COMMENTS

ON

THE UNEMPLOYMENT INSURANCE AMENDMENT BILL, B – 2013

(General Notice 738 of 2013: Government Gazette No. 36674 of 19 July 2013)

submitted to the

Unemployment Insurance Commissioner, South Africa

by

PROFESSOR MARIUS OLIVIER

Director: Institute for Social Law and Policy (ISLP); Extraordinary Professor: Faculty of Law, Northwest University (Potchefstroom)

and

PROFESSOR AVINASH GOVINDJEE

Head: Department of Public Law; Deputy Head: Labour and Social Security Unit, Nelson Mandela Metropolitan University (Port Elizabeth, South Africa)

AUGUST 2013
INDEX

<table>
<thead>
<tr>
<th>Theme</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>2. Key substantive issues in need of revision</td>
<td>1</td>
</tr>
<tr>
<td>2.1 Non-compliance with particular international standards</td>
<td>1</td>
</tr>
<tr>
<td>2.2 Issues of coverage and application</td>
<td>4</td>
</tr>
<tr>
<td>2.3 Purpose of UIA and application of Fund: Preventing / combating</td>
<td>5</td>
</tr>
<tr>
<td>unemployment and re-integration</td>
<td></td>
</tr>
<tr>
<td>2.4 Benefits rates and periods</td>
<td>7</td>
</tr>
<tr>
<td>2.5 Maternity benefits</td>
<td>9</td>
</tr>
<tr>
<td>2.6 Dependents' benefits</td>
<td>10</td>
</tr>
<tr>
<td>2.7 Dispute resolution and adjudication</td>
<td>12</td>
</tr>
<tr>
<td>2.8 Penalties and offences</td>
<td>12</td>
</tr>
<tr>
<td>3. Overall conclusions and recommendations</td>
<td>13</td>
</tr>
</tbody>
</table>

1. Introduction

The need to amend the UIA: The publication of proposed amendments to the Unemployment Insurance Act, 2001 (Act 63 of 2001) (the UIA / the Act), including the tabling of an Unemployment Insurance Amendment Bill (the Bill) for consideration at NEDLAC, is a welcome occurrence. This presents the opportunity to address existing shortcomings, deficiencies and inconsistencies facing the Unemployment Insurance Fund (the UIF / the Fund). Indeed, the extension of coverage (through the amendment of section 3(1)), the adjustment of the accrual rate of a contributor's entitlement to unemployment insurance benefits, the extension of the maximum duration of benefits (in terms of an amendment to section 13(3)(a)), the focus on matters relating to maternity benefits and the intention to use the Fund for preventing unemployment and re-integration into employment (via an expanded section 5) are all examples of noteworthy interventions. Notwithstanding these advancements, there are various crucial matters of substance which require further revision, in some instances due solely to the manner in which the proposed amendments have been formulated. These matters of substance are reflected on below, and relate to the following areas:

- Non-compliance with particular international standards
- Issues of coverage and application
- Purpose of UIA and application of Fund: Preventing / combating unemployment and re-integration
- Benefits rates and periods
- Maternity benefits
- Dependents' benefits
- Dispute resolution and adjudication
- Penalties and offences

2. Key substantive issues in need of revision

2.1 Non-compliance with particular international standards

2.1.1 Incorporation of ILO and SADC standards: Some attempt has been made to align the UIA to international and regional standards. Most notable in this regard is the setting of the rate of maternity benefits at 66% of a (female) contributor’s earnings (see the proposed addition of section 12(3)(c) to the Act), which will make the UIA compliant with the provisions of the International
Labour Organisation (ILO) Maternity Protection Convention, Convention 183 of 2000 (see article 6.3 of the Convention) and the Code on Social Security in the SADC (see article 8.1 of the Code).

Unemployment benefits constitute one of the nine social security branches covered by the core ILO social security Convention, i.e. ILO Social Security (Minimum Standards) Convention 102 of 1952 (see chapter IV of the Convention). If the UIA were to be compliant with Convention 102, this would assist in the ratification by South Africa of Convention 102 – the Convention can be ratified by compliance with three of the nine branches (see article 2(a)(ii) of the Convention). Also, article 4.3 of the Code on Social Security in the SADC requires of SADC Member States to maintain their social security system at a satisfactory level at least equal to that required for ratification of the ILO Convention 102.

It is therefore important to note that despite the attempt indicated above to align the UIA with international and regional standards, there are several examples of non-compliance with these standards (including but not restricted to Convention 102), appearing from the Bill, read with the provisions of the UIA. The following need to be mentioned in particular:

- Failure to provide for minimum period of benefits
- Maternity benefits – issues of coverage and disparate treatment
- Waiting period – access to unemployment benefits
- Unavailability of benefits in the event of partial unemployment and the suspension or reduction of earnings

2.1.2 Failure to provide for minimum period of benefits: The core ILO social security Convention, i.e. ILO Social Security (Minimum Standards) Convention 102 of 1952 requires a minimum period for which benefits should be paid in relation to:

- Unemployment benefits (13 weeks – see article 24 of Convention 102)
- Sickness benefits (normally 26 weeks, but can be reduced to 13 weeks – see article 18(1) and (2) of Convention 102)
- Maternity benefits (minimum of 12 weeks – see article 52 of Convention 102; extended to 14 weeks in accordance with article 4.1 of the ILO Maternity Protection Convention 183 of 2000, read with article 6 of the same Convention)

In order to preclude abuse, the two Conventions (102 of 1952 and 183 of 2000) then stipulate that a minimum qualifying period (of work/contributions, one assumes) can be stipulated, as far as these different categories of benefits are concerned – see article 17 (sickness benefits), article 23 (unemployment benefits) and article 51 (maternity benefits) of Convention 102. Article 6(5) and (6) of Convention 183 of 2000 (Maternity Protection Convention) (quoted immediately below) refers to qualifying conditions in relation to maternity benefits, qualified by the need to ensure that "a large majority of women" should be able to satisfy same and, if a woman is unable to meet these qualifying conditions, she should be entitled to (means-tested) social assistance.

"6.5 Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies.
6.6 Where a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance."

The UIA apparently does not comply with these minimum periods for which benefits should be paid. And yet, it now introduces a qualifying period of 13 weeks for maternity benefits (see section 24(6)
of the Act, as introduced by the Bill). Perhaps this could have been seen as a "reasonable" qualifying period, had the position been that a the woman would have been entitled to the full 17.32 weeks of maternity benefits – however, as discussed in par 2.5.4 below, section 24(4) of the UIA still refers to a "maximum" period of benefits of 17.32 weeks. The UIA does not contain minimum qualifying periods for any of the other benefit types.

In a recent publication – Social Security and the Rule of Law (ILO, 2012) (see p 94, read with note 172) – the ILO makes it clear that these minimum periods must apply in the event that Convention 102 has been ratified. In short, an unemployment benefit regime based on the acquisition of "contribution credits" or "days of benefit based on days of work", which does not provide for a minimum period of benefits in accordance with the requirements of Convention 102, is likely to be regarded as being in conflict with Convention 102 and, for that matter, as far as maternity benefits are concerned, with the requirements of Convention 183. Simultaneously, however, it has to be reiterated that a qualifying period of work or contributions could be introduced in relation to all categories of benefits available under the UIA, to preclude abuse.

2.1.3 Maternity benefits – issues of coverage and disparate treatment: In the area of maternity benefits under the UIA, it could be argued that the ILO Maternity Protection Convention 183 of 2000 should be the golden standard. The increase of the rate of maternity benefits to reflect a universally applicable rate of 66% of the (female) contributor's earnings is a clear indication that compliance with Convention 183 is intended (see par 2.1.1 above). The need to comply with this Convention further flows from the provisions of article 8.1 of the Code on Social Security in the SADC, which stipulates that "Member States should ensure that women are not discriminated against or dismissed on grounds of maternity and that they enjoy the protection provided for in the ILO Maternity Protection (Revised) Convention No. 183 of 2000." (underlining added)

A closer analysis of the Bill leaves one with the clear impression that the provisions of the Bill, read with the UIA provisions, do not fully comply with the requirements of Convention 183. This applies in particular in relation to issues of coverage and disparate treatment. As regards coverage, both the sphere of persons covered by the UIA and the nature of benefits available require comment. Article 1 of Convention 183 stipulates that the term "woman" applies to any female person without discrimination whatsoever, while article 2 provides that the Convention "applies to all employed women, including those in atypical forms of dependent work." (Under certain circumstances, the impact of this provision could be limited – see article 2.2 of the Convention.) And yet, given the narrow framework of persons covered by the UIA, in particular the emphasis in the definition of "employee" in section 1 of the UIA on "remuneration" in respect of services rendered and the exclusion of independent contractors, the implication is that only employees working within the framework of an identifiable employment relationship are covered by the UIA – no attempt has been made to cover workers in atypical forms of dependent work. Also, as far as benefits are concerned, as indicated in par 2.1.2 above, article 6.6 of Convention 183 requires that a woman who does not meet the conditions to qualify for cash benefits, shall be entitled to adequate means-tested social assistance benefits. However, it is clear from the provisions of both the UIA and the Social Assistance Act 13 of 2004 that neither working women who do not qualify as "employees" under the UIA, nor unemployed females are entitled to any maternity benefits under any public system in South Africa.

As far as disparate treatment/discrimination is concerned, two issues need to be mentioned:

- Firstly, the Bill now introduces a qualifying period of 13 weeks applicable in the case of maternity benefits (see the proposed section 24(6) of the UIA), but not to other categories of benefits (i.e. unemployment, illness, adoption and dependants' benefits). It is submitted that this patently discriminatory provision cannot be justified from the perspective of

- Secondly, as explained in paragraph 2.5.3 below, the suggested amendment of section 13(5) of the UIA still does not provide for female claimants to have an unrestricted entitlement to maternity benefits should they already have used/exhausted their days of benefits for purposes of claiming any other category of benefits (unemployment, illness or adoption benefits); however, access to these other categories of benefits is not affected by maternity benefits that have already been claimed. In our view this also amounts to a form of discrimination against females (as only they, and not males, could fall foul of this form of disparate treatment) and, in fact, between various categories of female beneficiaries.

2.1.4 Waiting period – access to unemployment benefits: According to section 16(1) of the UIA, an unemployed contributor is not entitled to unemployment benefits for any period of unemployment lasting less than 14 days. However, article 24.3 of Convention 102 restricts this period to 7 days. It is, therefore, necessary to align the provisions of section 16(1) in this regard.

2.1.5 Unavailability of benefits in the event of partial unemployment and the suspension or reduction of earnings: The 1966 Unemployment Insurance Act (Unemployment Insurance Act 30 of 1966) made provision in principle for the payment of benefits in the event of partial unemployment (i.e. where the employee concerned lost one job but retained another – see section 35(11) of the 1966 Act) or even where the unemployed contributor accepted employment at less than half the average rate of earnings which he/she earned before becoming unemployed (see section 48 of the 1966 Act). However, currently only domestic workers with multiple jobs are able to claim unemployment benefits despite having lost one job (see section 12(1A) of the 2001 Act).

It has to be noted that the more recent ILO Convention dealing with employment promotion and unemployment, namely ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988 also suggests the extension of coverage to the contingencies of -

- loss of earnings due to partial unemployment, defined as a temporary reduction in the normal or statutory hours of work (see article 10.2(a) of the Convention 168); and
- suspension or reduction of earnings due to a temporary suspension of work, without any break in the employment relationship for reasons of, in particular, an economic, technological, structural or similar nature (see article 10.2(b) of the Convention 168).

The current provisions of the UIA, which are not affected by the provisions of the Bill, therefore fall short of the protection provided under both the 1966 Act and ILO Convention 168.

2.1.6 Conclusion: The above examples indicate that the current UIA regime, as well as the provisions of the Bill, are in several respects not aligned with particular ILO standards. It is recommended that the provisions of the current UIA be thoroughly canvassed to bring the Act in line with the relevant ILO standards, and that the Bill be expanded to make provision for the changes required to align the UIA with the applicable ILO Conventions.

2.2 Issues of coverage and application

2.2.1 Non-alignment of coverage/application provisions of the amended UIA to relevant provisions of the Unemployment Insurance Contributions Act (UICA): While the Bill amends the provisions of the UIA to ensure effective coverage extension of the UIF to civil servants, learners and migrant workers, the concomitant provisions of the Unemployment Insurance Contributions Act (UICA) 4 of 2002 (see section 4 of the UICA) have not been amended. As such, there is currently no mandate to compel
these workers and their employers to contribute to the UIF.

2.2.2 State/Government as employer: The Memorandum on the Objects of the Bill suggests that (see paragraph 5 of the Object): "The inclusion of public servants will not affect the budget of the State since the UIF will pay benefits and Government reimburse the actual expenses paid as benefits." However, the Bill does not contain any statutory provision for the State/Government as employer to be exempted from the obligation to contribute. It is submitted that this is a matter which needs to be statutorily regulated. Furthermore, no explanation is given as to why the State/Government as employer is exempted from the obligation to contribute.

2.2.3 Migrant workers: Two issues require attention:

- It is recommended that the provision in the Bill substituting section 3 of the UIA (i.e. clause 1 of the Bill) should clearly indicate the deletion of the current section 3(1)(d) of the UIA.
- Also, the long title of the Bill indicates that UIF benefits are extended to "foreign workers who are within the country". One wonders why it is necessary to have this restriction (of a foreign worker having to be "within the country" in order to benefit from the UIF). It is submitted that it should be possible to make appropriate arrangements, also via dedicated bilateral arrangements, to provide for the necessary verification and checks to enable foreign workers who have returned to their home country to receive benefits. This may indeed be necessitated by the fact that in terms of the provisions of the Immigration Act 13 of 2002 they may well be compelled to leave South Africa upon losing their job. A failure to make the necessary provision in this regard may in the absence of sufficient justification be regarded as a form of nationality discrimination. Attention is also drawn to the provisions of section 16 of the Social Assistance Act (SAA) 13 of 2004, read with Regulation 31 of the 2008 Regulations in terms of the SAA, which contains arrangements for the payment of social assistance grant benefits to beneficiaries who are outside South Africa.

2.2.4 Coverage of the self- and informally employed: As indicated above, the current UIA restricts coverage to employees who work for employers within the context of an identifiable employment relationship. As suggested, at least as far as maternity benefits are concerned, this is out of step with the coverage provisions of Convention 183 of 2000 (see par 2.1.3 above). The recent ILO publication – Social Security and the Rule of Law (ILO, 2012) – notes the world-wide trend to increasingly include self-employed workers in social insurance schemes, including unemployment insurance schemes in some countries (p 136-138). Also, there is a clear trend, also in Africa, to develop appropriate frameworks for the accommodation in social security (including social insurance schemes) of persons who work informally. Recent social security legislation developed by the ILO for Swaziland and Lesotho respectively contains provisions that stipulate that special measures to accommodate the self- and informally employed need to be taken. This is reminiscent of the provision in the 2001 UIA, which stipulated that a 12 month period was granted within which arrangements needed to be developed to include domestic workers within the framework of the UIA.

2.3 Purpose of UIA and application of Fund: Preventing / combating unemployment and re-integration

2.3.1 Absence of a sufficient statutory mandate to prevent, combat and minimise unemployment: The proposed amendments to the UIA are partly aimed at preventing contributors from becoming unemployed and at aiding contributors to re-enter the labour market (should they become unemployed). This is evident from the proposed amendment to section 5 of the UIA, which relates to the application of the Fund, and which now includes the Fund being used to “finance the retention of contributors in employment and the re-entry of contributors into the labour market”.

5
The role to be played by the UIF in relation to the broader objectives of unemployment prevention and reintegration is important. Given the manner in which the purpose of the UIA (section 2) is currently circumscribed (namely, the establishment of a Fund from which unemployed employees or their beneficiaries are permitted to benefit), however, it is doubtful whether there is a proper statutory basis and mandate for the UIF to serve the wider ambit of preventing, combating and minimising unemployment and the creation of, for example, unemployment alleviation schemes. Section 10 of the UIA confirms that any surplus in the Fund may be used “to give effect to the purposes of this Act” (which are confined to the provision, from the Fund, of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependants’ benefits related to the unemployment of such employees), confirming the importance of amending section 2 to reflect broader purposes.

The role of the UIF in potentially preventing unemployment and bringing jobless people from unemployment or inactivity into work is a fundamental one. The present limited and short-term impact of the UIF (which will at least be improved by the extension of benefits to a maximum period of 365 days) and its desired labour-market orientation should be addressed so that the Fund may contribute appropriately to preventing and combating unemployment and to the reintegration of the unemployed into the labour market. Developing such linkages in the UIA is likely to enhance the relevance and impact of the Fund for unemployed persons who are desperately in need of assistance. Such matters are also inadequately addressed in the latest available version of the Employment Services Bill, highlighting the importance of their (more detailed) inclusion in the UIA. The present slew of amendments, it is respectfully submitted, falls short in this regard. This is also in contrast with previous legislation, namely the Unemployment Insurance Act, 1966 (Act 30 of 1966), which was better aligned with broader unemployment policy objectives, permitting the Minister, for example, to introduce schemes to combat unemployment. The proper integration of unemployment protection and employment promotion has also received international attention.

2.3.2 The need to extend the statutory basis for employment retention of contributors and re-entry into the labour market: The proposed amendment of section 5 of the UIA may also be criticised for affording the UIF a limitless discretion with respect to the manner in which it may use its funds to retain contributors in employment and assist unemployed persons to re-enter the labour market. The manner in which these important objectives are to be achieved in future are not reflected elsewhere in the Bill. This may be contrasted with the approach adopted, for example, in respect of the envisaged amendment of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993) (COIDA) which, it is intended, will include a new chapter pertaining to employment re-integration and return-to-work.

2.3.3 Memorandum misalignment: Finally in this regard, clause 2 of the Memorandum on the Objects of the Unemployment Insurance Amendment Bill, 2013 (“the Memorandum”) also appears to be at odds with the proposed amendment to section 5 (referring, apparently incorrectly, to “the refinancing of the unemployed insurance beneficiaries to make re-entry to the Labour market”).


2 See, for example, ILO Employment Promotion and Protection against Unemployment Convention Convention (No.168) and ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization (Report III Part 1B) “Social security and the rule of law” (Geneva) (2011) 42.
2.3.4 Conclusions and recommendations: In summary, it is recommended that:

- the use of the Fund for preventative and re-integrative purposes ought to be specifically reflected in section 2 of the UIA (dealing with the "purpose of this Act"). Section 2 should be amended accordingly and deliberately aligned with (an expanded understanding of) sections 5 and 10 of the UIA, so that the Fund (including any Fund surplus) may be utilised to achieve broader outcomes such as unemployment prevention and employment creation / re-integration;
- section 5 should be appropriately amended, as the proposed amendment to section 5 fails to address the notions of unemployment prevention and employment entry / re-entry adequately, requiring amplification in order to be effective and in order to properly contribute to preventing and combating unemployment and to the reintegration of the unemployed into the labour market;
- section 12 of the UIA, which enumerates the various benefits to which a contributor or dependant is entitled, may also be expanded to include benefits relating to unemployment prevention and employment reintegration.

2.4 Benefits rates and periods

2.4.1 Reading sections 12(3)(c) and (d) disjunctively: The Bill seeks to amend the general provision pertaining to benefits contained in the UIA (section 12) by the addition of two new subsections pertaining to benefit rates. The first new subsection relates specifically to maternity benefits (indicating that such benefits must be paid at a rate of 66% of the earnings of the beneficiary at the date of application, subject to the maximum income threshold set by the Minister). The second new subsection creates a differential rate of payment between the first 238 days of benefits (to be paid at the income replacement rate set in section 12(3)(b)) and the remainder of credits (subject to the 365 day maximum benefit duration during a four year period set in the proposed amendment to section 13 of the UIA), which is to be paid at a flat rate of 20%.

It is clear that these two new subsections must be read disjunctively, so that the proposed section 12(3)(c) applies to maternity benefits (which, in terms of section 24(4) may only be obtained for a maximum period of 17,32 weeks), while the proposed section 12(3)(d) applies to all other benefit types. The Memorandum unfortunately makes no reference to this distinction, indicating only that "The Bill seeks to amend section 12 of the Act by providing for the rate of the payment of maternity benefits". The distinction (in the application of section 12(3)(c) to maternity benefits and the application of section 12(3)(d) to all benefits other than maternity benefits) ought to be clarified in the wording of the amended section 12 and by amending the Memorandum, as this will greatly assist in the proper interpretation of the amended section.\(^3\)

2.4.2 Unemployment benefits and the use of credits: The proposed insertion of section 13(3)(b) creates a differential regime in respect of benefits received in the case of unemployment. Only in the case of unemployment, according to the present wording of this section, must benefits be paid to a contributor irrespective of whether benefits have been received during a four year cycle (provided that the unemployed contributor still has available credits). This singling out of unemployment benefits for special treatment ought to be addressed, particularly when considering that section 13 falls within the first (general) part of chapter 3 of the UIA and deals with the right to benefits in general. The formulation of section 13(3)(b) is also unaligned with clause 6 of the Memorandum,\(^3\)

\(^3\) As discussed in greater detail in the next section of this commentary, maternity benefits in South Africa should be aligned with the requirements of the ILO’s Maternity Protection Convention, 2000 (No. 183) and, in fact, should be de-linked (and treated separately) from the other benefit types in the UIA, as is the case in many other jurisdictions.
which does not make specific reference to “unemployment benefits”.

A further issue with the present wording of the amended section 13(3)(b) is that it fails to clarify precisely which benefits may have been received for the section to apply. The wording indicates only that "unemployment benefits must be paid to the unemployed contributor regardless of whether the contributor have received benefits within that four year cycle or not if the contributor has credits" (own emphasis). The use of the word "benefits" towards the end of the provision should therefore be clarified – so that readers may understand precisely when this subsection is applicable. More technically, it may be preferable to indicate that the payment of the benefits must be occur provided that the contributor has credits (the word "if" is used at present).

The wording of the amended section 13(6) ought to be reconsidered; the present formulation may lead to uncertainty and confusion, particularly when considering that there is no explanatory note to this subsection in the Memorandum. The present wording is ambiguous and brings into question the operation of the “four year cycle”, referring to "an application for benefits ... within the four year cycle of a previous claim" (own emphasis). Our understanding of the legal position is that the four year cycle is a "moving cycle" and that whenever a period of employment ends, the Fund will go back a period of four years (from the day after the date of ending of the period of employment) \(^4\) in order to calculate the benefits available (by subtracting the number of days during that four year period in respect of which benefits have already been paid from the number of days in credit).

2.4.3 Ministerial powers to set/amend: Schedule 2 to the UIA is amended by the substitution of a paragraph pertaining to the Income Replacement Rate (IRR). The Bill seeks to empower the Minister to vary the IRR and the benefit period through Regulations. While it may be acceptable to involve the Minister in the variation of the minimum and maximum IRRs and in respect of the setting of a flat replacement rate, the manner in which this occurs should correspond expressly with existing provisions of the UIA. In particular, section 12(3)(a) and (b) permits the Minister, with the concurrence of the Minister of Finance, to amend the scale of benefits contained in Schedule 3 within certain parameters. The Minister must, when performing this function, consult with the Board (in terms of section 12(4)(a)) and comply with the procedure set in section 55 of the UIA. Similarly, Schedule 2 should be amended to reflect this type of consultation in the procedure required with respect to the variation of the IRR and the setting of the flat replacement rate. In other words, a more elaborate and emphatic provision is necessary in this regard.

More problematically, the proposed amendment to Schedule 2 seeks to permit the Minister to vary the benefit period by regulation. This matter is presently governed by section 13(3) of the UIA and, it is suggested, should not be amendable by ministerial regulation. In other words, an amendment to the Act should be required to adjust the benefit period given the importance of the maximum benefit period for contributors and their beneficiaries.

In summary, it is recommended that:

- the wording of subsections 12(3)(c) and (d) be amended in order to clarify that a disjunctive reading is appropriate;
- the proposed subsection 13(3)(b) is problematic for various reasons, and should be amended to apply in instances other than in respect of unemployment benefits, clarifying which benefits may have been received for the section to apply, provided that the contributor has credits available;

\(^4\) See the amended section 13(3)(a).
• the wording of section 13(6) is ambiguous and this should be amended to clarify the operation of the four year cycle for purposes of deducting benefits already paid by the UIF;
• The Minister's power to vary the IRR and to set a flat replacement rate ought to be curtailed by incorporating a procedure akin to that required in the event that the scale of benefits is modified (sections 12(3) and (4)). The power of the Minister to adjust the (maximum) benefit period by regulation should be removed.

2.5 Maternity benefits

2.5.1 Qualifying period: As indicated above, section 24(6), which provides for a 13 weeks qualifying period, is now being added to the UIA by the provisions of the Bill. As suggested, a similar qualifying period does not apply in the case of unemployment, illness and adoption benefits. It is suggested that this is in conflict with the core right to equality enshrined in section 9 of the Constitution, especially as this impacts on women. It needs to be mentioned that the 1966 UIA did indeed contain a qualifying period (in principle 13 weeks) in relation to almost all the benefit categories – i.e. unemployment benefits (section 35(13)(a) of the 1966 UIA), illness benefits (section 36(6)(e) of the 1966 UIA), maternity benefits (section 37(5) of the 1966 UIA) and adoption benefits (section 37A(5)(b) of the 1966 UIA).

2.5.2 Unclear formulation of the (envisaged new) section 24(6) of the UIA: Section 24(6), to be inserted in the UIA via the provisions of the Bill, stipulates that: "A contributor is not entitled to benefits unless she was in employment, whether as a contributor or not, for at least 13 weeks before the date of application for maternity benefits." It is not clear what is meant by the following underlined phrases “… unless she was in employment, whether as a contributor or not …".

2.5.3 Failure to regulate the claiming of maternity benefits in the event of the exhaustion of other UIF benefits: The current UIA provides that the days of benefits that a contributor is entitled to may not be reduced by the payment of maternity benefits (section 13(5) of the UIA). However, it does not contain a provision that allows for the non-reduction of days of maternity benefits in the event that any other category of benefits preceding the period for which maternity benefits are paid, is claimed. In a legal opinion commissioned by the UIF and submitted by one of the co-authors (Prof Marius Olivier), it was indicated that the approach or practice of the UIF not to pay maternity benefits in the event where non-maternity related UIF benefits have been received (and exhausted), and yet paying both maternity benefits and other non-maternity related UIF benefits where maternity benefits have been claimed and received first, is not supported by the South African constitutional framework and relevant international standards.

The Bill now adds a new subsection 13(5)(b) to the UIA, which stipulates that: "The payment of maternity benefits may not affect the payment of unemployment benefits."

In our view, this provision does not address the shortcoming indicated above. In fact, it amounts to a repetition of the current section 13(5) (which will become the new section 13(5)(a)). It is accordingly submitted that (the new) section 13(5)(b) of the UIA should be reformulated to clearly indicate that the payment of unemployment, illness and adoption benefits does not affect the payment of maternity benefits.

2.5.4 Discrepancy between section 24(4) and section 24(5), as amended: Section 24(4) of the UIA provides that the maximum period of leave for which maternity benefits are payable is 17.32 weeks. This provision is, however, subject to the provision in section 13(3)(a), which stipulates that the actual available days of benefits accrue at a rate of one day of benefits for every four days of employment. On the other hand, the amended section 24(5) provides that, in the case of miscarriage
during the third trimester or a still-born child, a full maternity benefit of 17.32 weeks is payable. There appears to be no justification to provide for a full benefit in the one case and a maximum benefit in the other case. Section 24(4) and/or (5) should be amended in a way which would align these two provisions.

2.5.5 Formulation deficiency – section 24(5) as amended: Section 24(5) refers to "a full maternity benefits of 17 to 32 weeks." This is evidently wrong – the period should be 17.32 weeks.

2.5.6 Inchoate statements contained in the Memorandum: The Memorandum on the Objects of the Bill suggests that the Bill "seeks to amend section 25 of the Act and provide for the application to be made within two weeks of the date of commencement of maternity leave." No such amendment appears from the formulation of the Bill.

Also, the Memorandum suggests that the Bill seeks to amend section 26 of the Act by providing that the maternity benefits must be paid at a flat rate of 66% of the last earnings of a contributor. However, no amendment of section 26 of the UIA is envisaged by the provisions of the Bill. This issue of the 66% rate is covered in the envisaged new section 12(3)(c).

2.6 Dependants' benefits

It is clear that the issue of dependants' benefits remains fraught with difficulties. Three issues, in particular, may be highlighted:

2.6.1 Definition: Section 30 of the UIA circumscribes the notion of dependants' benefits by referring, firstly, to a "surviving spouse or a life partner of a deceased contributor" and, secondly, to "any dependent child of a deceased contributor" in certain instances. It is unclear how extensively the notion of "spouse" should be interpreted, as the UIA contains no such definition. The present wording of the UIA creates certain difficulties which should have been addressed in the amendment Bill. For example, does a life-partner or spouse who was married to the deceased employee in terms of customary or religious law qualify as a beneficiary if there was also a civil law marriage with another wife subsisting at the time of the employee's death? COIDA, for example, includes a detailed definition of the concept of "dependant of an employee" and, in section 54, stipulates the payment of compensation in the event of an employee's death in some depth, so that spouses / life partners and children of the deceased employee are dealt with equitably. The Social Assistance Act, 2004 (Act 13 of 2004) defines dependant to mean "a person whom the beneficiary is legally obliged to support financially and is in fact supporting", drawing no distinction between spouses / life partners and children for its purposes. Court cases in South Africa have also emphasised that unfair discrimination based on, inter alia, marital status is impermissible.5

2.6.2 Hierarchy and waiting period: Linked to the previous remarks, the amendment Bill perpetuates a hierarchy in respect of dependants' benefits, continuing to rank children below claimants who satisfy the understanding of "surviving spouses and life partners" and entitling the dependent child to claim only if there is no surviving spouse or life partner or in instances where the surviving spouse or life partner fails to apply for benefits within eighteen months of the contributor’s death. The creation of such a hierarchy appears to be based on the unfounded assumption that the surviving spouse / life partner will, in all instances, use the benefits obtained from the Fund to care for all dependants.

---

5 See, for example, Langemaat v Minister of Safety and Security 1998 IIJ 20 (T) and Hafiza Ismail Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Case No. 444/98 of 29 September 1999)(CC). This is also the approach adopted by the Pension Funds Adjudicator when determining the range of dependants for purposes of the Pension Funds Act, 1956 (Act 24 of 1956): see, for example, Van der Merwe v The Southern Life Association Ltd 1999 Juta's Pension LB 110 (WC) (PFA/WE/21/1/98).
dependent children (even children who were dependent on the deceased but were not children of a surviving spouse or life partner). To make matters worse, a dependent child might have to wait for 18 months for the surviving spouse / life partner to make his / her decision to claim benefits, before the child would know whether he / she should claim benefits. No proper explanation for this proposed amendment is offered by the Memorandum. It is unclear, for example, whether a 20 year old dependant, who is not a learner, would lose his / her entitlement to claim a benefit from the UIF in the case where the deceased employee's spouse fails to lodge a claim within eighteen months following the employee's death (by which time the deceased's child is over the age of 21). Whether or not such a claimant would be able to claim retrospectively in such a situation is uncertain and demonstrates one of the side-effects of the excessively lengthy period afforded to the surviving spouse / life partner for purposes of claiming a benefit from the Fund. Also, in our view, the exclusion of children's separate claims/entitlements in the event that the surviving spouse or life partner is claiming dependants' benefits, via the subordination of their claims to those of surviving spouses or life partners, constitutes a transgression of the constitutional principle that a child's best interests are of paramount importance in every matter concerning the child (see section 28(2) of the Constitution).

2.6.3 Nominees: Finally, in this regard, the proposed amendment to section 30 by way of inserting a new provision allowing contributors to nominate their beneficiaries in cases of death benefits, although well-intentioned, may create confusion and introduce an element of complexity in the administration of dependants’ benefits on the part of the UIF. The inserted sections 30(2A)(a) and (b) appear to contradict one another⁶ and may precipitate legal challenges in future, particularly when there is a competing claim between an alleged dependant and nominated beneficiary. The administrative burden on the Fund is likely to increase as a result of the proposed insertion.

The following recommendations pertaining to dependants’ benefits are advanced:

- It is recommended that the Bill be amended to consider whether a person was or would have been (wholly or mainly) financially dependent on the deceased. The use of the concept of a "surviving spouse or life partner" ought to be revisited.
- In the event of more than one dependant, an equitable sharing of the benefits must be ensured (as is the case with pension / provident fund payments and the broad definition of "dependant" in section 1 of the Pension Funds Act, 1956 and other social legislation discussed above). This may assist, for example, in the protection of the best interests of children of a deceased contributor and in alleviating the vulnerable position of children in general.
- Even if the distinction between a surviving spouse / life partner (on the one hand) and a dependent child (on the other) is retained for purposes of claiming dependants’ benefits in terms of the UIA (which is not recommended), the eighteen months' waiting period for dependent children is excessive and should be reduced, given that it is likely to fall foul of the best interests of the child standard.
- The inclusion of a subsection dealing with nominated beneficiaries may result in administrative difficulties and disputes. The insertion should preferably be removed.

---

⁶ The first subsection apparently creates an entitlement to a benefit for any nominated beneficiary, while the second subsection completely qualifies that entitlement. It may be better to combine these two subsections into one provision in order to clarify that the entitlement of a nominated beneficiary is subject to there being no surviving spouse, life partner or dependent child of the deceased contributor.
2.6 Dispute resolution and adjudication

2.6.1 Lack of an independent internal appeal mechanism and the absence of an external appeal institution: The UIA makes provision for an appeal to a regional appeals committee in the event of a decision to suspend a person's right to benefits, or a decision relating to the payment or non-payment of benefits (section 37(1)). The matter may be referred to a national appeals committee if a person is dissatisfied with the decision of a regional appeals committee (section 37(2)). However, these institutions – the regional and national appeals committees – cannot be regarded as either independent or external appeal mechanisms. They are not external institutions and are not independent vis-à-vis the UIF, as they are constituted as committees of the Board and since, at least as far as the regional appeals committee is concerned, a public servant (who could, in principle, be a staff member of the UIF or the Department of Labour) is a member of the committee.

The Labour Court is indicated as the court which has jurisdiction in respect of all matters in terms of the Act, unless otherwise provided and except in the case of an offence (section 66 of the UIA). However, the Labour Court's jurisdiction is effectively restricted to a review application and not to hear an appeal against a decision of the UIF or a regional appeal committee or the national appeal committee (see section 66, read with section 37(3)), or the statement of a special case on a question of law (section 67).

It is therefore evident that the UIF does not provide for an independent internal appeal mechanism or an external appeal institution. In this regard attention is drawn to section 34 of the Constitution, which stipulates that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

2.6.2 Absence of provisions regulating the establishment and functioning of the National Appeals Committee: The UIA regulates the establishment of regional appeals committees (see section 36A(1)). The Bill also inserts a provision which ensures that the constitution of the Board must provide for the functions of a regional appeals committee (see the new section 50(2)(a)(iA)). However, similar regulating provisions in relation to the national appeal committee are absent. It is recommended that a proper regulatory framework in relation to the national appeal committee be inserted into the UIA, in particular as it is not clear how the national appeals committee is to be appointed/established and how it should be composed.

2.8 Penalties and offences

2.8.1 The need to expand on and make the levying of a charge by the Fund, an agent or person purportedly acting on behalf of an applicant for benefits an offence: According to the amendment Bill, section 33 of the UIA is to be amplified by the addition of a subsection prohibiting the fund, an agent or person who purportedly acts on behalf of an applicant for benefits from levying any charge against the applicant. There are two concerns in this regard.

- Firstly, the prohibition is narrow in scope, restricting only the levying of a charge in the case of the processing of an application for benefits (and not expressly covering other parts of the benefit application process, such as the giving of advice or filling in of forms).
- Secondly, and more importantly, the prohibited conduct is not made an offence, resulting in the provisions of section 65 of the UIA not being triggered. Section 65 of the UIA confirms that any person convicted of an offence in terms of this Act is liable to a fine or to imprisonment, or to both a fine and imprisonment. Contraventions of the new section 33(3) of the UIA should expressly be listed as an offence on the same basis that persons who
contravene, for example, sections 63(1) and 64(1) of the UIA are guilty of an offence. This will then trigger the Act’s penalty clause in section 65. Failure to link the prohibited section 33 conduct to an offence and, thereby, to a penalty, is likely to result in the prohibition remaining completely unenforced and unenforceable.

3. Overall conclusions and recommendations

Several changes to the Unemployment Insurance Act, to be introduced via the provisions of the recently published amending Bill, are to be commended. These relate to among others the extended period of benefits (maximum of 365 days), the increase of the rate of maternity benefits to 66% of a (female) contributor's earnings, the adjustment of the accrual rate of a contributor's duration of benefits from 1 day for every 6 days of employment to 1 day for every 4 days of employment, some attempt to provide for retention of contributors in employment and the re-entry of unemployed contributors into the labour market.

And yet, it is evident that there is need for a thorough revision of the Bill, implying key changes to the UIA. Some of the broad areas of revision concern the need to ensure alignment of the Bill and the UIA to a standardised framework, with specific reference to international and regional standards and constitutional prescripts; and the removal and/or amendment of provisions, which are discriminatory, poorly formulated, inconsistent or unaligned with, for example, the Unemployment Insurance Contributions Act and the Memorandum on the Objects of the Unemployment Insurance Amendment Bill, 2013. More specifically, there are core matters of substance which require further consideration and revision.

Synopsis of key substantive issues requiring revision: This commentary, while acknowledging the important contribution made by the Bill to the developing unemployment insurance landscape in South Africa, focuses attention on key areas requiring reconsideration (either because of the manner in which the Bill has dealt with the issue or because of a failure to address an existing lacuna). These areas include:

- the (lack of) alignment of the UIA with ILO and SADC standards, particularly in relation to minimum periods of benefit, persisting issues of coverage and disparate treatment in respect of maternity benefits, the waiting period in respect of access to unemployment benefits and the unavailability of benefits (in general) in the event of partial unemployment and the suspension or reduction of earnings;
- issues of coverage and application, including the failure to synchronise the UIA with the Unemployment Insurance Contributions Act (UICA), the manner in which public servants and the State/Government as employer are to be included, matters pertaining to migrant workers (in particular their entitlement to claim/receive benefits when they are outside South Africa) and the coverage of the self- and informally employed;
- the (insufficient) mandate for and manner in which the Fund’s relationship with the key objectives of employment promotion and preventing/combating/minimising unemployment and re-integration into employment is addressed (including the manner in which section 5 has been drafted and the failure to align the provisions of sections 2, 5 and 10 of the Act);
- matters pertaining to benefit rates and periods, including the need to read sections 12(3)(c) and (d) disjunctively, inconsistent and unclear provisions regarding entitlement to benefits once available "credits"/days of benefits have been used, the application of the four year cycle and the minister’s power to set / amend the Income Replacement Rate (IRR) and to vary the benefit period by regulation;
- maternity benefits, in particular the 13 week qualifying period, the unclear formulation of the proposed section 24(6) of the UIA, the failure to regulate the claiming of maternity
benefits in the event of the exhaustion of other UIF benefits and the discrepancy between sections 24(4) and (5) (as amended);

- various matters pertaining to dependants' benefits, especially in respect of definitions, the creation of a claims hierarchy and waiting period and the introduction of a beneficiary nominations process (for purposes of receipt of death benefits);
- lack of an independent internal appeal mechanism and the continued absence of a proper external appeal institution and the absence of provisions regulating the establishment and functioning of the National Appeals Committee; and
- the need to expand on and make the levying of a charge by the Fund, an agent or person purportedly acting on behalf of an applicant for benefits an offence.

**General issues:** As alluded to above, the manner in which the amendments to the Act have been formulated may, in some instances, cause confusion in respect of the appropriate manner in which the revised Act is to be interpreted. This is problematic for a number of reasons and is likely to result in difficulties in the application of the Fund in the years to come if left unaddressed. The discord between the proposed amendments and the Memorandum on the Objects of the Unemployment Insurance Amendment Bill, 2013 is particularly striking. The Memorandum appears to have been appended to the Bill as something of an afterthought, being filled with inaccuracies, incorrectly numbered and failing to provide a proper (or, in some cases, any) explanation for a range of core issues which have been included in the Bill. It is respectfully submitted that the Memorandum requires complete revision in order to properly explain the intention behind the proposed amendments and their likely application. Various other recommendations have been advanced in an attempt to address the concerns raised.

**Professor Marius Olivier**  
**Professor Avinash Govindjee**  
**17 August 2013**