainstreaming inclusivity goals into gender equity policies.⁵ Thus, progressive equality agendas need to

³ Merike Blofield and Juliana Martínez Franzoni, 'Maternalism, Co-responsibility and Social Equity: A Typology of Work-Family Policies' (2015) 22(1) *Social Politics* 38; Hadas Mandel and Michael Shalev, 'Gender, Class and Varieties of Capitalism' (2009) 16(2) *Social Politics* 161.

⁴ International Labour Organisation (ILO), 'Global Wage Report 2014/15' (2014) <<http://www.ilo.org/global/research/global-reports/global-wage-report/2014/lang-en/index.htm>> accessed 27 June 2018.

⁵ Blofield and Martínez Franzoni (n 3).

take up gender issues, for example in relation to support for care work.⁶ A transparent environment is finally needed because without it progress is not only difficult to measure and monitor but the causes of inequality remain hidden and obscure.

To develop this argument further, we first review the current and potential roles for wage setting mechanisms- legal, collective and voluntary- in creating inclusive, gender equal and transparent labour markets. The key point emerging from this review is the complementarity and synergy between transparent and inclusive labour markets and the promotion of gender equality, and conversely the contradictions and constraints on the promotion of gender equality within segmented, unequal and non-transparent labour market systems. This review suggests the need for new mechanisms to promote gender equality alongside transparent and inclusive labour markets. Four main policy areas are identified and discussed: these are aimed at extending regulatory coverage, raising minimum standards, promoting fairness and developing more proactive and holistic mechanisms of implementation, for example through a 'gender duty'.

2. Wage Setting Institutions: The Contributions and Limitations of Legal, Collective and Voluntary Mechanisms

Figure One provides an overview of the characteristics of an inclusive, gender equal and transparent labour market. This is shown to depend on both horizontal and vertical dimensions to wage setting: by horizontal – indicated by the horizontal lines- we mean the coverage of employment standards. Here we differentiate between coverage of employing organisations (top horizontal line) and coverage of workforce groups (bottom horizontal line). Not only should there be widespread coverage but also convergence at a reasonable (decent work) level around minimum standards to provide an egalitarian basis on which to build vertical differentials - as indicated by the vertical lines in the diagram. On the left hand side we indicate the core principles for pay differentials under inclusive labour markets: that is, high minimum standards, due recognition for skills and experience (that is avoiding one of the major problems in female-dominated sectors, namely the lack of such

⁶ Ruth Pearson, 'Gendered, Globalisation and the Reproduction of Labour: Bringing the State Back In' in Shirin M. Rai and Georgina Waylen (eds) *New Frontiers in Feminist Political Economy* (Routledge, 2014) 19-42.

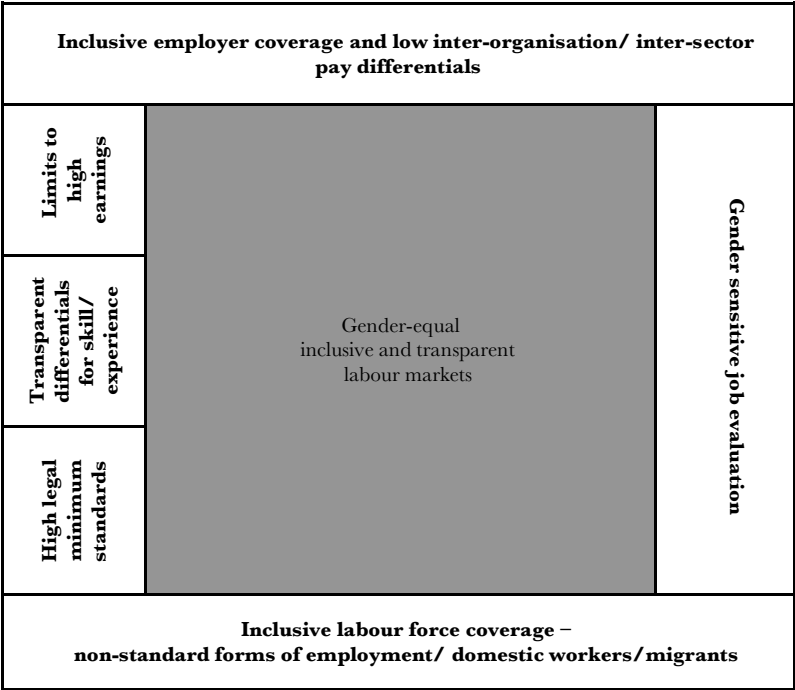
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recognition and of opportunities for progression),⁷ transparent wage structures and limits to high pay. On the right-hand side the need to integrate gender sensitive evaluation of jobs and skills within this framework of more inclusive and transparent labour markets is highlighted.

This diagram sets the framework for, according to our definition, establishing inclusive, equal and transparent labour markets. Labour market policies also need to be complemented by policies to support those with care responsibilities, both through the provision of services and through support for access to social protection for those engaged in unpaid care work or unable to access paid employment. These complementary policies may have equal importance for gender equality and indeed are included in our argument for a more universal and holistic approach to gender equality. However, the prime focus here is on conditions for gender equality within the wage employment system.

⁷ Damian Grimshaw and Jill Rubery, 'Undervaluing Women's Work' (2007) Equal Opportunities Commission Manchester, Working Paper Series No 53.
<http://www.equalityhumanrights.com/uploaded_files/equalpay/undervaluing_women_s_work.pdf> accessed 6 November 2015.

Figure One: Inclusive labour markets for gender equality



The contributions of legal, collective and voluntary mechanisms in moving towards the goal of an inclusive, gender equal and transparent wage labour market are identified in this review as potentially and ideally complementary rather than competitive, but in their current state of development they all remain insufficient. Legal mechanisms are important because interest in gender pay equity has tended to follow rather than precede legal rights to equal pay in most countries, and legal developments have had a catalytic and symbolic influence on non-statutory moves to promote equal pay. Despite scepticism towards legal interventions in some European countries with strong traditions of autonomous collective regulation, there is a clear need for policy action to be underpinned by legal rights. Specific types of legal intervention may also provide a framework or a catalyst for widening the agenda for collective bargaining. However, legal principles can also be more effectively enforced when implemented through and monitored by collective bargaining. This applies for example to the equity effects of minimum wage policies that may be enhanced when combined with and

embedded in collective regulation.⁸ Likewise, countries with high collective bargaining coverage are likely to have more inclusive labour markets, measured along a range of dimensions including overall wage inequality.⁹

However, even where collective bargaining coverage is high, wage setting institutions are not necessarily conducive to gender equity: there is evidence of continuing trade union reluctance to address skill differentials¹⁰ and of the continuing influence of the male breadwinner family wage.¹¹ Collective regulation may also not be sufficient to resist state policies to reduce public sector wages that tend to widen the gender pay gap.¹² Furthermore, disadvantaged groups, whether these be marginalised women workers, migrants or domestic workers, remain underrepresented within social dialogue institutions.¹³ Voluntary mechanisms, for example the implementation of codes of practice by companies, may make some contribution to gender pay equality.¹⁴ Yet, without mechanisms for enforcement and scrutiny, their impact is likely to be partial, uneven and also short-lived, dependent upon the latest social issue to which companies feel under pressure to respond.

⁸ Damian Grimshaw (ed) *Minimum Wages, Pay Equity, and Comparative Industrial Relations* (Routledge, 2013), 247.

⁹ Susan Hayter and Bradley Weinberg, 'Mind the Gap: Collective Bargaining and Wage Inequality' in Susan Hayter (ed) *The Role of Collective Bargaining in the Global Economy* (Edward Elgar, 2011); Gillian Whitehouse, 'Legislation and Labour Market Gender Inequality: An Analysis of OECD Countries' (1992) 6(1) *Work Employment & Society* 65; Blau and Kahn (n 2); Lars Calmfors and John Driffill, 'Bargaining Structure, Corporatism, and Macroeconomic Performance' (1988) 3(6) *Economic Policy* 13.

¹⁰ Paula Koskinen-Sandberg, 'Non-Decision Making in the Reform of Equal Pay Policy: The Case of Finnish Gender Equality Legislation' (2016) 35(4) *Equality, Diversity and Inclusion: An International Journal* 280; Paula Koskinen-Sandberg, 'Job Evaluation, Performance-related Pay and Gender Pay Equity: Gendered Practices in Pay Systems, and their Implications for Equal Pay Policy' (2015) *Swedish School of Economics* (Hanken), Helsinki, Finland.

¹¹ Andrea Schäfer and Karin Gottschall, 'From Wage Regulation to Wage Gap: How Wage-Setting Institutions and Structures Shape the Gender Wage Gap Across Three Industries in Twenty Four European Countries and Germany' (2015) 39(2) *Cambridge Journal of Economics* 467.

¹² Jill Rubery, 'Public Sector Adjustment and the Threat to Gender Equality', in Daniel Vaughan-Whitehead (ed) *Public Sector Shock: The Impact of Policy Retrenchment in Europe* (ILO, 2013) 23-43.

¹³ Linda Briskin and Angelika Muller, 'Promoting Gender Equality through Social Dialogue: Global Trends and Persistent Obstacles' (2011) ILO and Industrial and Employment Relations Department Working Paper No 34.
<http://www.ilo.org/ifpdial/information-resources/publications/WCMS_172636/lang-en/index.htm> accessed 27 June 2018.

¹⁴ S Barrientos and B Evers, 'Gendered Production Networks: Push and Pull on Corporate Responsibility?' in S. M. Rai and G. Waylen (eds) *New Frontiers in Feminist Political Economy* (Routledge, 2014).

A. Legal Regulation

The institutional design and operation of legal mechanisms are highly relevant to the notions of gender equal, inclusive and transparent labour markets. Reflecting the complex nature of gender equality, legislation designed to deal with the gender pay gap has developed to be diverse and multi-layered. However, significant shortcomings still remain. In respect of inclusiveness, a large number of individuals are still excluded from legislation that has been shown to protect women's incomes. This is often due to the continuing emphasis of legal systems on the standard employment relationship to the exclusion of workers in the informal economy.¹⁵ But problems exist also in terms of income equality. Minimum wage policies often fail to include mechanisms for updating the level of wages in line with prices. At the same time, other legal mechanisms tend not to prevent sector or company level minimum wage policies reproducing discrimination by setting minimum wages for female-dominated sectors/occupations lower than others.

In respect of gender equality *per se*, despite the recognition of the principle of equality, shortcomings in national legal mechanisms have limited progress in the eradication of the gender pay gap. This is broadly due to the continuing emphasis on a negative prohibition on discrimination rather than a positive duty to promote equality. More specific issues include the primary focus on equal pay for work of equal value for men and women¹⁶ despite evidence of intersectional discrimination (e.g. for black women or women migrants). Equally importantly, the insistence that a female claimant must select a male comparator working for the same employer limits the effectiveness of equal pay legislation in organisations characterised by flexible relations of production and fragmented working patterns.¹⁷

Finally, in respect of transparent labour markets, the confidential nature of information regarding pay, especially in the private sector, means that a claimant has no way of knowing whether a colleague is paid more, reducing at the same time the scope for organisations to take appropriate action to eliminate gender bias from their policies and

¹⁵ Leah F. Vosko, *Confronting the Norm: Gender and International Regulation of Precarious Work* (Law Commission of Canada, 2004).

¹⁶ Bob Hepple, Mary Coussey, and Tufyal Choudhury, *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart, 2000); Sandra Fredman, 'The Right to Equal Pay for Work of Equal Value' (2013) Background Paper for the UN Working Group on Discrimination against Women in Law and Practice <<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/ESL.aspx>> accessed 27 June 2018.

¹⁷ David Cabrelli, *Employment Law in Context* (OUP, 2014) 521.

practices. Besides, the lack of ability of individual litigants to bring actions, in conjunction with structural problems in enforcement processes (such as the procedure and the costs of litigation), are affecting organisational compliance. At a broader level, equal pay legislation only addresses part of the problem, namely, pay for work of equal value. It thereby fails to address discrimination encountered by women in promotion, training and education that keep disadvantaged groups in lower paid jobs,¹⁸ nor does it address the issue of unpaid care work.

B. Collective Bargaining and Social Dialogue

Just as with legal regulation, the impact of collective regulation on gender and social equality depends on its form. Collective bargaining has both macro and micro level impacts on the gender pay gap. At the macro level, research suggests that social dialogue and collective bargaining are most likely to promote inclusive employment systems that are beneficial to gender equality where the bargaining is coordinated and conducted at a national or sectoral level.¹⁹ This would have most effect where coverage is wide, especially where collectively bargained social benefits are an important part of social protection. Trade unions may also be active in campaigning for measures to raise low pay or extend employment standards or legal rights. At the more micro level, collective bargaining can reduce managerial discretion in pay practices. In regard to specific gender equality measures, collective bargaining can be a mechanism to promote more gender friendly policies whether via working time arrangements or gender-sensitive pay and grading systems. Trade union scrutiny of gender pay audits has also been found to increase their effectiveness,²⁰ and the credible likelihood of trade union action can also be an important spur to voluntary action by employers.

Collective bargaining is not always positive for gender equality, especially when coverage is limited or there is clear male breadwinner legacies defended through collective bargaining.²¹ That said, the alternative, namely employers acting without constraint, is also not found to be beneficial for gender pay equity. Where collective regulation is

¹⁸ Fredman (n 16) 2.

¹⁹ Blau and Kahn (n 2) 538; Calmfors and Driffill (n 9) 47.

²⁰ Marie-Thérèse Chicha, 'A Comparative Analysis of Promoting Pay Equity: Models and Impacts' (2006) ILO Working Paper No. 49 DECLARATION/WP/49/2006 <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_decl_wp_27_en.pdf> accessed 27 June 2018.

²¹ Schäfer and Gottschall (n 11).

weak, rent sharing tends to favour men.²² Trade unions have also taken a minimalist approach to gender equality bargaining even when legally mandated, limiting it primarily to work-life-balance policies²³ and trends tend to be towards more decentralised bargaining, less extensive coverage and more outsourcing of female-dominated jobs to take advantage of either no collective agreements or agreements setting low wages.

Collective organisation is thus a necessary and desirable mechanism for promoting gender equality but it is insufficient in its current form for structural and secular reasons: these include its traditional support of the male breadwinner and male-dominated skill categories,²⁴ its failure to organise disadvantaged groups and those in non-standard forms of employment (NSFE), its weak and often narrow approach to equality bargaining,²⁵ its secular weakness in many advanced countries and its limited development beyond narrow enclaves of protected employment in many developing countries.

C. Voluntary Action

Voluntary actions can and do play a role in promoting gender pay equity, inclusive and transparent labour markets,²⁶ but these actions are most effective when they fill gaps in institutional frameworks left by traditional social partners. Voluntary codes of conduct have spread within global supply chains under pressure from consumer groups, trade unions and other NGOs. The codes differ greatly in their ambitions for employment rights and their governance structures, and compliance problems can occur when they conflict with other business priorities.²⁷ Voluntary actions that result in improving women's pay may be initiated by employers, but it is often hard to identify the underlying reasons which may include pressure on employers and/or their clients exerted by the

²² Brenda Gannon et al, 'Inter-Industry Wage Differentials and the Gender Wage Gap: Evidence from European Countries' (2007) 38 (1) *The Economic and Social Review* 135, 151. François Ryck and Ilan Tojerow, 'Rent Sharing and the Gender Wage Gap in Belgium' (2004) 25(3/4) *International Journal of Manpower* 279; Hipolito Simón, 'International Differences in Wage Inequality: A New Glance with European Matched Employer-Employee Data' (2010) 48 *British Journal of Industrial Relations* 310, 313.

²³ European Trade Union Confederation (ETUC), 'Bargaining for Equality' (2014) ETUC 32
<https://www.etuc.org/sites/default/files/publication/files/bargaining_equality_en.pdf> accessed 27 June 2018.

²⁴ Sandra Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33(4) *Industrial Law Journal* 299.

²⁵ European Trade Union Confederation (n 23)

²⁶ Barrientos and Evers (n 14).

²⁷ Richard Locke et al, 'Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers' (2007) 146(1-2) *International Labour Review* 21.

state, trade unions or employers' associations, community or consumer groups or other NGOs.

Research has found incentives to be more effective in inducing employer action than negative punishments,²⁸ but many employers initiatives lack ambition and are partial in their effects. Commitment is stronger where employers perceive a business need to recruit and retain women, but again this often applies only to specific groups of women.²⁹

In developing countries, women in the informal sector or domestic work typically organise outside traditional institutional structures to pursue gender equality issues,³⁰ but this distinction may blur if the NGOs develop into effective trade unions for women in the informal sector. Furthermore, the impact of NGO action in promoting fair trade may be limited if consumers lack commitment to paying higher prices for commodities.

3. Towards More Inclusive, Gender Equal and Transparent Labour Markets: The Need for More Complementary Policies?

This review of the three main mechanisms for wage setting and promoting gender equality- legal, collective and voluntary- revealed that all are inadequate on their own but have the potential for complementarity and synergy. Legal regulation is essential to underpin fundamental rights to equality but on its own tends to provide only for a negative-complaint driven approach. However, legal rights can also underpin and extend collective regulation, while the threat of more extensive legal action may provide a spur for voluntary actions.

²⁸ Eva Heckl, Christina Enichlmair and Ingrid Pecher, 'Study on Non-Legislative Initiatives for Companies to Promote Gender Equality at the Workplace—Contract VC/2008/0348' (2010) Austrian Institute for SME Research for the European Commission/DG Employment, Social Affairs and Equal Opportunities 13.

²⁹ Linda Dickens, 'Beyond the Business Case: A Three-Pronged Approach to Equality Action' (1999) 9(1) Human Resource Management Journal 9.

³⁰ UN Women, 'Progress of the World's Women 2015-16: Transforming Economies, Realizing Rights' (2015) <http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf> accessed 27 June 2018; ILO, 'Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection' (2013) <http://www.ilo.org/travail/Whatsnew/WCMS_173363/lang--en/index.htm> accessed 27 June 2018; ILO, 'Domestic Workers Negotiate New Collective Agreements in Uruguay and Italy' (2013) <http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_212212/lang--en/index.htm> accessed 3 March 2018.

Collective bargaining may complement legal regulation, for example reinforcing the equity effects of legal minimum wages and reducing compression of women's wages towards the minimum wage. However, these benefits depend upon coverage which in turn often depends on legal mechanisms for extending collective regulation. In the European context, this could mean supporting, rather than undermining, the coordination capacity of multi-employer bargaining arrangements which play a crucial role in promoting inclusive labour markets.³¹ In a wider context, it could mean supporting, through voluntary, collective and legal regulation, the establishment of decent work criteria throughout a supply chain.

Beyond policies to establish or maintain solidaristic pay and inclusive bargaining, there are specific gender issues that need addressing. These include, for example, the development of new social movements to organise the more marginalised,³² many of whom are women, the extension of both bargaining and legal rights to address reconciliation of care commitments and work schedules, the development of policies to tackle the embedded undervaluation of women's work within collective agreements or the gender effects of performance-related pay systems,³³ and changes to social benefits to extend rights to those who are only intermittently in wage work or full-time in unpaid care work.³⁴ Again this policy agenda requires a mix of legal, collective and voluntary actions (to plug gaps in the first two mechanisms).

The contention that gender pay equality is more likely to be achieved in more inclusive and transparent labour markets also implies that there are strong interactions across policy domains and mechanisms; action on one front may not be successful if not supported by complementary policies and reinforcing mechanisms. When policies pull in competing directions, progress for gender equality in one direction may be offset by regress in another. Complementarity is needed, in particular between employment policies and support for social reproduction, as women cannot advance in employment without support for care and women outside employment need access to social protection and opportunities to

³¹ Aristeia Koukiadaki, Isabel Tavora and Miguel Martinez-Lucio, 'Joint Regulation and Labour Market Policy in Europe during the Crisis: A Seven-Country Comparison', in Aristeia Koukiadaki, Isabel Tavora and Miguel Martinez-Lucio (eds) *Joint Regulation and Labour Market Policy in Europe During the Crisis* (European Trade Union Institute, 2016) 125.

³² Ruth Milkman (ed) *Organizing Immigrants: the Challenge for Unions in Contemporary California* (Cornell University Press, 2006).

³³ Jill Rubery, 'Performance Related Pay and the Prospects for Gender Pay Equity' (1995) 32 *Journal of Management Studies* 637.

³⁴ Alain Supiot (ed) *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP, 2001); Leah F. Vosko, *Managing the Margins Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP, 2010).

re-enter employment. Furthermore, trade-offs between policies may have particular consequences for sub-groups of women, for example for different social classes.³⁵ These require attention if narrowing the aggregate gap between men and women is not to be at the expense of the more disadvantaged. In promoting inclusive labour markets, intersectional effects within each gender need to be considered, not only changes in aggregate or average indices. What policy takes priority will also depend on the dominant form of gender pay inequality in a particular institutional environment. That said, in most countries, the largest gender equality gains will come from actions to support the more disadvantaged by raising minimum wages or reducing exclusions from formal employment. Finally because achieving gender pay equity is like hitting a constantly moving target, which puts even the current level of gender pay equity at risk, policies are needed to defend existing gains as well as to secure new advances.

These varying considerations have informed the development of a four-pronged approach to developing policy to promote gender pay equity in the context of inclusive and transparent labour markets. The four prongs involve extending coverage and establishing high minimum standards, the two anchors to inclusive labour markets. These need to be built on by policies to promote fair pay throughout the hierarchy by removing embedded discrimination, preventing new forms of discrimination and promoting a renewed interest in fair pay, including by enforcing transparency. Finally, there is the all important need for a positive, proactive and holistic approach to policy implementation.

Table One takes these four policy prongs and identifies firstly examples of policy proposals that could promote both gender and social equality. To extend coverage, this could involve extending collective and legal regulation of wages and developing more universal, non-employment contingent social protection. With respect to raising standards, this could involve establishing high minimum wages sufficient to provide for adult subsistence. With respect to promoting non discrimination and fairness, these could entail new initiatives to value women's skills within a wider framework of rights to fair and proportional pay for all. Under positive implementation measures, new approaches such as a holistic gender duty are put forward, which could also be extended to other 'duties' to promote fair and proportional pay. Table One outlines how these selected exemplar policies could contribute to both gender equality and inclusive labour markets by meeting the criteria

³⁵ Becky Pettit and Jennifer L. Hook, *Institutionalizing Inequality: Gender, Family, and Economic Inequality in Comparative Perspective* (Russell Sage, 2009) 167; Mandel and Shalev (n 3) 170.

of reducing overall wage inequality, developing a stronger political will to address gender equality and promoting transparency.

Table One: Closing the Gender Pay Gap—Key policy Implications

	Coverage	Standards	Non-Discrimination	Positive Implementation
Proposed Policies	a) Legal extension of minimum wages and collective agreements to cover all sectors and contract types b) Universal social protection and minimum benefits-social wage rather than employer-provided benefits	Minimum wages should be set at living wage levels	Introduction of a general right to pay proportional to value within firms, enforced through transparency requirements and equality audits	Establishment of a positive duty of equality – for gender and other dimensions
Gender Equality	a) Extension of standards to areas of women's employment currently excluded b) Social protection for those in NSFE and unpaid labour benefits primarily women	Removal of the notion of women only needing a component wage from minimum wage standards – legal and collective	Reduction of undervaluation of women's work through gender sensitive skill evaluations. Extension of right to pay proportional to value	Holistic proactive approach needed in contrast to complaint-driven legal approach; action across a range of fronts including pay systems, working time, recruitment and progression etc.

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4. Policy Proposals

A. Extending Coverage of Employment and Social Protection

(i) The Extension of Collective Agreements and Employment Standards: New Ways of Reaching the Hard to Reach Areas

New policy initiatives are needed to extend equality and other relevant legislation, including minimum wage legislation, to cover disadvantaged groups currently excluded from scope.³⁶ Protection needs expanding to cover, for example, migrant workers, workers in agriculture, family undertakings, or domestic service, the bogus self-employed persons and workers in the informal economy.

Coverage is not only important for legal rights but also for collective regulation. At present, multi-level collective bargaining is no longer seen as a mechanism for facilitating inclusive growth but instead is relegated to a means of adjusting labour costs within the narrow sphere of the company. Labour market reforms in Anglo-Saxon economies in the 1980s and 1990s and the pursuit of ‘regulated austerity’ during the recent

³⁶ On low minimum wages for domestic workers, see Martin Oelz and Umar Rani, ‘Domestic Work, Wages, and Gender Equality: Lessons From Developing Countries’ (2015) ILO Working Paper No 7. < http://www.ilo.org/global/publications/working-papers/WCMS_430902/lang-en/index.htm > accessed 27 June 2018.

economic crisis³⁷ have resulted in an extensive dilution of both the representative and, most importantly, the regulatory functions of trade unions, with the regulatory function being consciously displaced by the state.³⁸ But there is increasing evidence suggesting that bargaining coverage is crucial for inclusive and sustainable growth. Table Two provides estimates of how sectoral bargaining results in much higher coverage in general and of non-union workers in particular than company bargaining: bargaining coverage seldom exceeds 25 per cent of workers in countries characterised by company-level bargaining.³⁹ Table Two also shows how legal extension of collective agreements to non-signatory employers also results in a much higher share of non-unionised workers (note the no extension countries are dominated by Scandinavian countries who have a much higher share of unionised workers in general due in part to trade union membership being linked to unemployment insurance). Even reports by the OECD⁴⁰ and the IMF⁴¹ expect reducing legal extension of collective wage agreements to widen the wage distribution and increase market inequality. Collective regulation (collective bargaining) should be supported as a public good with inclusive regulatory coverage of industrial/occupational workforces.⁴² Support for collective bargaining and the imposition of minimum wages at sectoral level through the operation of extension mechanisms would complement a pay equity strategy and would discourage firm-level bargaining that leads to wider inequalities.

³⁷ Simon Deakin and Aristeia Koukiadaki, 'The Sovereign Debt Crisis and the Evolution of Labour Law in Europe' in Nicola Countouris and Mark Freedland (eds) *Resocialising Europe in a Time of Crisis* (CUP, 2013)

³⁸ Keith Ewing, 'The Function of Trade Unions' (2005) 34(1) *Industrial Law Journal* 1, 15.

³⁹ Jelle Visser, Susan Hayter and Rosina Gammarano, 'Collective Bargaining Trends: Erosion, Stability or Decline?' (2015) Issue Brief No. 1 ILO Labour Relations and Collective Bargaining <http://www.ilo.org/global/topics/collective-bargaining-labour-relations/publications/WCMS_409422/lang-en/index.htm> accessed 27 June 2018.

⁴⁰ Organisation for Economic Cooperation and Development (OECD), 'All on Board: Making Inclusive Growth Happen' (2014) 73 <<https://www.oecd.org/inclusive-growth/all-on-board-making-inclusive-growth-happen.pdf>> accessed 27 June 2018.

⁴¹ Era Dabla-Norris et al, 'Causes and Consequences of Income Inequality: A Global Perspective' (2015) International Monetary Fund 26 <<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf>> accessed 27 June 2018.

⁴² Paul Marginson, 'The Changing Nature of Collective Employment Relations' (2014) Manchester International Relations Society 50th Anniversary Conference, 21 November <https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pm_-_changing_collective_er_-_mirs.pdf> accessed 3 March 2018.

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Table Two: Coverage of Union and Non-Union Members by Level of Bargaining and Extension Regime in Europe 2000-2009

Percentage of the Workforce					
	Company	Sector	No Extension	Conditional Extension	Automatic Extension
Union	20.3	35.8	73.1	35.6	28.4
Non-Union	7.1	41.2	15.6	31.4	52.2
Total	27.4	77.0	88.7	67.0	80.6

Source: Table 1, J Visser 'Wage Bargaining Institutions—From Crisis to Crisis' European Economy Economic Papers 4881

In a similar vein, extending the reach of collective regulation and more broadly labour standards across the supply chain would not only mean that labour costs are removed from being used as an element of competition among suppliers in the private sector or bidders for public contracts, but would also ensure that such processes would not exert a downward pressure on wages and working conditions. Incorporating social objectives into public or even private procurement, including compliance with collective agreements, promoting equal pay, could protect against the use of outsourcing to reduce pay.⁴³

(ii) Establishment of More Universal Social Protection Rights

Gender gaps in income over the life course relate not only to wages but also to support outside of wage work. Entitlements to support when unemployed, sick or on maternity leave or retired are often linked to employment status. To provide for gender equality in income and for women's economic independence, it is important to delink as far as possible access to at least minimum social protection from employment status and to provide a significant social wage. At least minimum social protection and social services need to be available to all women, whether

⁴³ Virginia Doellgast and Elisa Pannini, 'The Impact of Outsourcing on Job Quality for Call Centre workers in the Telecommunications and Call Centre Subcontractor Industries in Drahokoupil' in Jan Drahokoupil (ed) *The Outsourcing Challenge: Organizing Workers across Fragmented Production Networks* (European Trade Union Institute, 2015) 137-156; Ioulia Bessa et al, 'The National Minimum Wage: Earnings and Hours in the Domiciliary Care Sector' (2013) Low Pay Commissions
<<https://www.gov.uk/government/publications/national-minimum-wage-impact-on-the-domiciliary-care-sector>> accessed 10 April 2018.

or not in formal employment and this social wage needs to be funded through forms of progressive taxation (including taxation of employers' wage bill).⁴⁴ A complementary universal social wage policy⁴⁵ which partially at least socialises the costs of children reduces the level of the minimum wage necessary to meet minimum adult living wage costs. The need for a more universal approach has been recognised in the ILO's new social protection convention that no longer only covers those in employment.

There are various means by which social protection systems can do more to value women's work whether as unpaid care work or in intermittent employment or NSFE, where eligibility for social protection may not be achieved. One mechanism is to provide social rights to citizens independently of employment status: examples include healthcare in the UK, pensions in Denmark or basic incomes as proposed by Standing⁴⁶ and others. Other, less comprehensive, strategies for protecting those in unpaid care work or in NSFE with limited entitlements include: providing credits for care work or education;⁴⁷ reducing, revaluing or extending the period over which minimum contributions for eligibility are accumulated, thereby assisting access for those in low wage or NSFE; extending coverage to all forms of NSFE including self-employment which is often excluded; or providing a high minimum level of social benefits.⁴⁸ The significance of these policies depends upon the overall position of women in the labour market; for example, extending maternity rights to the self-employed has even greater importance in developing countries where more women are in the informal sector.⁴⁹

With the growth of NSFE and the spread of women's employment, many European countries have taken one or more of the above steps.⁵⁰ However, there are many variations in the treatment of, for example, the self-employed or minimum contributions for eligibility. Spain, for example, has loosened considerably the employment criteria for access to paid maternity leave for those under age 26 in recognition of the instability of the youth labour market while the UK has one of the lowest

⁴⁴ Juliana Martínez Franzoni and Diego Sánchez-Ancochea, 'Can Latin American Production Regimes Complement Universalistic Welfare Regimes?: Implications from the Costa Rican Case' (2013) 48(2) *Latin American Research Review* 148.

⁴⁵ Pearson (n 6) 19-42.

⁴⁶ Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011) 176.

⁴⁷ Supiot (n 34) 24.

⁴⁸ Jill Rubery et al, 'Challenges and Contradictions in the 'Normalising' of Precarious Work' (2018) 32 (3) *Work, Employment and Society* 509.

⁴⁹ Blofield and Martínez Franzoni (n 3).

⁵⁰ Rubery et al (n 48).

paid maternity leaves but strict entitlements to access. Slovenia requires employers to pay full-time insurance contributions for those on mandated reduced hours working due to care of young children, and France has reduced minimum contributions per quarter year from the equivalent of 200 hours at minimum wage employment to 150. In contrast, Germany has so far failed to provide minimum benefits in pensions or unemployment benefits or to require the self-employed to be covered by pensions.⁵¹

In line with the objective of economic independence for women, it is vital that social protection rights should be individualised and not dependent on household means-testing. However, individualisation without compensation and rewards for unpaid care work would have regressive impacts on women, so that full individualisation may not be appropriate before progress is made in equality in the wage labour market and in social protection systems.

B. Employment Standards: From Minimum to Living Wages as an Instrument of Gender Equality

The case for promoting gender pay equity is founded to a large degree on the problem that not only is it distributionally unfair but it also normally results in women not being able to function as independent adults. Gender pay equity is thus not only about levelling pay up to men's but about eradicating the male breadwinner regime's legacy that sets women's wages below an adult's living wage and thereby reduces women's capacity to form families.⁵² Traditionally, the notion of wages as providing for living costs rather than linked to the productivity of the individual or the job, has provided a rationale for the male breadwinner wage.⁵³ However, with wider acceptance of women's rights to economic independence, there has been a new movement to ensure minimum wages are compatible with adult minimum income needs for women as well as men. Women's right to be economically independent has been recognised in the policy programmes of the EU and could be the basis of further new international initiatives in this area. The ILO Constitution acknowledges the need for 'the provision of an adequate living wage' as one of the conditions for 'universal and lasting peace... based on social

⁵¹ *ibid.*

⁵² Ann Orloff, 'Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States' (1993) 58(3) *American Sociological Review* 303.

⁵³ Deborah M. Figart, Ellen Mutari and Marilyn Power, *Living Wages, Equal Wages: Gender and Labour Market Policies in the United States* (Routledge, 2002) 107.

justice'.⁵⁴ However, the ILO's 1970 Convention No 131 on Minimum Wage Fixing refrains from providing substantial guidance as to what an adequate minimum wage level should be and associated recommendations to make levels appropriate to guarantee adequate living standards are often non-specific.⁵⁵ The ILO could combine this, so far mainly symbolic, commitment to an adequate living wage with a commitment to gender pay equity that embraces the principle that women should have the right to function as economically independent adults. One possibility is thus to push for a new convention on minimum wages as proposed by Brosnan 'requiring that *all* workers be entitled to a minimum wage and that it is backed up by some level of enforcement...a convention could require countries to have minimum wages set at a specific level, which increases over time to allow the governments and employers in low-income countries to make the necessary adjustments'.⁵⁶

One issue in setting a living wage is whether individuals and households are primarily dependent upon wages for all their needs or whether there is a significant social wage covering major costs associated with raising children, care for children or the elderly, health insurance and pensions. A complementary social wage that is not necessarily tied to employment status could ease the task of raising the level of minimum wages to a living wage. Although the social wage provision has to be funded by taxation, the burden can be shared more progressively and not loaded on low wage employees or employers of lower wage labour. Campaigns for a living minimum wage have the capacity to mobilise wide public support as it is an understandable and recognisably fair principle.⁵⁷ Women, however, are the main beneficiaries so that support

⁵⁴ See also Article 7 of The International Covenant on Economic, Social and Cultural Rights ((adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3) on just and favourable working conditions, which requires that remuneration ensures fair wages and a 'decent living' for workers and their families; Article 10 on the protection of the family and Article 11 on the right to an adequate standard of living. In monitoring states, the Committee on Economic, Social and Cultural Rights has stressed that the minimum wage should apply universally, irrespective of industry or geographic area (see Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (OUP, 2014).

⁵⁵ Peter Brosnan, 'The Minimum Wage in a Global Context' in Jonathan Michie (ed) *The Handbook of Globalisation* (2nd ed, Edward Elgar, 2011) 223. While ILO Convention No. 26 has been ratified by 105 countries, which is one of the highest rates of ratification, ILO Convention No. 131 has so far been ratified only by 52 countries. See also ILO Recommendation No. 135 on Minimum Wage Fixing; Convention No. 95 on the Protection of Wages and Convention No. 173 on the Protection of Workers' Claims (Employer's Insolvency).

⁵⁶ *ibid* 227 (emphasis in original).

⁵⁷ Stephanie Luce, 'Living wages, Minimum Wages and Low-Wage Workers' in Stephanie Luce et al (eds) *What Works for Workers? Public Policies and Innovative Strategies for Low-Wage Workers* (Russell Sage Foundation, 2014) 215-44.

may depend on acceptance of women's rights to be independent adults. Many of the campaigns have involved wider community groups and NGOs as well as trade unions and have led to optimistic accounts of the potential for new social movements. Although new momentum around fair pay issues is welcome, it is mainly found in countries such as the US and the UK where collective and legal regulation is weak and has involved voluntary or locally-related provisions. And, as Luce stresses in relation to the US living wage campaigns, raising the legal federal minimum wage would have covered more people.⁵⁸ Thus, what is needed is for living wage campaigns to become embedded in universal and legally enforceable standards.

Setting a minimum living wage level provides an equitable platform on which to build differentials by skill and contribution. There is, however, a danger of compression around the high minimum wage particularly in sectors which traditionally have had low average wage levels. This problem can be seen both in a deregulated labour market such as the UK, where the minimum wage has changed from a residual floor to a going wage rate, and in more regulated countries such as France, where the institutionalised high minimum wage has often exceeded minimum wages set in collective agreements. In France, this hinders pay progression in sectors with a tradition of average low pay as several skill grades may fall below the national minimum wage, something that has affected public as well as private sectors. This reflects weak collective bargaining and a lack of commitment to upgrading the pay scale in low paying and often female-dominated sectors. The outcome is that some legacy of the male breadwinner model still survives in the low relative pay for skill in these sectors. This suggests the need to combine campaigns for a living minimum wage to set the baseline across the labour market with new ways to improve the setting of pay differentials, as we turn to next.

C. Generalising Rights to Fair Treatment and Equal Pay for Work of Equal Value—To Combine Progressive Social and Gender Equality Measures

General rights to fair pay, including equal pay for work of equal value, could provide vehicles for joint mobilisation of social equality and gender equality agendas. There is a strong case even in relation to gender equality, for widening the currently narrow rights linked to equal pay for work of equal value by gender. The main factors include: (i) the problem of finding male comparators; (ii) the fact that the right to equal pay only

⁵⁸ *ibid.*

applies when work is directly of equal value and there is no right to pay proportional to value; and (iii) the confinement of comparison of conditions to within one employer, even in a context of networked and fragmented production systems. These deficiencies in current equal pay legal regimes have been recognised in some countries and are also beginning to rise up the EU's agenda.

Thus, in Australia the concept of undervaluation emerged under several states jurisdictions and is not dependent on either direct proof of discrimination or strict male-female comparators. The national system, the Fair Work Act (s. 300), also imposes no requirement for valid male comparators or for discrimination to be established as a basis of equal remuneration claims and rulings.⁵⁹ Instead, a case for undervaluation may be made via a detailed award history showing how earlier decisions devalued (or failed to properly value) the work⁶⁰ or on the basis of feminisation indicators, including occupational gender segregation and low unionisation⁶¹ Ontario's Pay Equity Act included the proportionality idea for implementing equal value, so that the fairness of pay in women's occupations can be determined, even if male comparators are not present, with action plans used to remedy deficiencies devoting at least one per cent of the wage bill to this exercise per year. Ontario's Pay Equity Act also allows for proxy comparisons but only in the publicly-funded broader public sector to jobs assessed under either job-to-job or proportional value comparisons.⁶² In Europe, the European Committee of Social Rights has emphasised its expectation that states ratifying the European Charter on Social Rights should permit comparison of wages beyond the given enterprise, particularly where the workforce is largely,

⁵⁹ Joshua Healy and Michael P. Kidd, 'Gender-based Undervaluation and the Equal Remuneration Powers of Fair Work Australia' (2013) 55(5) *Journal of Industrial Relations* 760.

⁶⁰ Witness statement of Dr Meg Smith, Australian Municipal, Administrative, Clerical and Services Union and Others Exhibit ASU 2, Equal Remuneration Case (2011) Fair Work, Melbourne, Australia, 20-1. <www.fwa.gov.au/sites/remuneration/submissions/ASU_Submission_W3.pdf> accessed 10 April 2018; Gillian Whitehouse and Tricia Rooney, 'Approaches to Gender-based Undervaluation in Australian Industrial Tribunals: Lessons from Recent Childcare Cases' in Marian Baird, Keith Hancock, and Joe Isaac (eds) *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 113.

⁶¹ Siobhan Austen, Therese Jefferson and Alison Preston, 'Contrasting Economic Analyses of Equal Remuneration: The Social and Community Services (SACS) Case' (2013) 55 *Journal of Industrial Relations* 60, 62.

⁶² In 1996, the government repealed the proxy comparison method with the passing of Bill 26, Savings and Restructuring Act, Schedule J. However, a legal challenge (*SEIU Local 204 v Attorney General* [1997] OJ No. 3563) was brought against this legislation, and the Ontario Supreme Court decided that repealing the proxy method violated The Charter of Rights and Freedoms. The court declared that Schedule J had no force or effect, reinstating the proxy method in the Pay Equity Act as though it had never been repealed.

or even exclusively, female; to do otherwise would amount to a restrictive application of the principle of equal pay.

Another increasingly frequent measure to extend the scrutiny of pay structures and practices for gender equality is the use of gender pay audits. The adoption of these audits has been motivated by a recognised need to both increase transparency by providing a database on which to promote equality and by the lack of success under the traditional complaint-driven legal approaches in reducing the gender pay gap. According to the Workplace Gender Equality Agency (Australia), the pay gap is almost non-existent when pay is set transparently compared to 20.6 per cent when pay information is withheld.⁶³ While these initiatives are welcome, to some degree they move in the opposite direction to making comparisons outside the enterprise and instead focus on internal patterns of pay discrimination which is unlikely to help raise pay in female-dominated segments. Another problem is that there are major differences among countries in the scrutiny and follow-up plans envisaged consequent on gender pay audits:⁶⁴ where trade unions are involved in scrutiny and follow-ups (for example Sweden and Quebec and more recently Denmark, Austria and Germany) the prospects of action to reduce gender pay equality are greater than when the scrutiny mechanisms are weak or there are no requirements for follow up (for example in Australia and the UK), or austerity measures are reducing the scope for new collective initiatives (Spain).⁶⁵

To further develop these dual mechanisms of comparison across enterprises and sectors and to promote greater transparency with respect to pay dispersion within companies, it may be beneficial to consider generalising rights to fair pay and to equal pay for work of equal value to all employees. The benefits depend on the following considerations. Firstly, although the principle of equal pay for work of equal value has intuitive appeal, support may dissipate when it is realised that this is not a general right but only applies to a strict male-female comparator in most countries. It may be a wasted opportunity not to build on that intuitive appeal to develop a wider momentum in favour of fair and proportionate pay for all. Indeed, pay audits are only likely to be

⁶³ Michelle Brown, 'To Close the Gender Pay Gap We Need to End Pay Secrecy' (*The Conversation*, 16 September 2014) <<http://theconversation.com/to-close-the-gender-pay-gap-we-need-to-end-pay-secrecy-31626>> accessed 3 March 2018.

⁶⁴ Chicha (n 20).

⁶⁵ Jill Rubery and Aristeia Koukiadaki, 'Closing the Gender Pay Gap: A Review of the Issues, Policy Mechanisms and International Evidence' (2016) Gender, Equality and Diversity Branch, ILO <http://www.ilo.org/gender/Informationresources/Publications/WCMS_540889/lang-en/index.htm> accessed 27 June 2018.

supported long term if there are actions to remedy anomalies and unfairness regardless of the gender of the person to whom it applies. Secondly, the requirement on firms to provide more transparent information on their gender pay outcomes could be used to encourage them to adopt more transparent, consistent and equitable pay setting principles and practices in general. Thirdly, many countries are also passing or have passed wider non-discrimination legislation. Implementation of that legislation with respect to pay would be facilitated by a general right rather than a series of specific initiatives. This last point, however, brings us to a concern that a general right might lead to gender inequalities being ignored.⁶⁶ Gender inequalities play a particular role in shaping pay inequities for it is gender segregation that facilitates the embedding of inequalities in the organisation, status and pay of occupations, firms and sectors. This may increasingly apply to some other groups – for example, if some occupations become associated with migrant labour – but in most societies, gender has the widest reach in shaping pay differentials. Indeed other disadvantaged groups may frequently be employed in female-dominated segments. This means that there is a need for continuing gender specific action on equal pay, alongside the development of wider rights for fair pay and for pay proportional to value.

D. Positive Implementation: A Gender Duty as a New Way of Combining Legal, Collective and Voluntary Measures

Reforms in the areas analysed in the previous sections should take place within a broader framework that supports a holistic, proactive approach towards gender equality. Such an approach would establish a basis for action across a range of fronts, including pay systems, working time, recruitment and progression. In contrast to the conventional complaint-driven legal approach, the imposition of a gender duty, consistent with treating closing the gender pay gap as a human rights priority, would constitute the main mechanism here for dealing with the gender pay gap in a holistic way. Such an approach could be adopted not only with respect of gender equality but also regarding other sources of inequality – by group or form of employment, promoting social equality more broadly. In mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the

⁶⁶ Fredman (n 17) 10.

planning stage their effects on women and men, a ‘transformative’⁶⁷ form of equality would be hence achieved.

A positive duty to equality is distinguished by a number of characteristics. The first is the requirement to take into account the impact by gender across all an organisation’s activities.⁶⁸ As the European Commission stated in 2008, positive duties ‘means mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the planning stage their effects on women and men and by assuming that a transformation of institutions and/ or organisations may be necessary.’⁶⁹ In this respect, a positive duty to equality has the capacity to become a core part of the way in which an organisation operates and conducts its business. Thus rather than equality being considered the responsibility solely of human resource managers, a positive duty to equality calls for a rounded and progressive approach, which questions the way organisations traditionally operate and offers a route for equal pay to be seen as a mainstream issue that is promoted throughout the organisation.

The second characteristic is the focus of the duties. Rather than deriving from an individual right of a victim or group of victims against specified perpetrators, ‘proactive models place responsibility on bodies which are in a position to bring about change, whether or not they have actually caused the problem’;⁷⁰ the initiative hence lies with policy-makers and implementers, service providers or employers.⁷¹ In the gender context, the existence of a duty may also serve to compel organisations to adopt gender equality initiatives, even where the perception exists that gender inequality is no longer a ‘real problem’.⁷² The promotion of such proactive equality duties can also remedy the problems of the existing individual litigation-driven model that has been based on symmetrical treatment.⁷³

⁶⁷ Bob Hepple, ‘The Key to Greater Gender Equality’ (2014) 12 Equal Rights Review 59, 61.

⁶⁸ Hepple, Coussey and Choudhury (n 16) 59.

⁶⁹ European Commission, ‘Manual for Gender mainstreaming’ (2008) <<http://eiga.europa.eu/gender-mainstreaming/resources/international/manual-gender-mainstreaming-employment-social-inclusion-and-social-protection-policies-0>> accessed 31 August 2018.

⁷⁰ Sandra Fredman, ‘Equality as a Proactive Duty’ in Nicola Countouris and Mark Freedland (eds) *Resocialising Europe in a Time of Crisis* (CUP, 2013) 139.

⁷¹ Sandra Fredman, *Discrimination Law* (2nd ed, OUP, 2011) 299.

⁷² Deborah L. Rhode, *Justice and Gender* (HUP, 1991) 128.

⁷³ Colm McLaughlin and Simon Deakin, ‘Equality Law and the Limits of the ‘Business Case’ for Addressing Gender Inequalities’ in Jacqueline Scott, Shirley Dex and Anke C. Plagnol (eds) *Gendered Lives: Gender Inequalities in Production and Reproduction* (Edward Elgar, 2012) 153-73.

The third characteristic of a positive duty to equality is the range of actors involved in the process. A distinctive feature of such a model is the recognition of the need to incorporate ‘opportunities for those directly affected to participate, through information, consultation and engagement in the process of change’ as a basic principle of anti-discrimination law.⁷⁴ The promotion of a gender duty would imply action at different levels. At the international level, the ILO should ‘examine how the equality conventions could better support transformative equality’.⁷⁵ Consideration should also be provided to the inclusion of the principle of equal pay in international trade agreements and the existing equality promoting reporting and planning mechanisms that are required at the international and regional levels.⁷⁶ At the national level, a positive duty to equality would build on and strengthen the equal pay principles recognised in many legal systems.

5. Conclusions

The starting point for the analysis was the need to consider how to develop and promote an environment conducive to gender pay equity. Given the changing environment that has made closing the gender pay gap a case of constantly moving goalposts,⁷⁷ the focus of the article was on institutional arrangements and policies rather than on the behaviour and trajectories of individual women. In doing this, we examined not only gender specific measures but also how to combine these with more general policy measures to create a more conducive environment for gender equality. This is because not only are gender specific policy measures more likely to be effective in a supportive environment, but there may also be contexts in which general policy measures may even substitute for gender specific policies – though the need for vigilance against gender discrimination is always needed.

The key contention of this article is that gender pay equity needs to be pursued through a policy package that promotes inclusive and transparent labour market alongside specific measures to address gender pay equity. Initiatives to improve the pay of women within specific companies may have limited effects, even for the groups concerned, if

⁷⁴ Hepple, Coussey and Choudhury (n 16) 2.19.

⁷⁵ Hepple (n 67) 61.

⁷⁶ Mary Cornish and Fay Faraday, ‘Litigating Pay and Employment Equity: Strategic Uses and Limits: The Canadian Experience’ (International Pay and Employment Equity for Women Conference, Wellington, New Zealand, June 2004).

⁷⁷ Rubery and Grimshaw (n 1).

companies are able to outsource work to lower paying firms or if gender equity is achieved within the workplace through downgrading the pay of men as collective regulation is weakened or abolished. The recent successes in promoting rights for domestic workers involving the ILO, national and local actors indicate that progress can be made towards a more inclusive and less gender-biased employment system. Strengthening and extending employment standards, through higher minimum wages, providing more equal rights for workers in NSFE and promoting more extensive and inclusive collective bargaining, need to be combined with effective and new gender-specific measures. These measures need to extend the scope for addressing the undervaluation of women's work beyond cases based on within company comparisons with men, and build on the essential individual legal rights to equal treatment by extending duties on employers to promote gender equality in an active manner. To bring these two elements together and widen support and understanding of gender pay equity policies, consideration should be given to generalising a right to fair pay and equal pay for work of equal value within an employing organisation, to increase awareness and understanding, though this should not be allowed to detract from efforts to remedy the undervaluation of women's work. These should be complemented by legal and institutional support for a transparent environment, as this would contribute not only to the measurement and monitoring of progress in pay equity but would also shed light on the causes of continuing wage inequalities.

The contention that gender pay equality is more likely to be achieved in more inclusive labour markets and societies also implies that there are strong interactions across policy domains and mechanisms; action on one front may not be successful if it is not supported by complementary policies and reinforcing mechanisms. This applies to the entire range of policy mechanisms examined in this article, namely legal, collective or voluntary. Despite the complementarities between these different mechanisms, the existence of limitations finally suggests that there is also a need for new initiatives and new thinking, which could provide the basis for a renewed push for gender pay equity. Treating closing the gender pay gap as a human rights priority⁷⁸ would be a significant step towards ensuring progress in gender equality. In this respect, institutional mechanisms should address 'the complex task of regulating both individuals *and* institutions'.⁷⁹ The adoption and support of positive

⁷⁸ Hepple (n 67) 59.

⁷⁹ Colleen Sheppard, 'Mapping Anti-discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law' (2012) 151(1-2) *International Labour Review* 1,8 (emphasis in original).

equality duties at both international (eg. the ILO) and national levels would build on and strengthen the operation of existing mechanisms, supporting ultimately the eradication of pay discrimination and ensuring the objective of genuine gender equality.

Conceptualising Violence at Work Through A Gender Lens: Regulation and Strategies for Prevention and Redress

Katherine Lippel*

Abstract

Violence against women is notoriously pervasive and has been studied at length. Surprisingly less is known about the different facets of violence to which women are exposed at work. This article presents findings from a working paper commissioned by the Gender, Equality and Diversity Branch of the International Labour Organization to provide an overview of literature on occupational violence, from a broad range of disciplinary perspectives, including both conceptual papers and descriptions of regulatory frameworks from around the world. It first looks at definitions of workplace violence, including physical, psychological, sexual and discriminatory violence, including harassment, as well as workplace related intimate partner violence. It then turns to determinants of occupational violence, including psychosocial risk factors and structural violence. A discussion of the importance of using a gender lens to understand occupational violence and its roots concludes the conceptual section. Finally, the article presents different regulatory approaches to the prevention of occupational violence including both international and national instruments, again examined through a gender lens. It presents the case, in conclusion, for an *integrated* regulation of violence at work in

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order to maximize uptake of rights and effectiveness of prevention measures while promoting violence free workplaces for men and women.

Keywords: Occupational Violence, Gender, Regulation, Prevention, Work

1. Introduction

Violence against women is notoriously pervasive and has been studied at length. Surprisingly less is known about the different facets of violence to which women are exposed at work. In the context of the International Labour Organization's (ILO) women at work centenary initiative and also to inform the preparations for the discussion of a possible international convention and recommendation on violence and harassment in the world of work, the Gender, Equality and Diversity Branch of the International Labour Organization commissioned a working paper to provide an overview of literature on occupational violence, drawn from a broad range of disciplinary perspectives, including both conceptual papers and descriptions of regulatory frameworks from around the world. The report,¹ which builds on the 2006 ILO publication on violence at work,² considered literature in English, French, and Spanish. It provided a portrait of various categories of occupational violence and examined the prevalence of these different categories, in different countries, viewed through a gender lens. It then described different regulatory approaches including binding and non-binding initiatives,³ again viewed through a gender lens.

Workplace sexual violence, and sexual harassment in particular, have received attention in the literature and in regulatory strategies, but other types of violence to which women are disproportionately exposed either at work, because of the nature of their work, or while they travel to and

¹ This article is based on Katherine Lippel, 'Addressing Occupational Violence: An Overview of Conceptual and Policy Considerations Viewed Through a Gender Lens' (2016) ILO Working Paper No. 5/2016
<http://www.ilo.org/gender/Informationresources/Publications/WCMS_535656/lang-en/index.htm> accessed 24 April 2016.

² Duncan Chappell and Vittorio DiMartino, *Violence at Work* (3rd ed, ILO, 2006).

³ Teresa Fajardo, 'Soft Law' in *Oxford Bibliographies in International Law*
<<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml>> accessed 24 April 2016. For a discussion of corporate social responsibility and the human dignity of workers, see Isabelle Martin, 'Corporate Social Responsibility as Work Law? A Critical Assessment in the Light of the Principle of Human Dignity' (2015-2016) 19 Canadian Labour & Employment Law Journal 255.

from work, are less often addressed through a gender lens, and as a result, regulatory initiatives for promoting prevention and providing redress are less often conceptualized using a gender-sensitive analysis. This is a missed opportunity for crafting rules and practices that meet the needs of working women around the world.

The purpose of this article is to provide an overview of the findings of the report and to focus on priority strategies to ensure a better future for women at work. While it is hoped that the article will inform priority setting for discussions at the ILO, it is important to note that it does not seek to describe best practices in workplaces, best language in collective agreements or model voluntary standards. It does, however, include descriptions of some international and national regulatory approaches. The material is presented in two sections: the first describes the concepts and prevalence of various forms of occupational violence, prevention and intervention strategies discussed in the literature, and implications for women at work; the second provides an overview of national and international regulatory frameworks and raises questions as to the strengths and weaknesses of these frameworks from the perspective of working women.

2. Conceptualising Workplace Violence

This section explores various forms of workplace violence from a conceptual perspective and then applies a gender lens to identify intervention strategies.

A. Definitions of Workplace Violence

Workers are subjected to a myriad of forms of violence including physical violence, psychological violence (including harassment and bullying as well as verbal abuse), sexual violence (including sexual harassment and assault), other forms of discriminatory harassment, criminal violence, intimate partner violence related to the workplace, and technology-based violence including cyber-bullying. These categories are not mutually exclusive, but each raises challenges needing to be addressed. The relationship between the target of violence and the perpetrator is, of course, relevant. Violence can come from external sources, as in the case of robberies, external sources within the workplace, such as patients or school children, or internal sources, such as supervisors, colleagues or subordinates. With regard to internal violence, when it occurs between colleagues it is referred to as horizontal violence, while violence between

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different levels of the organisational hierarchy is referred to as vertical violence.

(i) Physical Violence

The World Health Organization (WHO) and the ILO defined physical violence in a joint questionnaire developed to study violence in the healthcare sector as 'the use of physical force against another person or group that results in physical, sexual or psychological harm, which includes, among others, beating, kicking, slapping, stabbing, shooting, pushing, biting and pinching'.⁴ Intention is not part of the definition, so that it includes not only behaviour that would be considered as a crime, but also acts by "perpetrators" who are not criminally liable for this type of behaviour, such as children, psychiatric patients, or residents of long term care facilities suffering from dementia.

In the United States, workplace homicide ranks very high in the statistics on work-related deaths for women, although this is less true for men. Due to a relatively segregated labour market, men are more likely to occupy jobs exposing them to other causes of work related fatalities. However, murder in the workplace, sometimes involving intimate partner perpetrators, has often been the first or second cause of workplace death for women in the U.S. in recent years.⁵

Physical violence committed by patients or students is often 'normalized' in the workplace, perceived to be part of the job,⁶ and in cases involving young children or legally incompetent adults it is highly unlikely that the criminal law would be applied. This said, in some countries, like the United States,⁷ violent crime is the primary focus of the literature on occupational violence, and the problems are

⁴ ILO et al, 'Workplace Violence in the Health Sector: Country Case Studies Research Instruments' (2003)
<http://www.who.int/violence_injury_prevention/violence/interpersonal/en/WVquestionnaire.pdf> accessed 28 May 2018.

⁵ The US Bureau of Labor Statistics reports that in 2014, among the workplace homicides in which women were the victims, the greatest share of assailants were relatives or domestic partners (32 percent of those homicides). In workplace homicides involving men, robbers were the most common type of assailant (33 percent). US Bureau of Labour Statistics, 'Census of Fatal Occupational Injuries Summary: 2016'
<<http://www.bls.gov/news.release/cfoi.nr0.htm>> accessed 21 February 2016.

⁶ This may affect reporting practices in surveys on occupational violence. See Markku Heiskanen, 'Violence at Work in Finland: Trends, Contents and Prevention' (2007) 8(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 22.

⁷ The US Bureau of Labor Statistics reports that, in 2014, 749 occupational deaths were attributable to 'violence and other injuries by persons or animals'. The number of workplace homicides was about the same as the total in 2013; in 2015 the figures rose by 2%. US Bureau of Labour Statistics (n 5).

conceptualized in the criminological literature on crime prevention more often than in that relating to occupational health.

A detailed study of criminal victimization in the workplace in Canada found that 37 per cent of violent workplace incidents had been reported to the police, and that male victims were much more likely than women to report to the police. The study suggests that this might be explained by the fact that men were more likely to have suffered injuries than women, and that 'women were more often victims of sexual assault, which has the lowest reporting rate to police'.⁸ Among the cases of workplace violence where the perpetrator was known to the victim, the perpetrator was a co-worker in 18 per cent of incidents.

Women occupying non-traditional jobs may be particularly vulnerable to acts of physical violence, as they are in the minority and their presence may be resented or they may be perceived to be vulnerable. South Africa has adopted regulatory incentives to increase the presence of women in mines, a move designed to promote women's equality and ensure their access to better jobs. Yet many of the women who take up this challenge have been exposed to physical and sexual violence in the workplace.⁹

(ii) Psychological Violence

A significant body of literature has developed in recent years on workplace bullying, a phenomenon labelled differently in different jurisdictions. Bullying is the term used in Australia, the United Kingdom, the United States and other Anglo-Saxon jurisdictions; mobbing is a term more commonly used in Scandinavian and German-speaking countries; *acoso* or *hostigamiento moral*, in Spanish; *harcèlement moral* in France and Belgium; *harcèlement psychologique* in French-speaking Canada and psychological harassment is used in some Canadian legislation. All these terms designate similar phenomena. They are used in this article interchangeably.¹⁰

⁸ Sylvain de Léséleuc, 'Criminal Victimization in the Workplace' (2007) Canadian Centre for Justice Statistics Profile Series 13
<<https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn000033259112-eng.pdf>> accessed 28 May 2018.

⁹ Lindiwe Zungu, 'Workplace Violence and Sexual Harassment Against Women Workers in the South African Mining Industry' (19-22 April 2016) Proceedings of the 10th International Conference on Workplace Bullying and Harassment, Auckland, New Zealand; Doret Botha, 'Women in Mining Still Exploited and Sexually Harassed' (2016) 14(1) South African Journal of Human Resource Management 753.

¹⁰ On the origin of the different terms in different linguistic contexts see, Katherine Lippel, 'The Law of Workplace Bullying: An International Overview' (2010) 32 Comparative Labor Law & Policy Journal 1.

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Leading scholars from organizational psychology, Ståle Einarsen and colleagues, define the concept as follows:

*Bullying at work is about repeated actions and practises that are directed against one or more workers; that are unwanted by the victim; that may be carried out deliberately or unconsciously, but clearly cause humiliation, offence, and distress; and that may interfere with work performance and/or cause an unpleasant working environment.*¹¹

They have also developed a precise measurement tool in the form of the Negative Act questionnaire.¹² Their definition has been widely applied in management and organizational psychology research.¹³ Regulators, on the other hand, define the term differently in light of the regulatory contexts in which they are introducing the concept, so it is possible to find laws that include one single serious event under the definition of psychological harassment in jurisdictions in which other forms of violence, like intimidation, are not explicitly regulated.¹⁴

Verbal abuse, which does not necessarily fit the definition of bullying, harassment or mobbing, is included in many studies examining occupational violence in the workplace,¹⁵ and in guidance material produced by the ILO for the purpose of risk assessments in the workplace.¹⁶ Technology provides a vehicle to multiply opportunities for verbal abuse, and recently researchers and regulators have been turning their attention to technology-based violence, including cyber-bullying (cyber-intimidation) and other forms of violence facilitated by social

¹¹ Ståle Einarsen et al (eds) *Bullying and Harassment in the Workplace: Development in Theory, Research and Practice* (2nd ed, CRC Press, 2011) 9.

¹² Dieter Zapf et al, 'Empirical Findings on Prevalence and Risk Groups of Bullying in the Workplace' in Ståle Einarsen et al (eds) *Bullying and Harassment in the Workplace: Development in Theory, Research and Practice* (2nd ed, CRC Press, 2011).

¹³ Al-Karim Samnani and Parbudy Singh, '20 Years of Workplace Bullying Research: A Review of the Antecedents and Consequences of Bullying in the Workplace' (2012) 17(6) *Aggression and Violent Behaviour* 581.

¹⁴ For example s. 81.18 of the Québec *Labour Standards Act*, R.S.Q. c. N-1.1, defines psychological harassment to include some one-off events. The literature also discusses single events of bullying that can be experienced as a critical life event; see, Premilla D'Cruz et al, 'The Workplace Bullying-Organizational Change Interface: Emerging Challenges for Human Resource Management' (2014) 25(10) *International Journal of Human Resource Management* 1434.

¹⁵ MB Fisekovic et al, 'Does Workplace Violence Exist in Primary Health Care? Evidence from Serbia' (2015) 25(4) *European Journal of Public Health* 693 applying the ILO, 'Workplace Violence in the Health Sector' (n 4).

¹⁶ ILO et al, 'Code of Practice: Workplace Violence in Services Sectors and Measures to Combat this Phenomenon' (2003) <http://www.ilo.org/safework/info/standards-and-instruments/codes/WCMS_107705/lang-en/index.htm> accessed 28 February 2016.

media and technology.¹⁷ Much of this work has looked at violence against women and girls, or cyber-bullying in schools, but little has focused on links between technology-based violence and work.

There are studies on workplace cyber-bullying looking at call centres in India,¹⁸ examining cyber-bullying across sectors in Sweden,¹⁹ and one from Australia which focused on male workers.²⁰ Some of this literature looks at violence using traditional technology, the telephone. Call centre personnel in Germany have been found to be at risk for sexual harassment.²¹ French personnel working in customer support departments were also found to be targets of violence from customers,²² as were call-centre workers in China.²³ Racial abuse is also a hazard of work in call centres.²⁴ A study of call-centre work in Mexico, involving a majority of women workers, documented the prevalence of verbal abuse to which workers were exposed as well as mechanisms they developed to deal with violent interactions with clients.²⁵

Regulation of cyber-bullying or cyber-based sexism is a challenge even in highly regulated societies, because of the ephemeral, non-physical nature of cyber posting. A recent Canadian judgment held that workplace human rights protections against discrimination on the basis of sex and marital status could not be applied to discriminatory speech expressed in a blog developed by a union in the context of collective

¹⁷ See Women's Legal and Human Rights Bureau, 'From Impunity to Justice: Domestic Legal Remedies for Cases of Technology-Related Violence Against Women' (2015) GenderIT.org <<http://www.genderit.org/node/4268/>> accessed 24 April 2018.

¹⁸ Premilla D'Cruz and Ernesto Noronha, 'The Interface Between Technology and Customer Cyberbullying: Evidence from India' (2014) 24(3) *Information and Organization* 176.

¹⁹ Rebecka Forssell, 'Exploring Cyberbullying and Face-to-Face Bullying in Working Life – Prevalence, Targets and Expressions' (2016) 58 *Computers in Human Behavior* 454.

²⁰ Carmel Privitera and Marilyn Anne Campbell, 'Cyberbullying: The New Face of Workplace Bullying?' (2009) 12 *CyberPsychology & Behavior* 395.

²¹ Sabine Sczesny and Dagmar Stahlberg 'Sexual Harassment over the Telephone: Occupational Risk at Call Centres' (2000) 14 *Work & Stress* 121.

²² Anne Chevalier et al. 'Working Conditions and Psychosocial Risk Factors of Employees in French Electricity and Gas Company Customer Support Departments' (2011) 84 *International Archives of Occupational and Environmental Health* 7.

²³ Xiaoyan Li and Erhua Zhou, 'Influence of Customer Verbal Aggression on Employee Turnover Intention' (2013) 51 *Management Decision* 890.

²⁴ Vandana Nath 'Aesthetic and Emotional Labour through Stigma: National Identity Management and Racial Abuse in Offshored Indian Call Centres' (2011) 25 *Work, Employment & Society* 709.

²⁵ Mireya Scarone and Leonor A. Cedillo, 'Psychosocial Risk Factors Among Telephone Service Workers: A Study of the Interaction Between Customer and Worker' (2007) 17 (1-2) *New Solutions* 137.

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bargaining. The Ontario Court of Appeal found that the speech in the blog had not been expressed ‘in the workplace’.²⁶

(iii) Sexual Violence

Definitions and measures of sexual harassment vary between jurisdictions and cultures.²⁷ The ILO Committee of Experts on the Application of Conventions and Recommendations defines sexual harassment as including the following elements:

*(1) (quid pro quo) any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men which is unwelcome, unreasonable and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or (2) (hostile work environment) conduct that creates an intimidating, hostile or humiliating working environment for the recipient.*²⁸

The European Directive 2006/54/EC (the recast directive) in article 2 defines both ‘harassment’ and ‘sexual harassment’.²⁹ Article 2(c) defines harassment: ‘where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment’. It also distinguishes it from ‘sexual harassment’: ‘where

²⁶ *Taylor-Baptiste v. Ontario Public Service Employees Union* (2015) Ontario Court of Appeal 495 [4].

²⁷ Chappell and Di Martino (n 2); Meg Bond et al, ‘Expanding Our Understanding of the Psychosocial Work Environment: A Compendium of Measures of Discrimination, Harassment and Work-Family Issues’ (NIOSH, 2007) <<https://www.cdc.gov/niosh/docs/2008-104/pdfs/2008-104.pdf>> accessed 24 April 2014; Yuki W.P. Huen, ‘Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken’ (2011) 47 Asian Survey 811; Rashida Ather, ‘Sexual Harassment at Workplace and Protective Measures for Women: National and International Perspectives’ (2013) 3 (4) IUP Law Review 33; Lidia Casas Becerra, ‘The Effectiveness of the Sexual Harassment Law in Chile: From Theory to Practice’ (PhD thesis, University of Ottawa 2016).

²⁸ ILO, ‘Giving Globalization a Human Face’ (2012) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf> accessed 24 April 2018; See also ILO Committee of Experts on the Application of Conventions and Recommendations, ‘General Observation Convention No 11’ (2003) 463.

²⁹ Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.' The Directive includes both harassment and sexual harassment in the definition of discrimination, which it prohibits. The Directive thus addresses both unwanted sexual attention in the workplace and the poisoned work environment. It is useful to note that some surveys on working conditions in Europe³⁰ and Québec³¹ have used questions on unwanted sexual attention as a proxy for sexual harassment, without asking about the poisoned work environment, which may in part explain low levels of reporting of sexual harassment in some surveys.

Literature from the United States specifies that the concept of sexual harassment can also include '*quid pro quo* behaviors where the unwelcome behavior becomes a term or condition of employment or advancement.'³²

Sexual harassment is under-reported,³³ and may overlap with other forms of violence³⁴ or be subsumed into the broader concept of psychological harassment, particularly if targets are stigmatized when complaining of sexual or gender based harassment.³⁵ The vast majority of targets of sexual harassment are women and the vast majority of perpetrators are men. However, there are cases of sexual harassment

³⁰ Eurofound, 'Physical and Psychological Violence at the Workplace' (Publications Office of the EU, 2013) <<http://www.eurofound.europa.eu/publications/foundation-findings/2014/working-conditions/foundation-findings-physical-and-psychological-violence-at-the-workplace>> accessed 24 April 2018. The report at page 8 notes that unwanted sexual attention was used as a proxy for sexual harassment until the 2010 survey.

³¹ Katherine Lippel et al, 'Violence au travail: Harcèlement psychologique, harcèlement sexuel et violence physique' in M. Vézina et al, *Enquête québécoise sur des conditions de travail, d'emploi, et de santé et de sécurité du travail* (EQCOTESST, 2011) 325 <<http://www.irsst.qc.ca/media/documents/PubIRSST/R-691.pdf>> accessed 18 June 2018.

³² Kimberly T. Schneider et al 'Sexual Harassment Research in the United States' in Ståle Einarsen et al (eds) *Bullying and Harassment in the Workplace: Development in Theory, Research and Practice* (2nd ed, CRC Press, 2011).

³³ Kristin Van De Griend and DeAnne Hilfinger Messias, 'Expanding the Conceptualization of Workplace Violence: Implications for Research, Policy, and Practice' (2014) 71 *Sex Roles* 33.

³⁴ Eurofound (n 30).

³⁵ Rachel Cox, 'From Sexual to Psychological Harassment: One Step Forward, Twenty-Five Years Back for Women's Equality at Work?' in Shelagh Day, Lucie Lamarche and Ken Norman (eds) *14 Arguments in Favour of Human Rights Institutions* (Irwin Law, 2014).

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where the targets are men, and the perpetrators may be either men or women.³⁶

Precarious employment, notably temporary contracts, has been found to increase the risk of exposure to sexual harassment in an Australian study,³⁷ and again in a Québec study,³⁸ although studies in both jurisdictions also found that the precariously employed were less likely to be exposed to psychological harassment.³⁹ This suggests that the phenomena are quite differently motivated, with sexual harassment being easier to perpetrate when targets are precariously employed, while psychological harassment being more likely to target workers on long-term contracts, perhaps because it is sometimes used strategically to exclude individuals from the workplace who are not perceived to be desirable by management or colleagues. Workers on temporary contracts may be excluded from the workplace simply by not renewing their contract, a strategy unavailable to management when the worker has better job security.

Women working in non-traditional jobs are particularly vulnerable to sexual harassment. Despite South Africa's efforts to promote women's participation in the mining industry, the prevalence of sexual harassment and sexual violence have led to calls for improved practices and leadership to ensure that sexual harassment policies are applied and that effective support systems for women put in place.⁴⁰

(iv) Discriminatory Harassment

Discriminatory harassment, including gender based harassment,⁴¹ has received less attention in the literature than sexual harassment. It has been prohibited in international instruments and national legislation in

³⁶ Paula McDonald and Sara Charlesworth, 'Workplace Sexual Harassment at the Margins' (2016) 30 *Work, Employment & Society* 118.

³⁷ Anthony D. LaMontagne et al, 'Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians' (2009) 33 *Australian and New Zealand Journal of Public Health* 173.

³⁸ Katherine Lippel et al, 'Workplace Psychological Harassment: Gendered Exposures and Implications for Policy' (2016) 46 (1) *International Journal of Law and Psychiatry* 74.

³⁹ *ibid*; Dominic Keuskamp et al, 'Workplace Bullying a Risk for Permanent Employees' (2012) 36 *Australian and New Zealand Journal of Public Health* 116.

⁴⁰ Botha (n 9).

⁴¹ Gender-based harassment is discriminatory harassment motivated by the gender of the target, and does not intrinsically involve sexual innuendo. Gender-based harassment, but not sexual-advance harassment, was found to be related to the under-representation of women in male-dominated workplaces, although men in female-dominated workplaces were not more exposed to either form of harassment, see Dana Kabat-Farr and Lilia M. Cortina, 'Sex-Based Harassment in Employment: New Insights into Gender and Context' (2014) 38 *Law and Human Behavior* 58.

North America, Australia, and Europe for a number of years. The legislation governing discriminatory harassment usually requires that the harassment be shown to be related to a prohibited ground of discrimination and the categories protected by national legislation vary considerably. Harassment against racialized minorities is understood to be prohibited in most human rights instruments, but the prohibition against harassment on the basis of age or sexual orientation is less universal. Even though harassment on the basis of ethnicity or race is prohibited in many countries, effectiveness of those protections is rarely studied. Those studies that do exist show that racialized minorities are more often exposed to harassment and discriminatory treatment.⁴² Bullying and harassment of workers with disabilities has not been studied extensively.⁴³

There is an emerging body of literature on harassment based on sexual orientation and gender identities,⁴⁴ notably in Australia,⁴⁵ where discrimination on the basis of sexual orientation is prohibited. In the United States, where sexual orientation is not included in Title VII protections,⁴⁶ researchers have documented adverse effects of discrimination and harassment related to sexual orientation and its effects on health, and have suggested regulatory measures to improve protection.⁴⁷

⁴² In Canada, see Stephanie Premji and Wayne Lewchuk, 'Racialized and Gendered Disparities in Occupational Exposures among Chinese and White Workers in Toronto' (2013) 19 (5) *Ethnicity & Health* 512; in the US, see Pat Chew, 'Freeing Racial Harassment from the Sexual Harassment Model' (2007) University of Pittsburgh School of Law Working Paper Series <<http://law.bepress.com/pittlwps/papers/art54>> accessed 24 April 2018.

⁴³ In the UK, see Ralph Fevre et al, 'The Ill-Treatment of Employees with Disabilities in British Workplaces' (2013) 27 *Work, Employment and Society* 288.

⁴⁴ On work-related discrimination toward transgender individuals in the US, see Varunee Sangganjanavanich and Javier Cavazos, 'Workplace Aggression: Toward Social Justice and Advocacy in Counseling for Transgender Individuals' (2010) 4 *Journal of LGBT Issues in Counseling* 187.

⁴⁵ Tania Ferfolja, 'Lesbian Teachers, Harassment and the Workplace' (2010) 26 *Teaching and Teacher Education* 408.

⁴⁶ Title VII of Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (US) as amended, prohibits discrimination in employment based on 'race, color, religion, sex (including pregnancy, childbirth and related medical conditions) and national origin'. The Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990) (US) prohibits discrimination on the basis of disability. See US Equal Employment Opportunity Commission, <<https://www.eeoc.gov/laws/statutes/titlevii.cfm>> accessed on 10 July 2016.

⁴⁷ Veronica Rabelo and Lilia Cortina, 'Two Sides of the Same Coin: Gender Harassment and Heterosexist Harassment in LGBQ Work Lives' (2014) 38 *Law and Human Behavior* 378.

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(v) Intimate Partner Violence and Work

Women are disproportionately targets of intimate partner violence, discussed here insofar as it relates to workplaces and work: intimate partner violence that occurs in the workplace and intimate partner violence that affects the worker's ability to do her work or keep her job.⁴⁸ Other issues in the literature include studies of the spill-over effect of work that can increase the risk of a worker becoming a perpetrator of domestic violence⁴⁹ and studies that call for workplaces to manage their employees who are perpetrators of domestic violence outside the workplace.⁵⁰

In the United States, intimate partner violence is considered to be a public health issue, and between 2003 and 2008, one third of workplace homicides among US women were perpetrated by a personal relation, the majority attributed to an intimate partner.⁵¹ Yet in the United Kingdom, the Health and Safety Executive uses the Crime Survey for England and Wales to report on violence at work but excludes domestic violence from the purview of the report because 'these cases are likely to be very different in nature from other experiences of violence at work.'⁵²

Domestic violence, regardless of where it occurs, can have a negative impact on the target's ability to get to work, to stay at work or to work well, and there are studies from New Zealand,⁵³ Canada,⁵⁴ Australia,⁵⁵

⁴⁸ A recent survey found that the consequences of domestic violence impact victims' work lives. See C. Nadine Wathen et al, 'The Impact of Domestic Violence in the Workplace: Results from a Pan-Canadian Survey' (2015) 57 JOEM e65.

⁴⁹ Scott A. Melzer, 'Gender, Work, and Intimate Violence: Men's Occupational Violence Spillover and Compensatory Violence' (2002) 64 Journal of Marriage and Family 820.

⁵⁰ Katherine Martinez, 'Not Just Domestic Violence: The Role of the Workplace in Mitigating Abusers' (2015) 15 University of Maryland Law Journal of Race, Religion, Gender & Class 15.

⁵¹ Hope P. Tiesman et al, 'Workplace Homicides among U.S. Women: The Role of Intimate Partner Violence' (2012) 22 Ann Epidemiol 227. See US Bureau of Labor (n 5): 'assailants in workplace homicides differed greatly depending on the gender of the decedent. Approximately 43 percent of female decedents were fatally assaulted by a relative or domestic partner; the corresponding figure for male decedents was 2 percent'.

⁵² Paul Buckley, 'Violence at Work 2016/2017' (2018) Health and Safety Executive (UK) <<http://www.hse.gov.uk/statistics/causinj/violence/work-related-violence-report-2018.pdf>> accessed 21 May 2018.

⁵³ Margaret M. Rayner-Thomas, 'The Impacts of Domestic Violence on Workers and the Workplace' (Master of Public Health Thesis, University of Auckland 2013).

⁵⁴ Wathen et al (n 48).

⁵⁵ Male Champions of Change, 'Playing Our Part: Workplace Responses to Domestic and Family Violence' (2015) <<http://malechampionsofchange.com/wp-content/uploads/2015/11/Playing-Our-Part-Male-Champions-of-Change-Letter.pdf>> accessed 6 February 2016.

and the United States⁵⁶ which document ways in which targets' performance at work can be negatively affected by intimate partner violence outside of work and ways in which they can be supported by workplaces.

B. Applying a Gender Lens to the Prevention of Workplace Violence

While it is not possible to provide an exhaustive overview of prevention strategies for the different forms of occupational violence and violence against women in the workplace and during the commute between home and work, here we will illustrate the types of interventions that could be or have been considered as effective in the prevention of violence. These types of interventions are primarily for the purpose of circumscribing the types of activities which need to be promoted by regulatory frameworks to be discussed in the next section. The purpose is not to determine whether criminal law, for example, is more effective than economic sanction. Rather, the hope is to illustrate, in light of the literature, examples of intervention strategies which could feasibly be implemented in workplaces and in communities if the proper (regulatory) incentives were in place.

(i) Identifying Determinants of Violence Targeting Workers

Occupational violence in its many forms is often associated with organizational factors that provide fertile ground for both internal and external violence. 'Systemic violence' refers to 'violence yielded by the working organization' and 'means that the structure of the organization can have features which make workers liable to violence. For example, maximizing the economic outcome of the organisation or simple indifference may lead to defective protection of the worker'.⁵⁷ The term 'structural violence' has been used

to identify the heavy workloads, low levels of decision-making autonomy, low status, rigid work routines and insufficient relational care as forms of violence. Not only are these poor working conditions

⁵⁶ Jessie B. Brown, 'Costs of Domestic Violence in the Employment Arena: A Call for Legal Reform and Community-Based Education Initiatives' (2008) 16 Virginia Journal of Social Policy & the Law 1; Julie Goldscheid, 'Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law' (2009) 18 Columbia Journal of Gender and Law 61.

⁵⁷ Heiskanen (n 6) 24.

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*experienced as sources of suffering but they prevent care workers from providing the kind of care they know they are capable of.*⁵⁸

The same authors link the streamlined treatment of residents in the context of restructuring of the health care sector with an increase in violence against care workers. For example the use of cost-saving strategies based on rationing of diapers in a residential care facility was found to be a trigger of violent incidents by residents against staff, who were instructed to not change a diaper of an incontinent elder unless a blue line appeared on the diaper, showing it to be sufficiently saturated to justify the cost of changing the diaper.⁵⁹

Exposure to a broad range of psychosocial risk factors, including organisational factors, has been found to be associated with bullying and harassment. Job strain (high work demands with low decision latitude), job insecurity⁶⁰ and a poor psychosocial safety climate⁶¹ are known determinants of workplace bullying, findings confirmed in reviews of the international scientific literature⁶² and in studies from Australia,⁶³ Belgium,⁶⁴ and Québec.⁶⁵ The literature also discusses other forms of workplace aggression, including incivility.⁶⁶ Some of these categories can be considered as psychosocial risk factors that are precursors to other forms of occupational violence.

⁵⁸ Albert Banerjee et al, 'Structural Violence in Long-Term, Residential Care for Older People: Comparing Canada and Scandinavia' (2012) 74 *Social Science & Medicine* 390, 391.

⁵⁹ Pat Armstrong et al, *They Deserve Better: The Long-Term Care Experience in Canada and Scandinavia*, (Canadian Centre for Policy Alternatives, 2009).

⁶⁰ Denise Salin and Helge Hoel, 'Organisational Causes of Workplace Bullying', in Ståle Einarsen et al (eds) *Bullying and Harassment in the Workplace: Development in Theory, Research and Practice* (2nd ed, CRC Press, 2011) 227. For explanatory pathways see Michelle R. Tuckey et al, 'Workplace Bullying: The Role of Psychosocial Work Environment Factors' (2009) 16(3) *International Journal of Stress Management* 215. For an overview see ILO, 'Psychosocial Risks, Stress and Violence in the World of Work' (2016) 8 (1-2) *International Journal of Labour Research* 1.

⁶¹ Tessa S. Bailey et al, 'A National Standard for Psychosocial Safety Climate (PSC): PSC 41 as the Benchmark for Low Risk of Job Strain and Depressive Symptoms' (2015) 20(1) *Journal of Occupational Health Psychology* 15. A healthy psychosocial safety climate requires management commitment to psychological health and safety; see Rachel Potter et al, '*Bullying & Harassment in Australian Workplaces*' (Safe Work Australia, 2016).

⁶² Salin and Hoel (n 60).

⁶³ Tuckey et al (n 60) and Potter et al (n 61).

⁶⁴ Elfi Baillien and Hans De Witte, 'Why is Organizational Change Related to Workplace Bullying? Role Conflict and Job Insecurity as Mediators' (2009) 30 (3) *Economic and Industrial Democracy* 348.

⁶⁵ Lippel et al, 'Workplace Psychological Harassment' (n 38).

⁶⁶ See Brad Estes and Jia Wang, 'Integrative Literature Review: Workplace Incivility: Impacts on Individual and Organizational Performance' (2008) 7 *Human Resource Development* 218.

A key factor in reducing exposure to psychological violence, including bullying and harassment, as well as sexual harassment is to find ways to make these behaviours unacceptable in the workplace. This is achieved not just by posting policies declaring them to be unacceptable but by changing the workplace culture so that there is a shared perception that such behaviour, that may have been prevalent and accepted years ago, is no longer tolerated either by management or by workers and their unions. The active participation of unions in educating the workforce with regard to sexual harassment⁶⁷ or bullying⁶⁸ can be far more successful in reducing these behaviours than top down orders from management or zero tolerance policies that raise the stakes for perpetrators, possibly exacerbating ill-feeling in the workplace.

A study of occupational hazards of call-centre work in Mexico discussed ways in which workers and their union can protect the health of workers exposed to violence, and concluded that participatory research with the workers and academics had empowered the workers to identify sources of distress and to act upon their knowledge.⁶⁹

Far less literature addresses the prevention of violence perpetrated while workers commute to and from work. In part, this is explained by the fact that in many countries, including those in North America, injury incurred while travelling to and from work is not compensable under workers' compensation law. Often prevention is driven by costs to the workplace, although some regulators have nonetheless provided guidance material to encourage employers to consider hazardous commutes when organizing the design of parking lots and scheduling shifts.⁷⁰ Vulnerability of women to violent attacks occurring while travelling to and from work has been acknowledged as an obstacle to integration of women in the mining workforce in South Africa, for example, where, despite incentives for mining companies to hire more women, the lack of accommodation for women at the mines, and the shift

⁶⁷ Trade Union Congress, 'Still Just a Bit of Banter: Sexual Harassment in the Workplace in 2016' (2016) <<https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>> accessed on 24 April 2018.

⁶⁸ Rachel Cox, 'Québec Unions' Role with Respect to Complaints of Psychological Harassment in the Workplace: The Peril and Promise of Implementing Individual Rights Through Collective Labour Relations' (2015) 13 (2) *Policy and Practice in Health and Safety* 69.

⁶⁹ Scarone and Cedillo (n 25).

⁷⁰ Worksafe BC, 'Take Care: How to Develop and Implement a Workplace Violence Prevention Program' <http://www.worksafebc.com/publications/health_and_safety/by_topic/assets/pdf/take_care.pdf> accessed 24 April 2018.

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design, require they travel long hours to get to and from work.⁷¹ The International Monetary Fund's report on integrating women into the Moroccan workforce has underlined the importance of improving public transport to facilitate and make more secure women's journeys to and from work.⁷²

Intimate partner violence relates to work either because the manifestations of violence occur at work, or because the workplace is called upon to accommodate the needs of workers who are targets of intimate partner violence outside the workplace. As we have seen above, there are ongoing discussions regarding regulatory protections in labour law to ensure targets' safety, on the one hand, and to require they be supported to ensure their ongoing employment, on the other.

(ii) Understanding the Gendered Nature of Workplace Violence

Unsurprisingly, women are more often the targets of sexual violence and domestic violence, but it is equally important to address work related physical violence, prevalent in certain sectors where women are in the majority, such as the health care sector. This is a priority issue in most countries, to the point where the ILO, in collaboration with the International Council of Nurses, the WHO and the Public Services International, developed a questionnaire designed to measure workplace violence in the health sector in different countries, and dozens of studies have focused on the risks of physical violence in the health sector in every continent.⁷³ Studies have also found that workers in the field of education are disproportionately targets of physical violence and threats of violence,⁷⁴ and again, women make up the majority of the workforce in education in many countries.

When work involves care giving (healthcare sector) and child rearing (education) violent acts perpetrated by patients and students have been found to be perceived as normal by supervisors and workers in these sectors. As a result, many incidents go unreported, and no prevention efforts are put into place because the problem is largely invisible. Putting an end to the normalization of physical violence would be a significant step towards reducing exposure of workers to acts of physical violence in

⁷¹ Asand P. Benya, 'Women in Mining: A Challenge to Occupational Culture in Mines' (Masters of Arts (Industrial Sociology) Thesis, University of the Witwatersrand 2009).

⁷² International Monetary Fund, 'Morocco: Reducing Gender Inequality Can Boost Growth' <<https://www.imf.org/en/News/Articles/2017/03/01/NA030117-Morocco-Reducing-Gender-Inequality-Can-Boost-Growth>> accessed on 24 June 2017.

⁷³ See Lippel, 'Addressing Occupational Violence' (n 1) 19.

⁷⁴ *ibid* 20.

these sectors.⁷⁵ Violence against domestic workers, particularly those living in the employer's home, has been especially hard to tackle as workers are alone with the perpetrators and often dependent on them for everything from their livelihood to their ability to remain in the country. This explains why violence in domestic work was one of the first categories to be addressed by an ILO convention.⁷⁶

Women have been found to be disproportionately targets of psychological violence in some studies but not in others. A Québec study found that socio-economic status within the workplace, related to position in the corporate hierarchy, education and salary, was protective for men: the higher their status, the less likely they were to be targets of psychological harassment, yet the same was not true for professional or managerial women, who were not protected by their status.⁷⁷ This example illustrates the importance of stratified analysis in studies of occupational violence. If all cases were analyzed together, it would have given the impression that the position in the hierarchy was protective for all workers. Only when you analyse data separately, by sex, can you see that specific types of violence play out differently for men and women.

Gender is not always a determinant in the exposure to violence. Other studies on bullying have not found gender differences, and it is likely that national contexts play a role in the gender dimensions of occupational violence, if we consider forms of violence that are potentially gender neutral, as opposed to sexual violence or intimate partner violence which is *a priori* gendered in its production. A systematic review of the literature on verbal violence, applying a gender lens, found that most studies did not conclude there were gender differences, although a few found that men were more exposed than women.⁷⁸

⁷⁵ *ibid* 25.

⁷⁶ *ibid* 20. See C189-Domestic Workers Convention, 2011 (No. 189).

⁷⁷ Lippel et al, 'Workplace Psychological Harassment' (n 38). See also Denise Salin, 'The Significance of Gender for Third Parties' Perceptions of Negative Interpersonal Behaviour: Labelling and Explaining Negative Acts' (2011) 18 *Gender, Work & Organization* 571.

⁷⁸ Stephane Guay et al, 'Verbal Violence in the Workplace According to Victims' Sex-a Systematic Review of the Literature' (2014) 19 *Aggression and Violent Behavior* 572.

3. Regulatory Protection from Workplace Violence and its Consequences

A. International and Regional Regulatory Approaches

There are no ILO conventions dedicated to occupational violence although a number of ILO instruments refer either directly or indirectly to certain manifestations of violence. For example, conventions looking at specific sectors such as domestic work⁷⁹ or maritime labour⁸⁰ contain language addressing some forms of occupational violence. Several UN human rights treaties and conventions contain provisions targeting specific categories of violence, such as sexual harassment, without focussing on the workplace. The UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families⁸¹ does focus on abuse and violence against migrant workers, although not specifically in the context of the workplace, but clearly it would apply to workplaces as well as the broader communities. The UN Convention on the Rights of Persons with Disabilities contains specific provisions on violence and abuse.⁸² The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been interpreted to encompass violence. CEDAW ‘provides protections against gender based violence, including sexual assault and harassment: the treaty’s definition of discrimination has been interpreted to include these abuses. [...] The General Recommendation also states clearly that sexual harassment in the workplace is a form of violence against women.’⁸³

There are also regional instruments, including the European Social Charter,⁸⁴ the European Council Directive 2000/78/EC,⁸⁵ the European Council Directive 2006/54/EC (The Recast Directive),⁸⁶ and

⁷⁹ Domestic Workers Convention (No. 76).

⁸⁰ ‘Amendments of 2016 to the Code of Maritime Labour Convention, 2006’ (2016) ILC.105/PR/3-1A.

⁸¹ Article 16(2) (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158.

⁸² Article 1(b) (harassment), Article 16 (violence and abuse), Article 27 (work and employment) (adopted 13 December 2006, entry into force 3 May 2008) A/RES/61/106

⁸³ adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 3; Margaret Satterthwaite, ‘Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers’ (2005) 8(1) Yale Human Rights & Development Law Journal 1, 19, 48.

⁸⁴ Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

⁸⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJL 303.

⁸⁶ The Recast Directive (n 29).

the European Council Directive 1989/89/391 on occupational health and safety.⁸⁷ These instruments do oblige states to report on their progress in addressing sexual harassment and bullying, to provide powers to inspectorates and remedies for targets of certain categories of occupational violence.⁸⁸ In Europe, there is also the Istanbul Convention on Violence against Women that contains provisions on sexual harassment and domestic violence, but that does not explicitly focus on work or violence in the workplace.⁸⁹ In Africa, there is the Maputo Protocol⁹⁰ on women that explicitly addresses sexual harassment at work, and sexual harassment in the workplace is also explicitly mentioned in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.⁹¹ In Asia, there is the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN,⁹² but there is no specific focus on work.

There is thus a patchwork quilt of provisions addressing some forms of violence against some categories of workers, of both sexes in some cases while applicable specifically to women in others, but to this day there is no international convention that addresses all forms of occupational violence and that seeks to ensure protection for all workers.

B. Selected National Approaches

There are a broad range of categories of national legislation that are either designed to address occupational violence or that may be used by targets who seek protection or who seek compensation for injury suffered at the hands of perpetrators of violence. Some are reserved for specific categories of violence while others, such as workers' compensation, can address all forms of workplace injury including injury attributable to

⁸⁷ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183.

⁸⁸ See Lippel, 'Addressing Occupational Violence' (n 1) 33-9.

⁸⁹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Council of Europe Treaty Series-No. 210).

⁹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (Maputo Protocol) (adopted 11 July 2003, entry into force 25 November 2005) CAB/LEG/66.6, art 1(j), 3(4) and 13(c).

⁹¹ Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará, 1994) art 2 <<https://www.oas.org/en/mesecvi/docs/BelemDoPara-ENGLISH.pdf>> accessed 24 April 2018.

⁹² Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, <http://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW_violenceagainstdchildren.pdf> accessed 24 April 2018.

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workplace physical and psychological violence. Not many regulatory approaches have been studied to determine their effectiveness, and what is effective in one jurisdiction may fail to be useful in another depending on the social climate, the nature of regulatory inspection, and the degree to which workers and employers are conscious of the specific type of violence to be eradicated.

The nature of the most effective regulatory approaches may depend on national context. For example, constitutional protections of workers guaranteeing decent working conditions and occupational health and safety protections are the recourse of choice for targets of bullying in Brazil,⁹³ Chile⁹⁴ and Columbia⁹⁵ because in these countries the violation of a constitutional right provides access to a simple, affordable remedy – the *tutela*. While several countries now have explicit legislation against bullying and harassment, the formal labour legislation only applies to employees, a situation ill-suited to economies such as that of Colombia, where the majority of workers are in the informal sector.⁹⁶

In contrast, explicit legislation on bullying can be very effective as a pedagogical tool in jurisdictions with a high rate of unionization and a largely formal workforce, particularly if the unions are called upon to provide representation to targets of bullying, not just to members who have been disciplined for acts of bullying. In Québec, for the 40% of the workforce that is unionized, the anti-bullying legislation requires that recourse be exercised through the union, and representation is provided by the state to non-unionized targets having a *prima facie* case.⁹⁷ This legislation, in force since 2004, has attracted a great deal of attention as well as a great deal of criticism as it places an onerous burden on unions to defend targets, while the Labour Code requires the union to defend members who have been sanctioned by the employer. In many cases the union must therefore defend both the target and the perpetrator, which creates conundrums and costs. However, one major effect of this regulatory approach is to have provided a compelling incentive to unions to educate their members regarding psychological harassment and sexual

⁹³ Julia Gitahy da Paixao, 'El Acoso Laboral en el Ordenamiento Jurídico del Brasil: Marco Legal Y Fallos Recientes' (2012) 7 *Revista Estudios Laborales* 123.

⁹⁴ Diego Lopez Fernandez, 'Legal Protection for Victims of Workplace Harassment in Chile' (2010) 32 *Comparative Labor Law & Policy Journal* 91; subsequent Chilean legislation introduced a specific recourse for targets of bullying.

⁹⁵ Laura Porras Santanilla, 'La Ley de acoso laboral en Colombia ¿facilitó o por el contrario dificultó la protección efectiva de las personas afectadas?' (2012) 7 *Revista Estudios Laborales* 141.

⁹⁶ *ibid.*

⁹⁷ See Cox 'Quebec Unions' (n 68) and Rachel Cox, 'Psychological Harassment Legislation in Québec: The First Five Years' (2010) 32 *Comparative Labor Law & Policy Journal* 55.

harassment, understood to be included within the purview of the anti-harassment legislation. Because all targets with a *prima facie* case are supposed to have representation, and because the employer is responsible for eliminating psychological harassment in the workplace, both employers and unions have a vested interest in ensuring prevention at the source. When this works well, which is often when relations between unions and management are constructive, the workplace actors reduce the risk of exposure to psychological harassment by intervening before situations get out of hand. However, when industrial relations are poor, the target of harassment becomes embroiled in a complex, drawn out, litigious process that can exacerbate any health problems that might result from exposure to psychological violence.⁹⁸

Aside from legislation targeting specific forms of violence, such as bullying and sexual harassment, a broad range of regulatory frameworks are applied to either prevent or punish workplace violence. These include general legislation such as criminal and civil law, human rights provisions and labour law (most notably non-discrimination law), and legislation governing occupational health and safety and workers' compensation.⁹⁹ Increasing costs of workers' compensation and sickness insurance associated with occupational violence have led in recent years to regulatory interventions to promote better risk assessments in workplaces with regard to violence.¹⁰⁰ In Belgium, where anti-bullying provisions were enacted in the Labour Code in 2002, changes were introduced in 2014 to require that psychosocial risk factors be addressed by employers, regardless of incidents of harassment or violence.¹⁰¹ The Occupational Safety and Health Administration (OSHA) of the US Department of Labor recently published a request for information, stating that 'OSHA is considering whether a standard is needed to protect healthcare and social assistance employees from workplace violence'.¹⁰² Although this is not an exhaustive overview of recent developments, it shows that

⁹⁸ Cox 'Quebec Unions' (n 68). The same conclusions apply to prevention of psychosocial hazards more generally; see David Walters, 'Worker Representation and Psycho-Social Risks: A Problematic Relationship?' (2011) 49 *Safety Science* 599.

⁹⁹ See Lippel, 'Addressing Occupational Violence' (n 1) 39-49.

¹⁰⁰ In 2016, Norway amended the regulation on the conduct of work to impose stricter obligations on companies to assess the risk of threats and violence against their employees and to train their employees on how to prevent and deal with threats and violence; see Eurofound, 'Norway: Latest Working Life Developments - Q4 2016' (2017) <<https://www.eurofound.europa.eu/observatories/eurwork/articles/norway-latest-working-life-developments-q4-2016>> accessed 2 March 2017.

¹⁰¹ Federal Public Service Employment, Labour and Social Dialogue, 'Nouvelle législation relative aux risques psychosociaux au travail à partir du 1er septembre 2014.' <<http://www.emploi.belgique.be/defaultNews.aspx?id=41483>> accessed 24 April 2018.

¹⁰² RIN 1218-AD 08, 'Prevention of Workplace Violence in Healthcare and Social Assistance' (7 December 2016) 81(235) Federal Register 88147.

occupational violence is high on the agenda of various countries, albeit with different priorities and different approaches to the issue.

C. Applying a Gender Lens to the Regulation of Workplace Violence

Several authors have noted that remedies sought by women alleging workplace violence perpetrated by colleagues or subordinates appear to be compromised by the natural identification of traditional workplace actors and regulators with the target of sanctions imposed by the employer. For example, Lidia Casas Becerra, in her doctoral thesis on uptake of sexual harassment legislative protections in Chile, describes obstacles to effective implementation of sexual harassment legislation in the workplace.¹⁰³ First, women workers themselves were hesitant to label unwanted sexual attention as sexual harassment, and were thus unlikely to complain or to draw the attention of labour inspectors. Workplaces in Chile are required to address sexual harassment in internal regulations, but many participants in her study were unaware of the existence of such rules. Finally, when workers did try to exercise their rights, decision makers were often hesitant to punish perpetrators of sexual harassment as the labour courts had a long tradition of protecting job security. In the majority of cases studied, the perpetrator was the plaintiff contesting disciplinary measures, and the success rates of perpetrators contesting the sanction imposed by the employer was actually higher than the success rate of targets of sexual harassment who had filed complaints. Her results suggest that addressing external violence is more easily the subject of a workplace consensus than addressing internal violence where supervisors and colleagues are the perpetrators.

Sometimes the explicit regulatory interventions distinguish between internal and external violence in a way that may appear to trivialize internal violence as compared to that involving perpetrators from outside the workplace. For example, an early occupational health and safety regulation adopted in British Columbia and is still in force, prohibits violence from all sources but labels all forms of violence by internal perpetrators, including physical or sexual violence, as 'improper behaviour' while reserving the term 'violence' for 'attempted or actual exercise of physical force by a person other than a worker so as to cause injury to a worker'.¹⁰⁴ This regulatory approach sends the message that internal violence is somehow less important than external violence, particularly given that obligations placed on employers are less stringent with regard to 'improper behaviour'. Yet nothing in the literature

¹⁰³ Casas Becerra (n 27).

¹⁰⁴ *Occupational Health and Safety Regulation* (BC Reg 296/97) ss 4.24-2.27.

suggests that negative health effects are greater when the perpetrator comes from outside the organization. On the contrary, studies have found few differences in health consequences but they have found that internal violence has a greater impact on targets' well-being and ability to remain in the job.¹⁰⁵

A judgment from the Ontario Court of Appeal failed to overturn a lower court judgment that weighed competing human rights values in this context. The facts illustrated a conflict between the freedom of expression of the union president, who criticized a manager in terms that crassly focussed on her personal life, and the protection of workers from sexism. All decisions in this case found in favour of the union president's free speech, thereby trivializing the sexist nature of the speech in a way that suggested it was reasonable to conclude that the complainant's equality rights had not been violated. In the words of the Divisional Court, as cited by the Court of Appeal, 'her concern and upset would have been largely the same whether the point about her relationship with Mr. [...] was made using sexist language or not.'¹⁰⁶ The Court of Appeal approved the reasoning of the Human Rights Tribunal when it went on to specify that 'hate speech' or 'violent expression' were not protected under the right to freedom of expression in The Canadian Charter of Rights and Freedoms but that the blog postings, judged to be protected speech, 'were not hate speech. They contained rude, distasteful and sexist remarks which even [the author] acknowledged upon reflection appeared to him to have been "written by an asshole"''.¹⁰⁷

4. Conclusion

Occupational violence affects both men and women, although it is clear that they may be targeted differently, for different reasons and in different ways. All workers who are victims of violence may suffer serious health consequences to both their physical and mental health. Rather than focussing only on the promotion of protections for women in the workplace, it seems that the more effective strategy to ensure uptake of regulatory protections by employers of workers, their representatives and society as a whole, is to include prevention and protection against

¹⁰⁵ M. Sandy Hershcovis and Julian Barling, 'Towards a Multi-Foci Approach to Workplace Aggression: A Meta-Analytic Review of Outcomes from Different Perpetrators' (2010) 31 *Journal of Organizational Behavior* 24.

¹⁰⁶ *Taylor-Baptiste* (n 26) [47]; *Taylor-Baptiste v Ontario Public Service Employee Union*, (2014) 323 OAC 376 (Divisional Court).

¹⁰⁷ *Taylor-Baptiste* (n 26) [47] - [67].

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violence in the workplace in a range of legislative and other instruments. This should include occupational health and safety and workers' compensation legislation that applies to all workers, thus ensuring that the protections are mainstreamed. Advantages of integrating the right of all workers to protection against violence in labour legislation include a better and more uniform understanding of the existence of provisions, and an inclusionary approach that makes violence against all workers everybody's business. Parallel legislation targeting only violence against women may be more easily marginalized or ignored, relying on regulators rather than workplaces to ensure its adequate application. In a globalised labour market where inspectorates, particularly human rights inspectorates, are often underfunded and perceived as marginal to the workplace, it seems more likely that protections will apply effectively if employers, unions and all workers feel they benefit from protective legislation but also that they will be sanctioned if they themselves fail to protect workers or, worse, act as perpetrators of workplace violence.

It can be said that addressing violence that targets women at work requires reflection and interventions at the crossroads between occupational health and safety frameworks and frameworks designed to detect and address sexism and discrimination. To date, national and international regulators and researchers have not embraced a holistic view. In most discussions, issues have been addressed in silos: those interested in sexual violence lobby for specific remedies without consideration of the broader question regarding all forms of occupational violence and their determinants, while those interested in workers' health are blind to the gender dimensions of occupational violence in all its forms.

Criminal violence against women is disproportionately invisible because women don't report sexual violence. Sexual harassment is also hugely underreported, and when alternative recourse is available, as in jurisdictions where sexual harassment is included in the concept of bullying, the discriminatory dimension becomes even more invisible.¹⁰⁸ When violence occurs in the workplace many jurisdictions do not disaggregate reports on violence in the workplace by gender, and domestic violence at work, including homicides, goes largely unreported in studies of workplace violence in many countries, including the UK. This invisibility of the gendered dimensions of occupational violence undermines the effectiveness of prevention strategies and discourages anti-discrimination initiatives. Addressing the occupational violence which all workers are exposed to is important, but it must not be done at

¹⁰⁸ See Cox 'Sexual to Psychological Harassment' (n 35) and Casas Becerra (n 27).

the expense of making visible the gendered and discriminatory dimensions of workplace violence.

Governments must be accountable. To enable men and women to participate equally in the labour market, it is necessary to ensure that they can get to work safely and work in safe workplaces where they will not be targets of occupational violence because they are workers or because of their gender.

An Employment Right-Standard Provisions for Working Women Experiencing Domestic Violence

Ludo McFerran, Anna Lee Fos-Tuvera and Jane Aeberhard-Hodges*

Abstract

In many countries the majority of those experiencing domestic violence are in paid employment. Maintaining employment and economic independence is a critical pathway to reducing the impacts of domestic violence of homelessness and unemployment. Yet, the workplace is not firmly part of an integrated global response to reducing the impacts of domestic violence. The link between domestic violence and the workplace is part of the current ILO debate on an international gender-based violence labour standard. There are a growing number of national strategies responding to the impacts of domestic violence that spill over into the workplace in the form of attendance, performance and safety. This article focuses on two different jurisdictional approaches, from Australia (collective bargaining) and the Philippines (national legislation) to assess the efficacy of different approaches and increase international knowledge sharing on this critical work challenge. Using comparative methodology, this article analyses the factors that have contributed to

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improved conditions and implementation of domestic violence rights at work, the special role of trade union bodies in driving advances and maintaining good implementation, and the challenges to further progress in areas such as small business and employed domestic violence perpetrators. The authors call on progressive employers to support the global campaign for sustainable domestic violence rights at work.

Keywords: Gender-Based Violence, Rights at Work, Australia, The Philippines

1. Introduction

Violence in and out of work, in the form of both domestic violence and sexual harassment, is a violation of human rights and impacts heavily in the workplace. All forms of violence result in a high cost for workers, employers and society in general: lost time, injuries, complaints, staff turnover, loss of skills, and reputational risk. While the discourse to date has been centred around domestic violence in national actions plans under the auspice of the UN or regional instruments, including Sustainable Development Goal 5, the spillover to workplaces has only been covered by a few recent international labour standards. The references to workplace violence have focused on specific groups of high-risk workers, such as domestic workers, persons living with HIV and Indigenous peoples. The International Labour Organization (ILO) has decided to discuss, in 2018, an international labour standard on this subject, and the link between domestic violence and the workplace is firmly part of the global debate.¹ In the context of a better future for women at work, this article enriches the knowledge base from a comparative perspective.

Defining the impacts of domestic violence that spill over into the workplace has been assisted by the study of recent developments in a number of national contexts. This includes collective bargaining and employment law reform in Australia; anti-discrimination law reform in the United States; occupational health and safety law reform in Ontario, Canada; and violence against women legislation that addresses the workplace in Spain, the Philippines and most recently Italy and New Zealand. There are many different responses to domestic violence at

¹ ILC, 'Ending Violence and Harassment Against Women and Men in the Worlds of Work' (2018) ILC, 107th Session, Report V(1), ILO, [202]-[207]; ILC, 'Provisional Records Nos 8A & 8B: Reports of the Standard-Setting Committee on Violence and Harassment Against Women and Men in the World of Work' (2018) 107th Session.

work. By focusing on two different jurisdictional approaches, from Australia and the Philippines, to assess the efficacy of different approaches, this article increases international knowledge sharing on this critical work challenge. Using comparative methodology, this article analyses the factors that have contributed to improved conditions and implementation of domestic violence rights at work, the special role of trade union bodies in driving advances and maintaining good implementation, and the challenges to further progress. The article focuses on these two countries because of the commonalities behind their different approaches, which at first sight may appear diametrically opposed: Australian and the Philippines. In Australia, the approach is largely via domestic violence clauses in collective bargaining agreements where the direct actors in the world of work negotiate solutions through a voluntary dialogue that leads to a binding agreement. In the Philippines, the approach takes the form of legislation. Yet, in both contexts, activism and evidence-based research have been partly behind the introduction of new kinds of employment rights, such as domestic violence leave, the right to request flexible working time so as to attend to domestic violence related matters, and a broadening of existing workplace anti-discrimination rights to embrace domestic violence.

2. Case Study: Australia

A. The Conditions for Securing the Shift to Standardised Support

Recognising a gap in worker rights and protection regarding gender-based violence, Australian trade unions adopted collective bargaining in 2010 to introduce standardised rights for workers affected by domestic violence in enterprise agreements.² By December 2016, the Federal Department of Employment estimates that over two thousand agreements contained a domestic violence clause, and that in the final quarter of that year a third of all agreements approved contained a domestic violence clause, covering 75 per cent of all employees in agreements.³ While there are great variations in content, a domestic

² For a description of the Australian employment arrangement see Appendix 1.

³ Department of Employment Workplace Agreement Database data provided to McFerran 10 March 2017. Between 2013-2016 Workplace Agreement Database has estimated that 2,191 not expired agreements and potentially 2,591 still operative agreements contained a domestic violence clause, covering a range of 1,098,047 to 1,375,497 workers. The number of employees in Australia is approx 12 million.

violence clause ideally covers dedicated paid leave, flexible work arrangements, confidentiality of employee details, workplace safety plans or strategies (for example, screening of phone calls or emails), referral processes to support services, protection from discrimination or adverse action and training, among other labour rights.⁴

Building on the success of collective bargaining, and concern for workers not covered by agreements, the Australian Council of Trade Unions (ACTU) put a case before the national industrial tribunal, the Fair Work Commission (FWC), in 2016 for the inclusion of paid domestic violence leave in modern awards.⁵ Public sector unions had already began negotiating domestic violence rights at work with Australian governments, and all have varied awards, negotiated agreements or introduced guidelines for the employer to provide domestic violence pay and support.

In October 2017, the FWC organised conferences to discuss the content of the proposed model domestic violence clause and concluded that: ‘in the event that the Full Bench adhered to the preliminary view expressed in the majority decision and determined that there should be a model unpaid family and domestic violence leave term then the conference parties propose the [compromise] model term attached.’ That model term includes the following acceptance of unpaid domestic violence leave (for victims but not perpetrators):

An employee experiencing family or domestic violence may access unpaid leave if it is necessary to deal with the impact of the family and domestic violence and it is impractical for the employee to do so outside their ordinary hours of work.

Agreements in the final quarter of 2016 containing a domestic violence clause were predominantly in the private sector (85 to 88 per cent).

⁴ These were the fields covered in the 2015 ACTU-University of New South Wales funded study of employers’ perspectives on implementation of domestic violence clauses cited see Appendix 2.

⁵ Success before the FWC would extend coverage to workers not covered by agreements and would set a national benchmark. A decision on the case was expected in 2017 but FWC proceedings were extended because a Vice President had released his (negative) decision before the other Full Bench members had finalized their decisions (Workplace Express, Saturday 29 April 2017); when other members delivered their preliminary views expressed in the majority decision that ‘all employees should have access to *unpaid* family and domestic violence leave’ (emphasis added) (*4 yearly review of modern awards—Family & Domestic Violence Leave Clause* [2017] FWCFB 3494 at [6]), a number of the employer organizations reserved their right to oppose any provision of unpaid leave at the hearing of this matter.

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Note 1: The entitlement to take unpaid leave only applies to an employee subjected to family and domestic violence.

Note 2: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.⁶

Before 2010 a number of Australian programs had sought to encourage employers to opt into supportive policies on the issue of domestic violence, such as the conservative government sponsored ‘Businesses Against Domestic Violence’.⁷ Yet, the evidence was that the optional policy had not produced widespread or sustainable results.⁸ One obstacle may have been a misconception that domestic violence only affects those in lower socio-economic groups or women from certain cultural groups. This was debunked by an Australian Bureau of Statistics survey on personal safety in 2005 which found that nearly two-thirds (62.9 per cent) of Australian women who reported experiencing violence by a current partner were not in abject poverty, but in paid employment.⁹

A contributing factor that prepared the Australian world of work for a major shift in domestic violence included progress in the Australian domestic violence strategy. This strategy had taken shape in the 1980s following the creation in the previous decade of a number of women’s refuges by feminists. The strategy concentrated on a criminal justice response through state-based domestic violence legislation, creating the domestic violence protection order, and enhanced access to public

⁶ *FWC Statement* [2017] FWC 5445. The entitlement of part-time and casual employees and what quantum of unpaid leave *per annum* remains contested.

⁷ Strategic Partners Pty Ltd et al, ‘Current Perspectives on Domestic Violence: A Review of National and International Literature’ (1999) Partnerships Against Domestic Violence 20 <<https://wesnet.org.au/wp-content/uploads/2012/07/PADV-Lit-review.pdf>> accessed 16 July 2018.

⁸ Suellen Murray and Anastasia Powell, ‘Working It Out: Domestic Violence Issues and the Workplace’ (2018) 16 Australian Domestic and Family Violence Clearinghouse.

⁹ Australian Bureau of Statistics, ‘Personal Safety Survey, Australia’ (2005) Reissue 4906.0, Table 20. Similar results are reported in Sweden with sixty-seven point nine per cent (Lotta Nybergh et al, ‘Self-Reported Exposure to Intimate Partner Violence Among Women and Men in Sweden: Results From a Population-Based Survey’ (2013) 13 BMC Public Health 845); Rwanda fifty-two point nine per cent (Dana R. Thomson et al, ‘Correlates of Intimate Partner Violence Against Women During a Time of Rapid Social Transition in Rwanda: Analysis of the 2005 and 2010 Demographic and Health Surveys’ (2015) 15 BMC Women’s Health 96; and the Philippines fifty-seven per cent according to the Philippine Statistics Authority and ICF International, ‘Philippines National Demographic and Health Survey 2013’ (2014) <<https://dhsprogram.com/pubs/pdf/FR294/FR294.pdf>> accessed 3 February 2017.

housing post-refuge. Essentially the model remained the same for several decades: in the best case scenario, police removed women and their children from their homes, placing them in a refuge, the court granted them a protection order, and they may have been re-housed at some point in public housing. By the 1990s there was growing pressure to improve the options for women and children by supporting them to stay safely in their own homes, excluding the violent partner or family member if necessary. When new programs for women to stay safely in their homes were introduced, the majority of women accessing support were in some form of employment.¹⁰ Many of these women spoke about how important the support of their workplace had been in enabling them to make the often very difficult choices to stay in their homes rather than flee. Many attributed this support to the character of their employer:

*I was piloting the New South Wales Safe at Home model in the mid 2000s and was struck by the phrase 'I was lucky, I had a good boss'. Keeping the job, getting time off work to go to court, or having better security at work were real practical supports for working women struggling to hold onto their homes. Luck should have nothing to do with it.*¹¹

Evidence of the business and personal costs was another factor. The total costs of lost productivity to the Australian economy associated with domestic violence were estimated at \$484 million (AUS) in the year 2002-2003.¹² These findings were mirrored in a number of other countries.¹³

¹⁰ Ludo McFerran, 'Taking Back the Castle: How Australia is Making the Home Safer for Women and Children' (2016) Issues Paper 14 ADFVC 13.

¹¹ Ludo McFerran, 'Has Collective Bargaining Domestic Violence Worked?' (Women and Work Research Group, Business School Conference, Sydney University, 9 March 2016) <http://sydney.edu.au/business/_data/assets/pdf_file/0006/263247/Mcferran_DV@work_paper_for_IWD.pdf> accessed 2 February 2017.

¹² Access Economics Pty Ltd, 'The Cost of Domestic Violence to the Australian Economy' (2004) Office for the Status of Women Canberra <https://www.dss.gov.au/sites/default/files/documents/05_2012/cost_of_dv_to_australian_economy_i_1.pdf> accessed 17 February 2017.

¹³ In Chile women's lost earnings as a result of severe physical domestic violence were estimated to cost 2 per cent of the country's gross domestic product in 1996 and one point six per cent in Nicaragua (Mayra Buvinic and Andrew Morrison, 'Violence as an Obstacle to Development' (1999) Inter-American Development Bank <<https://publications.iadb.org/bitstream/handle/11319/5273/Technical%20Note%204%3a%20Economic%20and%20Social%20Consequences%20of%20Violence.pdf?sequence=1>> accessed 20 February 2017. The United States lost an estimated eight million days of paid work annually, costing employers almost \$728 million (National Center for Injury Prevention and Control, 'Costs of Intimate Partner Violence Against Women in the United States' (2003) <<http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>>

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Links were drawn between staying financially independent and becoming trapped in violent relationships: 'Employment is a critical pathway to ensure women's financial security. Internationally, the links between economic independence, employment and the impact of domestic violence have been steadily developing'.¹⁴

Further evidence of the effects of domestic violence in Australian workplaces was collected in a national online survey conducted in 2011 by the Australian Domestic and Family Violence Clearinghouse (ADFVC) of 3,600 members of the National Tertiary Education Union, the New South Wales Nurses Association and the Victorian branch of the Australian Services Union.¹⁵ The findings demonstrated clear impacts on the attendance, productivity and safety of employees. Nearly half of those who had experienced domestic violence reported that the violence had affected their capacity to get to work, primarily due to injury or being restrained. Nearly one in five (19 per cent) who had experienced domestic violence in the previous twelve months reported that the violence continued at the workplace: abusive phone calls, emails or texts, and the attendance of the abusive person at the workplace. In later research, the majority of workers who had experienced domestic violence (59 per cent) reported a negative effect on their work performance: feeling distracted, anxious, and unwell.¹⁶ Women's vulnerability to economic insecurity was highlighted as the decade drew on, with 2016 statistical analysis and qualitative evidence demonstrating how domestic violence contributes to alarming levels of financial stress among Australian women

accessed 17 February 2017). In the UK the estimated economic costs of domestic violence in relation to time taken off work due to injuries was £1920 million in 2008 (Sylvia Walby, 'The Cost of Domestic Violence: Up-date 2009' (2009) UNESCO Chair in Gender Research, Lancaster University <http://edvitaly-project.unimib.it/wp.../12/Cost_of_domestic_violence_update-1.doc> accessed 16 July 2018).

¹⁴ Council of Australian Governments, 'Building a Strong Foundation Safe and Free from Violence: National Implementation Plan for the First Action Plan 2010-2013' (2012) 12

<https://www.dss.gov.au/sites/default/files/documents/07_2014/first_action_plan_1.pdf> accessed 16 July 2018.

¹⁵ Ludo McFerran, 'Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey' (2011) <http://dvatworknet.org/sites/dvatworknet.org/files/Australia_survey_report_nov2011.pdf> accessed 16 July 2018.

¹⁶ Ludo McFerran, Natasha Cortis and Tahlia Trijbetz, 'Domestic and Family Violence Clauses in your Workplace: Implementation and Good Practice' (2013) Social Policy Research Centre and Centre for Gender Related Violence Studies University of New South Wales.

and recommending keeping paid employment and industrial relations protection as part of the holistic solutions.¹⁷

There was a realisation that inaction was weighing heavily on not only individuals, but also firms' bottom line and the nation's finances - something needed to be done. The conditions were right for a shift from optional to guaranteed engagement by employers. From the experience of women who thought themselves lucky to have a good boss, came the idea of a standard workplace right, a domestic violence clause.

B. Developing a Domestic Violence Clause

A draft Australian domestic violence clause was created in April 2010 through a partnership between the ADFVC¹⁸ and the public sector unions in the state of New South Wales.¹⁹ The first claim for a domestic violence clause²⁰ was made in the bargaining round for an enterprise agreement in the university sector, but first successfully negotiated in the local government sector by the Australian Services Union Victorian Authorities and Services Branch (ASU) in September 2010. The ADFVC and the unions had drawn heavily on model domestic violence agreements negotiated by UNISON, the British public service union, but one innovation in the Australian clause was the claim for *paid* leave, providing the aggrieved employee with time to do what is critically necessary in instances of domestic violence, such as going to court and obtaining a protection order. With up to twenty days paid domestic violence leave, the first Australian domestic violence clause created 'world's best practice'.²¹

The ACTU adopted the domestic violence policy at its 2012 national conference, urging all affiliates to use the clause. Within four years, 34 of the 38 ACTU affiliates had become parties to negotiating a domestic violence clause. Union support for a domestic violence clause in collective

¹⁷ Natasha Cortis and Jane Bullen, 'Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress: Final Report' (2016) Horizons <<https://d2c0ikyv46o3b1.cloudfront.net/anrows.org.au/s3fs-public/page-attachments/ANROWS%20Horizons%20Report%20-%20Domestic%20violence%20and%20womens%20economic%20security.pdf>> accessed 16 July 2018.

¹⁸ The ADFVC (based at the University of New South Wales from 1999-2014) was effectively the national domestic and family violence centre for research, information collection and dissemination, and good practice monitoring.

¹⁹ The NSW Public Service Association and the Community and Public Service Union (CPSU) SPSF NSW Branch.

²⁰ See Appendix 2 for ACTU's model domestic violence clause.

²¹ Marian Baird, Ludo McFerran and Ingrid Wright, 'An Equality Bargaining Breakthrough: Paid Domestic Violence Leave' (2014) 56(2) *Journal of Industrial Relations* 198.

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bargaining marked a breakthrough role for Australian unions by creating a new industrial relations issue, the impacts of domestic violence at work, and a new form of paid leave.²² This elevated the workplace response out of the optional basket for employers and firmly into the mainstream national strategy on domestic violence.

C. Factors Contributing to Successful Bargaining

Some of the factors which led to early bargaining of domestic violence clauses were described in the case study by Baird et al on a domestic violence clause negotiated between a union and a local government council.²³ One factor identified was the role of the expert external agency, in this case the ADFVC, which was able to provide objective advice on domestic violence to all parties. For the ADFVC, the purpose of enforceable and standardised workplace rights in a domestic violence clause was to avoid the vagaries of managerial discretion by providing consistency and clarity for affected workers.²⁴ Critical input from women in the negotiations was a further factor, as these women were able to draw on personal experiences of domestic violence to provide authenticity to the claims. Baird et al. also described the reputation and image of the parties as a factor:

For the Union, the importance of this clause to their members, the growing proportion of female membership they aspired to represent and the awareness of the issue in the communities they dealt with, all contributed to the internal recognition of the need to support the claim. For the Council, operating and providing services in a domain where domestic and family violence was well understood and where there is a role for the Council to be a leader in addressing the problem, served to support the inclusion of the paid domestic violence leave clause.²⁵

²² Australian unions had been allocated no role in the previous national domestic violence strategy. UN and Council of Europe guidance on drawing up violence against women national action plans still does not include reference to the workplace or collective bargaining. Where the workplace is referred to it is usually in relation to employers and companies rather than trade unions.

²³ Baird et al (n 21).

²⁴ ADFVC, 'Submission to ALRC Issues Paper on Family Violence and Commonwealth Laws – Employment and Superannuation' (2011) 15 <www.arts.unsw.edu.au/media/FASSFile/Submission_in_Response_to_the_ALRC_Issues_Paper_on_Family_Violence_and_Commonwealth_Laws__Employment_and_Superannuation.pdf> accessed 2 February 2017.

²⁵ Baird et al (n 21) 204.

As more unions included domestic violence clauses in their log of claims, evidence of the effects of domestic violence in the workplace became a necessary part of negotiating. The above-mentioned 2011 ADFVC survey of 3,600 union members did just that. The findings not only demonstrated clear impacts on the attendance, productivity and safety of employees but also challenged assumptions about the link between domestic violence and the workplace. The belief that workers would be reluctant to disclose was overturned as nearly half (45 per cent) of workers with recent experience of domestic violence disclosed their situation to someone at work, although more to co-workers than management or human resources staff. Nevertheless, nearly half did disclose to a manager or supervisor, though only 10 per cent found their response helpful. This last result was less surprising as most managers and supervisors in 2011 had no training or resources in responding appropriately to domestic violence. The findings also revealed that co-workers were more affected than anticipated, having to support and protect their abused colleagues or by being directly threatened or assaulted. Besides providing important evidence to inform unions and employers of how domestic violence could spill over into the workplace, the research informed the provision of better workplace support such as the need for supervisor and manager training and the need for all-of-workplace policies to protect co-workers as well as those individuals directly involved.

These were important learning points that were later reflected in some domestic violence clauses. For example, in August 2017, Rio Tinto became Australia's first mining company to offer a comprehensive package of measures to address domestic violence in its workforce. Employees who are directly affected by family or domestic violence will be eligible for emergency accommodation, short-term financial assistance and up to ten days of dedicated leave to seek legal assistance, appear in court, attend counselling or relocate. The benefits will be extended to 19,000 workers. At-risk Rio Tinto employees will have access to safety plans to protect them while at work, including security, new telephone numbers, screening or blocking calls and email protection. Company team leaders and human resources staff will continue to be trained to recognise and respond to family and domestic violence in the workplace.

D. Partners as Factors

Forming partnerships was a significant element in progressing domestic violence rights at work. Key partners were governments: as employers and policymakers, from the pioneering engagement of local councils in

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early agreements to the provision of public sector paid domestic violence leave by states such as Victoria (twenty days) and political support for national employment law reform to include domestic violence.²⁶ There was even a Commonwealth Public Service Commission circular, issued under the National Plan to Reduce Violence against Women and their Children, permitting domestic violence leave,²⁷ use of which was apparently not tracked. The support of the national government to fund the development and implementation of standardised domestic violence rights at work was an important contributing factor. The then Commonwealth Labour Government funded a three-year program from 2010 to 2013, 'Safe at Home, Safe at Work' at the ADFVC. This support enabled the national survey on the impacts of domestic violence at work on individuals and co-workers discussed above, the creation of resource tools to inform individuals of their rights, to assist employers and unions in policy development and negotiating, and a training program for key personnel. The Labour Government also amended the national employment legislation (Fair Work Amendment Act 2013) to introduce a domestic violence provision (the right to request flexible leave). Unfortunately, the current Liberal-National Government is less supportive, blocking the inclusion of a domestic violence clause in negotiation of new Commonwealth public service agreements.²⁸

Other important partners included a number of independent statutory authorities. The Australian Law Reform Commission conducted an inquiry into Commonwealth laws and domestic violence and recommended that the government supports domestic violence clauses in enterprise agreements.²⁹ The Australian Human Rights

²⁶ Josh Gordon, 'Daniel Andrews still waiting for PM's answer on his family violence leave plans' *The Age* (Victoria, 18 October 2016) <www.theage.com.au/victoria/daniel-andrews-still-waiting-for-pms-answer-on-his-family-violence-leave-plans-20161018-gs4x9l.html> accessed 2 February 2017.

²⁷ Commonwealth Circular, 'Supporting Employees Affected by Domestic or Family Violence' (2012/3, Last updated 23 Nov 2012) clause 17 of which reads: 'In accordance with agencies' enterprise agreements, people who are affected by domestic or family violence should be allowed to access their personal leave entitlements for reasons such as: (a) Attending medical or counselling appointments; (b) Moving into emergency accommodation and seeking more permanent safe housing; (c) Attending court hearings; (d) Attending police appointments; (e) Accessing legal advice; and (f) Organising alternative care and educational arrangements for their children.'

²⁸ Noel Towell, 'Malcolm Turnbull's public servants lose domestic violence leave' *The Canberra Times* (Canberra, 8 March 2016) <www.canberratimes.com.au/national/public-service/malcolm-turnbulls-public-servants-lose-domestic-violence-leave-20160308-gndjcr.html> accessed 2 February 2017.

²⁹ Australian Law Reform Commission, 'Family Violence and Commonwealth Laws-Improving Legal Frameworks' (2012) Report 117 Recommendation 16-4 <<https://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117>> accessed 16 July 2018.

Commission recommended that discrimination on the grounds of domestic violence be unlawful in all areas of public life including the workplace.³⁰ The Fair Work Commission (FWC) in a landmark domestic violence and work case ordered a Melbourne employer to pay maximum compensation to a domestic violence victim unfairly sacked because her employer claimed they could not protect her from her partner who worked in the same office.³¹ This, and a further similar case,³² show that there has emerged a new principle in Australian workplace law requiring employers to provide an ‘added duty’ of care for domestic violence victims at work. This ‘added duty’ of care at work for domestic violence victims rests on the fact that they rely on workplaces for financial/economic security and physical security from abuse.

While some employer groups have been resistant to the introduction of domestic violence rights at work, insisting as recently as 2014 that the violence is a community responsibility without any workplace impacts,³³ others have been supportive. The National Retail Association (NRA) CEO has called for her members to pay domestic violence leave to affected workers.³⁴ Individual employers have taken their own initiatives. According to the Chief Executive of iconic boot-makers Blundstone, a company which adopted ten days domestic violence leave for its ninety workers: ‘We put an enormous amount of investment in people, and it disrupts small to medium size businesses a lot if they lose their good

³⁰ Australian Human Rights Commission, ‘Consolidation of Commonwealth Discrimination Law’ (2012) Supplementary Submission to the Commonwealth Attorney-General’s Department <<https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%2020021%20-%20Australian%20Human%20Rights%20Commission%20-%2023%20January%202012.PDF>> accessed 16 July 2018.

³¹ Chloe Taylor, ‘Landmark Case sees FWC Rule in Favour of Domestic Violence Victim’ *HRD Online*, (*HRC Online*, 27 July 2015) <<http://www.hcamag.com/hr-news/landmark-case-sees-fwc-rule-in-favour-of-domestic-violence-victim-203135.aspx>> accessed 2 February 2017.

³² *King v D.C Lee & L.J Lyons* [2016] FWC 1664.

³³ Anna Patty, ‘Domestic Violence leave - ACTU wage case application’ *Sydney Morning Herald* (Sydney, 28 October 2014) <www.smh.com.au/nsw/domestic-violence-leave--actu-wage-case-application-20141027-11ccew.html> accessed 2 February 2017.

³⁴ Renee Viellaris, ‘Retail Group Backs Proposals for Paid Leave for Staff Victims of Domestic Violence’ *The Sunday Mail (Qld)* (Queensland, 2 October 2016) <<http://online.isentialink.com/heraldsun.com.au/2016/10/01/da14dfcb-9f17-45a5-b237-e03db5b76137.html>> accessed 2 February 2017. The NRA estimates that, ‘almost 45,000 women, working within the Australian retail industry, experienced some form of family violence in 2014/15. This is approximately 6.7 per cent of the female workforce’. See National Retail Association, ‘Family Violence and the Australian Retail Industry’ (2016) <www.nra.net.au/wpcontent/uploads/2015/09/RetailFV_Mar2016_Final.pdf> accessed 2 February 2017.

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people...There is a straight out business imperative to get involved here'.³⁵ At the other end of the scale, CEOs from many of Australia's largest companies publicly endorsed paid domestic violence leave.³⁶ According to Telstra Australia, the inclusion of ten days paid domestic violence leave in their Enterprise Agreement 2015-2018 has not 'opened the floodgates' with 22 out of a workforce of 32,000 accessing the leave in the first six months, and only taking an average leave of 2.3 days.³⁷

Very similar results emerged from a 2015 survey of over one hundred private sector employers who had negotiated a domestic violence clause in their enterprise agreement.³⁸ The average paid domestic violence leave taken in a 12 month period was 43 hours, with a range of 8-202 hours. Per incident, where time off was requested, most employees took two to three days or less. Few employers reported any challenges implementing domestic violence clauses, on the contrary commenting that 'having domestic/family violence clauses demonstrated support for staff and resulted in a more positive, supportive work environment'.³⁹

The Victorian public sector provision of 20 days paid domestic violence leave had been accessed by 58 employees in the first 12 months (mid 2016-2017), requiring an average of five days leave.⁴⁰ It, therefore, appears that both the private and public sectors are embracing gender-based violence protections at work.

Yet the 'costs' of introducing paid domestic violence leave has remained a contentious issue for some, most recently raised by both the Commonwealth Government and employer groups in opposition to the

³⁵ ABC News, 'Bootmaker Blundstone offers paid domestic violence leave to employees' (*ABC News*, 2 June 2015) <<http://www.abc.net.au/news/2015-06-02/bootmaker-blundstone-offers-domestic-violence-leave-to-employees/6513744>> accessed 2 February 2017.

³⁶ Male Champions of Change, 'Playing Our Part: Workplace Responses to Domestic and Family Violence' (November 2015) <<http://malechampionsofchange.com/wp-content/uploads/2015/11/Playing-Our-Part-16-Days.pdf>> accessed 2 February 2017.

³⁷ Commonwealth Circular (n 27).

³⁸ Gendered Violence Research Network, 'Implementation of Domestic Violence Clauses – An Employers' Perspective' (2015) <<https://www.actu.org.au/media/886612/implementation-of-dv-clauses-an-employers-perspective.pdf>> accessed 16 July 2018.

³⁹ Other positive effects noted by respondents were: the clause raised awareness of the issue within the workplace and reduced stigma; enhanced the overall employer reputation and status; staff were able to take leave without stress; improved cooperation with unions which helped with bargaining; employees felt more comfortable and confident speaking to management about requesting support; and the clause contributed to morale-building within their organisation.

⁴⁰ Melissa L. Davey, 'More than 50 public sector workers claim family violence leave in Victoria' *The Guardian* (London, 8 June 2017) <<https://www.theguardian.com/society/2017/jun/09/more-than-50-public-sector-workers-claim-family-violence-leave-in-victoria>> accessed 9 June 2017.

ACTU claim for ten days paid domestic violence leave in modern awards, discussed above. The latest analysis calculates a cost neutral outcome: 'The costs to employers associated with those payouts are likely to be largely or completely offset by benefits to employers associated with the provision of paid domestic violence leave: including reduced turnover and improved productivity'.⁴¹ While the argument for workers' rights in situations of gender-based violence and the domestic violence spill over to workplaces is a strong one and the FCW preliminary view is favourable to *unpaid* leave, a final decision on a model domestic violence clause in modern awards is still awaited.

E. Unacceptable Variation

The major negative outcome of the collective bargaining on domestic violence in Australia has been the non-standard nature of the conditions negotiated. An analysis of clauses up to September 2015 found that the leave conditions being negotiated between Australian unions and employers varied widely.⁴² The range of variation is of concern as the ACTU had provided a model domestic violence clause to its affiliates. The model domestic violence clause is a package of supports, which includes paid domestic violence leave, but also safety planning, protection from adverse action or discrimination, training of key personnel, and referral to domestic violence experts. The dedicated leave has always attracted the most attention but all the conditions in the model clause are necessary to provide effective support, meaning that a holistic approach has the best chance of greatest sustainable impact. However, evidence from the above-mentioned employer survey (2015) now shows that there has been a concentration on the issue of leave, to the detriment of the other equally important elements of this labour protection. The neglect of other conditions, and the varied nature of the very conditions being negotiated, suggest that collective bargaining has not met the goal of introducing minimum terms and conditions. This finding supports the need for minimum standards which can only be made available in enforceable national instruments such as modern awards and employment legislation.

⁴¹ Jim Stanford, 'Economic Aspects of Paid Domestic Violence leave provisions' (2016) Centre for Future Work at the Australia Institute Briefing Paper 3 <http://www.tai.org.au/sites/default/files/Economic_Aspects_Domestic_Violence_Leave.pdf> accessed 16 July 2018.

⁴² Ludo McFerran, 'Expert Report of Ludo McFerran: Analysis of Enterprise Agreements 2014–2015' (2016) Expert witness report for ACTU, FWC hearings Section 156 – 4 Yearly Review of Modern Awards, Family and Domestic Violence Leave (AM2015/1).

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The variation in conditions that have been negotiated in Australian domestic violence clauses could have been reduced if they had been monitored, and training for negotiators provided, yet Australia has had no national monitoring system since 2013. The failure of government to commit resources to support a national implementation program also means there is currently no good practice national training or resources to assist individual workers, employers or unions. Instead, there has been a loss of the good resources developed and poorly informed trainers are stepping into the vacuum.

Nevertheless, there was a marked improvement in the standard of leave conditions in 2016. Up to September 2015, less than 30 per cent of agreements with a domestic violence clause contained a provision of dedicated paid domestic violence leave. In 2016 this rose to over two thirds (67.5 per cent), with the standard leave available being ten days. The explanation may be found in Victoria, a state responsible for two-thirds of the 2016 agreements certified by the FWC that contain a domestic violence clause. The Victorian Labour state government funded the union movement (Victorian Trades Hall Council) in 2015 to provide domestic violence at work training to unions and employers, and to monitor the conditions being negotiated in domestic violence clauses. An estimated 85 per cent of the 2016 Victorian clauses now contain dedicated paid leave, and Victoria still accounts for the bulk of clauses that provide 20 days.⁴³ While similar training and resource support could be introduced state by state, surely the lesson is that standardised provisions need good implementation and oversight strategies that stem from enforceable rights enshrined at the national and international levels.

3. Case Study: The Philippines

Several elements characterize the legislative approach of the Philippines including an early commitment to international standards on gender-based violence, public advocacy, forming of coalitions to face up to particularly high-profile situations, and later on the use of evidence based on a survey.

⁴³ WAD Data (n 3).

A. Anti-Violence Against Women and Their Children Act 2004

The Philippines is an early adopter of gender-based violence protection in the world of work: ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1981, the Optional Protocol to the CEDAW in 2003, and introducing in 2004 cutting-edge legislation to protect working women affected by domestic violence. Contributing factors may have been an improving economy⁴⁴ and relatively high rates of female participation in the labour force.⁴⁵ The early adoption of domestic violence workplace rights in Philippine legislation may also have been influenced by the process of advocacy. A decade of sustained advocacy by ‘victim - survivors, women’s human rights advocates and organisations, women legislators, government agencies and the National Commission on the Role of Filipino Women’⁴⁶ produced the Anti-Violence Against Women and Their Children Act Republic Act 9262 of 2004 (Anti-VAWC Act). Section 43 of the Act contains access to ten days paid leave and protection from adverse action and discrimination in the workplace. The consultative process of drafting the bill ‘allowed women to articulate their needs, an element of human rights perspective that has been lacking in the Philippine legislative process’.⁴⁷ This inclusive process, and the extended discussion on the scope of the bill, may have contributed to a broader understanding of

⁴⁴ World Bank, ‘Philippine Economic Update: Pursuing Inclusive Growth Through Sustainable Reconstruction and Job Creation’ (2014) Poverty Reduction and Economic Management Unit, Philippine Country Office East Asia and Pacific Region, Report No. 83315-PH. To some degree the conditions have been favourable, with the Philippine economy experiencing higher growth in recent years, yet 75 per cent of workers are poorly protected in informal employment, and the poverty incidence declining ‘only moderately between 2009-2012.’

⁴⁵ Philippines Statistical Authority, ‘National Demographic and Health Survey 2013’ (2014) <<https://dhsprogram.com/pubs/pdf/fr294/fr294.pdf>> accessed 17 July 2018. Nearly half the working age female population in the workforce and approximately 60 per cent of Filipina women who have experienced domestic violence are in employment. According to 2017 statistics, in Australia the workforce participation rate for women is 59.1 per cent. See Australian Workplace Gender Equality Agency, ‘Gender Workplace Statistics at a Glance’ (2018) <https://www.wgea.gov.au/sites/default/files/Stats_at_a_Glance.pdf> accessed 17 July 2018.

⁴⁶ Rowena V Guanzon, ‘Laws on Violence against Women in the Philippines’ (2008) UN Office on Drugs and Crime and Division for the Advancement of Women 12 <http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20%28Rowena%20Guanzon%29.pdf> accessed 21 January 2017.

⁴⁷ M. P. Munez, ‘Can Reforms Withstand Guns-and-Gold Politics? A Report on the Philippines’ in Friedrich Ebert Stiftung (ed) *Gaining Ground? SEA Women in Politics and Decision-Making. Ten Years After Beijing: A Compilation of Five Country Reports* (2nd ed, Philippine Office, 2005) 187 <<http://ci.nii.ac.jp/ncid/BA79087345>> accessed 21 January 2017.

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potential locations of the violence, beyond the home and including the workplace.⁴⁸

Arriving at this legislation was linked in particular to massive public reaction to the domestic violence suffered by and leading to the death, on 23 November 2001, of Maria Teresa Carlson, the wife of a local politician, who had complained about her husband's mistreatment. Once this news was out, advocates pushed the campaign to reconcile a number of pieces of draft legislation on the subject, resulting in a unity bill before Congress. Advocacy took strength through the creation of *Task Force Maria*, a coalition of at least 23 women's and people's organisations reacting to Ms Carlson's death. The Task Force took the Philippines Commission on Human Rights to task for failing to act on her publicised disclosures. The then President of the Philippines, Gloria Arroyo, signed the bill into law on International Women's Day 8 March 2004. In addition to the workplace leave, the Anti-VAWC Act includes provisions shielding victims with protection orders without having to file a case in court and recognising the 'battered woman syndrome' as a defence in litigation.⁴⁹

However, there have been problems identified by Professor Guanzon of the University of the Philippines College of Law with the implementation of the Anti-VAWC Act, and the lack of budgetary appropriation in the law for implementation:

*The legislators who sponsored the Anti-VAWC Act believed that the law would be passed without serious obstacles if there was no specific amount as appropriation or funds for its implementation. They merely provided in Section 45 of the law that an amount shall be included in the annual General Appropriations Act, and the Gender and Development (GAD) budget of the mandated agencies and local governments shall be used to implement services for victims. This proved to be a crucial gap, because although the national agencies have their GAD budget (five per cent of their total budget), the elimination of violence against women and training of government personnel and support services for victims of violence against women may not be the agency's priority.*⁵⁰

⁴⁸ According to ibid advocates discussing a proposed domestic violence Bill in 1997 wanted a broader bill that extended protection beyond the home.

⁴⁹ 'The Unhappy Life of Maria Theresa Carlson' *News Break Archive*, (*News Break Archive*, 12 December 2001) <<http://archives.newsbreak-knowledge.ph/2001/12/12/the-unhappy-life-of-maria-theresa-carlson/>> accessed on 15 January 2018.

⁵⁰ Davey (n 40). Several studies even indicated that agencies have been underspending on GAD budgets and have interpreted GAD so loosely that sports development projects and a dump/fire truck, sound system and motor vehicles for general use, for examples, have crept in as qualified for GAD funding.

Moreover, the CEDAW Committee in its 2016 Conclusions on the Philippines report stated at paragraph 25 that '[it was] concerned about ... (b) The limited scope of the [Anti VAWC Act], which is focused mainly on domestic violence by intimate partners'.⁵¹ The government's earlier reports to the CEDAW Committee openly expressed concern about finances lacking for the implementation of its plans for gender mainstreaming and described how the GAD five per cent budget appropriation is a measure to mitigate this challenge.⁵²

B. Testing the Implementation of the Act

The results of the failure to fund implementation were starkly exposed when the International Trade Union Confederation Asia-Pacific (ITUC-AP) and the Philippine affiliates⁵³ conducted a domestic violence at work survey amongst members. The ITUC-AP Senior Officer for Women and Projects received support from the ITUC-AP General Secretary to conduct online surveys in a number of Asia Pacific countries, replicating surveys which had been conducted by the ACTU and the New Zealand Council of Trade Unions (NZCTU). This was an initiative which fitted well with the current campaigns of ITUC itself.⁵⁴ The Philippines was the leading candidate to conduct the survey because of the existence of the Anti-VAWC Act, the need to establish awareness of worker's rights within the Act, and consequently to assess the level of implementation of those rights. Furthermore, the policy of industrial tripartism in the Philippines has given unions access to national decision making on worker's rights and conditions. Union bodies such as the Trade Union Congress of the Philippines (TUCP), with the support of certain trade union solidarity support organizations, have actively campaigned on issues such as sexual harassment and discrimination against women, and participated in a number of domestic violence initiatives including the establishment and operation of pre-legislation 'alternative structures' such as women's desks and support facilities lodged at the TUCP. They also supported domestic violence training for public lawyers. The TUCP

⁵¹ The CEDAW Committee, 'Concluding Observations : Philipinnes' (2016) CEDAW/C/PHL/CO/7-8.

⁵² 'Fifth and Sixth Periodic State Report: Philippines' (2004) CEDAW/C/PHL/5-6 [110]-[112].

⁵³ Referring to the Trade Union Congress of the Philippines (TUCP); Federation of Free Workers (FFW) and Sentro ng mga Nagkakaisa at Progresibong Manggagawa (SENTRO).

⁵⁴ Campaigns for the rights of domestic workers and for an ILO convention on gender based violence in the workplace.

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lobbied for the passage of ordinances which provide for the allocation of funds for domestic violence and GAD awareness programs, and the inclusion of information on violence against women in government-mandated pre-departure orientation seminars for overseas workers.

The 2015 ITUC-AP/Philippine affiliates' survey on the impact of domestic violence on workers and workplaces found that one in five respondents reported having experienced domestic violence. Of this group, 75 per cent reported that their work performance suffered, over half reported that the violence followed them into work and nearly 84 per cent reported that the violence affected their attendance at work. Yet respondents' awareness of legally mandated paid domestic violence leave was low at 39 per cent, take up of domestic violence leave was even lower, at only 23 per cent of affected workers, and one in four said employers did not 'act in a positive way when workers report their domestic violence experience.'⁵⁵ Unlike previous domestic violence at work surveys (Australia, New Zealand, UK, Turkey and Canada) the Philippine survey contained a section specifically for domestic workers, and found that despite the legal protection afforded to domestic workers, 30 per cent had experienced abuse in their employer's household, and a proportion had experienced abuse both at home and at work.

C. Effect of Survey Findings

The most positive response to the survey launched in September 2015, has been from the national organisation of human resource managers, People Management Association of the Philippines (PMAP),⁵⁶ which signed a Memorandum of Understanding (MOU) with TUCP in November 2016 to conduct joint programs to address domestic violence in the workplace. Participants at the PMAP's 52nd Annual Conference in October 2015 had expressed surprise at the survey findings presented by TUCP. PMAP will use TUCP as the provider of free resource persons and materials for training programs on domestic violence, assist TUCP in addressing queries from unionised member companies regarding domestic violence at the workplace, and communicate with all of its unionised member companies about the program.

⁵⁵ ITUC-AP, 'National Survey on the Impacts of Domestic Violence on Workers and Workplaces in the Philippines' (Launch of the joint ITUC-AP/Philippine Affiliates Research Findings and Dissemination Forum, Manila, 2015). Conducted between June-September 2015, a total of 1,084 workers completed the survey, the majority of who were from unionized enterprises, mostly in permanent and full-time positions.

⁵⁶ An organization of over 1,800 member companies and individual management executives specializing in human resources.

ITUC-AP has maintained a focus on the elimination of violence against women, in particular on domestic violence. The Regional General Council (the second highest body of the organisation) adopted two resolutions (in 2014 and 2015) signifying its firm commitment to deepening understanding of domestic violence by replicating domestic violence at work surveys in coordination with partners, and stepping up joint efforts to curb gender-based violence including domestic violence at the workplace. Two new surveys started in September 2016. Meetings of Mongolian and Taiwanese affiliates with key stakeholders resulted in initial commitments to improve laws, protection and services for workers experiencing domestic violence. Other affiliates responded positively to the call of ITUC-AP for increased engagement on gender-based violence advocacy. The Israeli trade union body HISTADRUT signed a similar cooperation agreement in November 2016 with the Presidium of Business Organizations (employers' group) on joint workplace prevention and assistance for victims.

Domestic violence also became the focus of ITUC-AP regional and affiliates' national campaigns and the subject of enterprise discussions. In particular, gender-based violence became the central theme of unions' International Women's Day (8 March 2016) and World Day for Decent Work (7 October 2016) celebrations calling for better, healthier and gender-based violence-free and supportive workplaces. Regional meetings (Bangkok 2015) and workshops (Manila 2016) discussed affiliates' on-going initiatives on domestic violence at work, identified gaps and priority areas to strengthen and advance coordinated responses and developed actions plans and strategies to promote domestic violence to employers, governments and others. Key findings of the Philippine survey and initiatives of ITUC-AP were presented to the APEC 'Enhancing Opportunity for Women in Asia Pacific Conference' in Taiwan, March 2016, and at the UN Commission on the Status of Women 60th Session side event 'Safe at Home, Safe at Work' in New York, March 2016.

As a key next step toward supporting the work of affiliates, in particular the Philippine affiliates, the Chinese Federation of Labour (CFL) in Taiwan and the Confederation of Mongolian Trade Unions (CMTU), the ITUC-AP sent a staff mission to Toronto, Canada to understand how the Canadian Labour Congress (CLC) has adapted the Unifor (Canada's largest private sector union) model of Women's

Advocate Program for other Canadian affiliates.⁵⁷ An Asia-Pacific version of the Women's Advocate Program was to be launched in 2017.⁵⁸

4. Information Sharing Internationally: Lessons from the Australian and Philippines Experiences

The developments that occurred in Australia and the Philippines represent two different strategies for protecting workers affected by domestic violence: through national legislation and collective bargaining. In both countries, the exercise of conducting national surveys to highlight the impacts of domestic violence on workers was successful in raising the awareness of union members, in providing evidence for employers and governments when negotiating agreements and law reform, and in informing the resources and training necessary for good implementation of workplace rights. One lesson that can be drawn from the Australian experience is that, once armed with the evidence, collective bargaining was effective in breaking a sense of inertia in the workplace on the issue of domestic violence. Engaged unions could break through the rhetoric that domestic violence is a personal matter that does not affect the world of work. Similarly, the unions in the Philippines were able to expose poor employer and employee awareness of legal rights and the consequences of government inactivity.

A feature of the process of evidence collection by surveys and the promotion of minimum standards and good implementation has been international cooperation. This was exemplified by the creation in 2013 of an International Domestic Violence at Work Network. The network comprises domestic violence researchers, experts, social and labour organisations, and employers.⁵⁹ An example of good cooperation is the

⁵⁷ It is an institutionalized and negotiated program which aims to create safer workplaces and communities for women by recognizing and providing support and resources for women experiencing violence and/or harassment.

⁵⁸ The International Transport Workers Federation, with support from Swedish affiliate SEKO and solidarity support organization Union to Union, is also working with affiliates in India, Nepal, Australia, Peru and Libya to develop the Canadian model of women's advocacy programmes. Source: Jodi Evans, ITF Women Transport Workers Equality Officer, email correspondence with author (7 February 2017).

⁵⁹ The international domestic violence at work network (www.dvatworknet.org) received funding from the Social Science and Humanities Council of Canada to develop knowledge of international developments. Co-ordinated by the Centre for Research and Education on Violence Against Women and Children, Western University, Ontario, the network has created a set of core domestic violence at work survey questions based on the

role taken by a number of global union federations in the network, raising the opportunity for multinationals to provide global conditions to employees. Larger corporations in financial services, transport, telecommunications and tertiary education many with global employees, dominate the agreements negotiated in Australia.⁶⁰ Vodafone, for example, with over 100,000 employees globally, was one of the first organisations in the world to introduce a mandatory minimum global maternity policy.⁶¹ Vodafone Australia introduced ten days paid domestic violence leave and could extend this entitlement to its global staff. It is hoped that other business will follow in its footsteps. Union Network International (UNI) global union has gathered information from their affiliated unions around the world for a survey on the impacts of domestic violence at work that has been translated into five languages.⁶² The UNI World Women's Committee, representing ten million women in the skills and services sectors around the world, hosted a meeting of the domestic violence at work network in their HQ in Switzerland, to present and discuss the survey. According to the UNI World Women's President: 'I think we have a key opportunity to tackle domestic violence and UNI will be calling on all affiliates to step up, lobby for an ILO convention on violence against women and men at work and transform the lives of millions all over the world'.⁶³ A good case study is presented by UNI (Case Study 5) of the South African Commercial, Catering and Allied Workers Union that used a good domestic violence legislative framework to gain leverage when negotiating domestic violence clauses in collective agreements.⁶⁴

Australian model (2011). Surveys have been conducted in Australia (2011), New Zealand (2013), the United Kingdom (2014), Canada (2014), Turkey (2015) and the Philippines (2015), collecting and analysing employees' experiences of domestic violence and how this has affected their workplaces and the workplaces responses. Findings across the surveys have consistently found similar impacts on attendance, performance and safety.

⁶⁰ Department of Employment Workplace Agreement Database, data provided to McFerran 11 October 2016. Less than 8 per cent of all agreements approved by the FWC from July-September 2015 contained a domestic violence clause, yet the workers covered by these agreements represented 64 per cent of all workers in agreements that quarter.

⁶¹ 'Vodafone Leads Way on Paid Parental Leave' (15 March 2015) <www.vodafone.com.au/media/paid-parental-leave/> accessed 2 February 2017.

⁶² Each survey, which includes a set of core questions, requires translation and customization to ensure that it makes sense in the local context and meets approval by the Western University (Ontario) Research Ethics Board.

⁶³ Email from D McGuire to McFerran (12 February 2017).

⁶⁴ Jane Pillinger, 'Violence and Harassment Against Women and Men in the World of Work: Trade Union Perspectives and Action' (2017) ILO 106

<http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_546645.pdf> accessed 17 July 2018.

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The International Transport Workers Federation (ITF) is working with affiliates in Tunisia and Egypt, who have engaged with local women's rights organisations to customise the survey for their context. The ITF now routinely incorporates domestic violence at work as an issue in any engagement with affiliates on broader gender-based violence at work.⁶⁵

Network members also contributed to European discussions of the link between domestic violence and work. The Council of Europe's Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence unfortunately neglects the impacts on employed women and their workplaces.⁶⁶ This has left other European bodies such as the European Trade Union Confederation (ETUC) to drive better understanding of workplace responses. The ETUC gender equality work programme, adopted in 2012, set a goal to encourage trade unions to address the link between domestic violence and workplace violence. Information from affiliates confirmed that the ETUC should continue to work on this issue, which led to the project 'Safe at Home, Safe at Work' and a research report based on eleven European country case studies conducted by Jane Pillinger, a gender expert, between 2015-2016. Pillinger documents the background of European trade union activism on violence against women and sees the 'opportunity to consolidate much of this work, draw on good practices and take it a step further by influencing European decision-makers'.⁶⁷

The project found that in relation to domestic violence, the variations in collective bargaining across Europe has meant that 'unions have shaped their activities around the structures that exist'.⁶⁸ According to Pillinger, unions have been most active in Spain, UK, Italy and Denmark. In her briefing for the ETUC Safe at Home, Safe at Work Conference (2016) Pillinger found, for example, that the Spanish Organic Law 1/2004 on protection against domestic violence, which includes a

⁶⁵ See organisations in (n 56).

⁶⁶ Despite slow progress in ratifying the Istanbul Convention, a UK programme has been agreed for ratification under the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017. Pillinger argues that the violence against women strategy of the UK has been fairly comprehensive and inclusive of the main priorities of the Istanbul Convention and does include the workplace. This is also the case of the strategies of Scotland, Wales, and Northern Ireland which explicitly include reference to the workplace. The pending ratification of the Istanbul Convention by the European Union 'will also be important for mobilising action from within the EU' (Email from Jane Pillinger to McFerran (7 February 2017)). Of concern is that Russia is one of four of the 47 member states of the Council of Europe that has neither signed nor ratified the Istanbul Convention, and has now reduced domestic violence from a criminal to an administrative offence.

⁶⁷ Email Jane Pillinger to McFerran (7 February 2017).

⁶⁸ *ibid.*

measure to enable victims of domestic violence remain in work, enabled the inclusion of domestic violence in workplace agreements and policies.

Today, many (Spanish) collective bargaining agreements, harassment and violence protocols and gender equality plans have provisions in place regarding domestic violence. Clauses include informing domestic violence victims of their rights, preventing domestic violence through training, flexible working hours, and paid and unpaid leave.⁶⁹

She cites further European examples of progress driven by unions such as training for shop stewards in Denmark on preventing and addressing domestic violence at the workplace, recognised by an annual conference and award for innovative workplace policies. In France, Pillinger lists a number of agreements that include clauses on domestic violence at La Poste, Carrefour and Peugeot Citroën.⁷⁰ Recommendations for the ETUC affiliates that emerged from the project included: women in senior negotiating positions to promote violence against women into bargaining agendas; supporting information for workers experiencing sexual harassment and domestic violence; partnering with non-governmental organizations and specialist violence against women organizations; highlighting the business arguments for tackling violence against women; and lobbying for the inclusion of measures to address domestic violence at work in collective bargaining agreements and government national actions plans on violence against women. For ETUC, specific actions include model violence against women workplace agreements for affiliates; lobbying and awareness-raising for European level organizations to include relevant clauses in future European social dialogue agreements and in future EU policies; and the development of a strong EU legal framework on violence against women at work, including rights relating to domestic violence at work.

⁶⁹ See final report Jane Pillinger, 'Safe at Home, Safe at Work: Trade Union Strategies to Prevent, Manage and Eliminate Work-Place Harassment and Violence Against Women' (2017) <<https://www.etuc.org/documents/safe-home-safe-work-final-report#.WUJqeldiM6g>> accessed 17 July 2018. See Jane Pillinger, 'Briefing on the ETUC project 'Safe at Home, Safe at Work': Trade Unions' Strategies to Prevent, Manage and Eliminate Workplace Harassment and Violence Against Women' (ETUC Conference, Madrid, 24-25 November 2016).

⁷⁰ *ibid.* The 2015 La Poste agreement on professional equality includes a chapter on violence in the workplace and domestic violence at work, covering support for victims, including housing support, a free hotline number, possibilities to relocate work, and information about specialist support organisations. The Carrefour SA Hypermarchés agreement of 2012 states that prevention of domestic violence at work is part of the company's Corporate Social Responsibility strategy to inform and train employees on the subject. PSA Peugeot Citroën's 2014 agreement includes a clause on supporting workers who are victims of domestic violence.

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The ILO, a foundation member of the abovementioned international domestic violence at work network, urged network members to conduct comparable national domestic violence at work surveys and promoted Australian collective bargaining of domestic violence as a best practice model. The ILO started its scheduled debate in June 2018 an international labour standard on violence and harassment against women and men in the world of work. An expert group meeting to advise the ILO on the issue was held in October 2016 and agreed that 'domestic violence and other forms of violence and harassment are relevant to the world of work when they impact in the workplace' (Conclusion 3) and that 'Collective agreements could address the effects of domestic violence' (Conclusion 27).⁷¹

One conclusion that can be drawn from the sharing of international and comparative knowledge on domestic violence and work is that the most effective national and international strategies should combine employment legislation, collective bargaining, anti-discrimination legislation such as operates in certain American states, occupational health and safety legislation as in the Canadian province of Ontario and employer policies being developed in countries such as Turkey. This combination would maximise the safety net and the resources for implementation. For, as the experiences in both Australia and the Philippines demonstrate, good implementation does not always follow good reform, and a key international lesson must be that the resources for implementation and monitoring are built into any national and international development. The international domestic violence at work network has monitored good practice, allowing, for example, Canadian unions to consciously react to the gaps that they have seen open up in Australia as regards training and variations. The Canadian Labour Congress provides both education and resources for union leaders and negotiators to pursue entitlements to workplace protections including paid domestic violence leave, and principles outlining what collective agreement language should, at a minimum achieve, along with model language.⁷²

⁷¹ ILO, 'Report of the Director-General: Fifth Supplementary Report - Outcome of the Meeting of Experts on Violence against Women and Men in the World of Work' (2016) GB.328/INS/17/5.

⁷² DV@Work Network, 'Impact of Domestic Violence on Workers and the Workplace: ILO Expert Group Meeting on a Convention on Violence Against Women and Men at Work' (2016) Issue Briefing 6 <<http://canadianlabour.ca/leaders-and-negotiators>> accessed 17 July 2018.

5. Emerging Issues that Must Be Addressed

A number of emerging issues continue to challenge a good practice response to domestic violence at work. The evidence of the domestic violence experienced by domestic workers, both at work and in their homes requires further research, including tracking and analysis.

As noted above in the Australian case study, the process of collective bargaining has generated a need for more empirical research into the impacts of domestic violence in the world of work. It would be really helpful for research institutions to investigate on an ongoing basis not only the incidence of the domestic violence spill over into the workplace, but also whether the policy choices - like equality or occupational safety and health legislation, penal laws, collective bargaining, or other measures - are delivering sustainable results in thwarting this violation of human rights and workplace rights to decent work.

Another urgent issue on which Australian employers are seeking guidance is whether to provide leave to employed domestic violence perpetrators.⁷³ The evidence is that the behaviour of employed domestic violence offenders in the workplace creates a parallel cost to the employer due to absences, poor performance, misuse of work time and company resources, and occupational health and safety risks.

Another enduring response gap is an appropriate strategy for small business, both for employers and employees. Small businesses are less likely to have agreements (less than 12 per cent of Australian agreements with a domestic violence clause have 1-15 employees),⁷⁴ and the cost challenges facing small business are often cited by employer groups and responsible government agencies as barriers to paid domestic violence leave.⁷⁵ Nor can the gap between permanent and casual employees to

⁷³ Michele Cranwell Schmidt and Autumn Barnett, 'Effects of Domestic Violence on the Workplace; A Vermont Survey of Male Offenders Enrolled in Batterer Intervention Programs' (2012) Vermont Council on Domestic Violence <https://www.uvm.edu/crs/reports/2012/VTDV_WorkplaceStudy2012_Presentation.pdf> accessed 17 July 2018. The evidence is that the behaviour of employed domestic violence offenders in the workplace creates a parallel cost to the employer due to absences, poor performance, misuse of work time and company resources, and occupational health and safety risks. A third of respondents took paid and unpaid time off work to be abusive or as a result of the abuse; a third made abusive and threatening calls during working hours (a third using work phones); and one in five said that they had caused or almost caused an accident because they were distracted (a finding that may be of special importance in blue collar industries).

⁷⁴ *ibid* Footnote 58.

⁷⁵ Lucille Keen, 'SMEs shouldn't have to pick up the tab for domestic violence, Kate Carnell says' *Financial Review* (Sydney, 20 June 2016) <www.afr.com/news/policy/industrial-relations/smes-shouldnt-have-to-pick-up-the-tab-for-domestic-violence-kate-carnell-says-20160620-gpn2bn> accessed 7 February 2017.

domestic violence workplace rights be ignored. Domestic violence erodes access by working women to safe and fulltime work.⁷⁶

A final element for further research and analysis is the situation of non-standard employees. Casual workers do not have the option of timing domestic violence events when they are not at work, and are least able to afford unpaid time off work to address the crisis. This gap has been recognised by the ACTU, and casual workers are included in the paid domestic violence leave claim before the FWC, albeit after the 20 October 2017 FCW Statement still a contested part of a model domestic violence clause.

6. Conclusion

A better future for women at work is not assured. Any progress made to secure new workplace rights may be reversed in the broader context of declining union membership and the growth of precarious work that disproportionately affects women. Strong partnerships and solid empirical data on impact (via the survey methodology embraced by workers' organisations globally) have been key to progressing domestic violence workplace rights. A critical voice at this stage is that of progressive employers who have adopted standardised and guaranteed domestic violence rights for their employees, and have the evidence of the positive outcomes for having done so. These experiences now need to be heard at the national and international level in order to persuade other employers of the value of proactively understanding and responding to the impacts of domestic violence at work. Australia waited thirty-five years before the union movement on the one hand made domestic violence a national industrial relations issue and on the other hand placed the workplace firmly into national domestic violence strategy. The Philippines struck out over a decade ago with strong legislative protections that still crave full implementation in practice. These delays should not be repeated globally.

⁷⁶ Suzanne Franzway et al, 'Gendered Violence and Citizenship: the Complex Effects of Intimate Partner Violence on Mental Health, Housing and Employment' (2016) University of South Australia <<https://www.unisa.edu.au/PageFiles/71190/Gendered-Violence-and-Citizenship-report.pdf>> accessed 17 July 2018.

Appendix 1 The Australian Employment Arrangement

The Australian labour market is quite a regulated one. Ten statutory minimum employment conditions are set by the National Employment Standards (NES) in the Fair Work Act of 2009. These include ten days paid personal sick leave which may also be taken as carers leave and an unenforceable right to request flexible working in certain circumstances. Several of these standards are unavailable to casual workers, such as paid sick and holiday leave (though casuals do receive a loading on their pay partly to compensate for this). Nearly a quarter of women employees (18 per cent of men) are employed on a casual basis. A system of industry and occupational arrangements known as ‘awards’ underpin, for most of the workforce, a further set of minimum standards such as to enhanced overtime and shift payments. Award standards are set by a tribunal (the Fair Work Commission) after hearing evidence from employer and employee representatives, and are legally binding. However, employees and their employer are free to collectively bargain with or without the involvement of trade unions. Whilst NES minima cannot be undercut by collective agreements reached through bargaining, the additional award standards can sometimes be provided employees are better off overall as a result of the agreement.

The number of employees in Australia is approximately 12 million (January 2017 ABS 6202.0).

ABS 6306.0 - Employee Earnings and Hours, Australia, May 2016 shows 24 per cent of employees have had their pay set by awards and 38 per cent by collective agreements; others were negotiated individually.

Appendix 2 ACTU Clause Family and Domestic Violence

X.1 General Principles

X.1.1 [Insert employer] recognises that employees sometimes face situations of violence or abuse in their personal life that may affect their attendance or performance at work. [Insert employer] is committed to providing support to staff that experience family and domestic violence.

X.1.2 Understanding the traumatic nature of family and domestic violence [insert employer] will support their employee if they have difficulties performing tasks at work. No adverse action will be taken against an employee if their attendance or performance at work suffers as a result of experiencing family and domestic violence. An employee will not be discriminated against or have adverse action taken against them because of their disclosure of, experience of, or perceived experience of, family violence.

X.2 Definition of Family and Domestic Violence

X.2.1 For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former). To avoid doubt, this definition includes behaviour that:

- (a) is physically or sexually abusive; or
- (b) is emotionally or psychologically abusive; or
- (c) is economically abusive; or
- (d) is threatening; or
- (e) is coercive; or
- (f) in any other way controls or dominates the family or household member and causes that person to feel fear for their safety or wellbeing or that of another person; or

- (g) causes a child to hear or witness, or otherwise be exposed to the effects of, such behaviour.

X.3 Family and Domestic Violence Leave

X.3.1 An employee, including a casual employee, experiencing family and domestic violence is entitled to [20] days per year of paid family and domestic violence leave for the purpose of:

- (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) relocation or making other safety arrangements; or
- (c) other activities associated with the experience of family and domestic violence.

X.3.2 In addition, an employee, including a casual employee, who provides support to a person experiencing family and domestic violence is entitled to access family and domestic leave for the purpose of:

- (a) accompanying that person to legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) assisting with relocation or other safety arrangements; or
- (c) other activities associated with the family and domestic violence including caring for children.

X.3.3 This leave will be in addition to existing leave entitlements, may be taken as consecutive or single days or as a fraction of a day, and can be taken without prior approval. X.3.4 Upon exhaustion of the leave entitlement in clause [X.3.1], employees will be entitled to up to [2] days unpaid family and domestic violence leave on each occasion.

X.4 Notice and Evidentiary Requirements

X.4.1 The employee shall give his or her employer notice as soon as reasonably practicable of their request to take leave under this clause.

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X.4.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clause [X.3]. Such evidence may include a document issued by the police service, a court, a health professional, a family violence support service, a lawyer, a financial institution, an accountant or a statutory declaration.

X.4.3 The employer must ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential. Information will not be kept on an employee's personnel file.

X.5 Contact person

X.5.1 The [insert employer] will nominate a contact person to provide support for employees experiencing family and domestic violence and notify employees of the name of the nominated contact person. The nominated contact person must be trained in relation to family and domestic violence and privacy issues relevant to the workplace and receive paid time off work to attend such training.

X.5.2 An employee experiencing family and domestic violence may raise the issue with the nominated contact person, their immediate supervisor, Health and Safety Representatives or their union delegate/shop steward.

X.5.3 Where requested by an employee, the contact person will liaise with the employee's supervisor on the employee's behalf, and will make a recommendation on the most appropriate form of support.

X.5.4 Health and Safety Representatives and union delegates will be provided paid time off work for appropriate training in supporting employees at the workplace who are experiencing family violence.

X.6 Individual Support

X.6.1 In order to provide support to an employee experiencing family and domestic violence and to provide a safe work environment to all employees, [insert employer] will approve any reasonable request from an employee experiencing family and domestic violence for:

- (a) changes to their span of hours or pattern or hours and/or shift patterns;

- (b) job redesign or changes to duties;
- (c) relocation to suitable employment within [insert employer];
- (d) a change to their telephone number or email address to avoid harassing contact; or
- (e) any other appropriate measure including those available under existing provisions for family friendly and flexible work arrangements.

X.6.2 An employee that discloses to the nominated contact person or their supervisor that they are experiencing family and domestic violence will be offered:

- (a) access to professionals trained specifically in family and domestic violence through the Employee Assistance Program (EAP); and
- (b) a resource pack containing information in relation to external support agencies, referral services and other local employee support resources.

X.6.3 [Insert employer] will develop guidelines to supplement this clause which detail the appropriate action to be taken in the event that an employee reports family and domestic violence.

X.7 Workplace Safety

X.7.1 [Insert employer] will implement a workplace safety plan with specific measures to minimise the risk that employees will be subject to violent or abusive behaviour at work and protocols for dealing with a crisis situation.

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