SELECTED PERSPECTIVES ON RETURN-TO-WORK AND DISABILITY MANAGEMENT IN TWO DEVELOPING COUNTRIES: MALAYSIA AND SOUTH AFRICA

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I. INTRODUCTION

Return-to-work of occupationally injured and diseased workers, and the management of their disabilities, is an area clearly in need of reform in the developing world. In most of these countries, in contrast with the position in the developed world, a broad-based system has not yet been put in place. The lack of an appropriate return-to-work (RTW) framework and system often results in injured or ill employees losing their employment and becoming dependent on disability pensions or incapacity payments. It is therefore imperative to establish a RTW system that enables a disabled worker to secure, retain and advance in suitable employment, and thereby to further such person's integration or reintegration not only into the labour market but also into society. Consequently, there is a clear need for policy and legislative reforms, supported by suitable institutional and operational arrangements of the social security systems in general and the workers compensation system in particular.

In this contribution the focus is placed on the recent experience of two developing countries with regards to the introduction, via a public scheme and on a national basis, of RTW and Disability Management systems, in view of the limited scientific work which has thus far been done in this regard as far as the developing world in concerned. The said countries are Malaysia and South Africa. Malaysia has been selected as it is generally regarded as the developing country with perhaps the most advanced system of RTW and Disability Management applicable to among others occupationally injured and diseased workers. South Africa has been selected as it is a leading developing country which has now, for the first time, taken official steps to introduce a general publicly directed RTW and Disability Management system applicable to these workers. In the case of both Malaysia and South Africa ample reliance has been placed on some experiences emanating from the developed world. This contribution, which is essentially a literature review, critically analyses the Malaysian and South African initiatives, also from the perspective of some experiences in the developed world. Cursory reference is also made to the implications flowing from the ratification by both Malaysia and South Africa of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) of 2006.

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1  This contribution is to some extent based on a paper entitled ‘Return-to-work and Disability Management in the developing world: Developments in South Africa and Malaysia, with reference to the UN Convention on the Rights of Persons with Disabilities and comparative precedents’ and co-authored by M Olivier, A Govindjee, E Cheong and M Azman. The paper was presented at the 16th ILERA (International Labour and Employment Relations Association) World Congress, Philadelphia, Pennsylvania, USA, 2-5 July 2012.

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5  See also United Nations General Assembly Resolution 48/96 - Standard Rules on the Equalization of Opportunities for Persons with Disabilities.
II. BACKGROUND: KEY CONSIDERATIONS SUPPORTING THE INTRODUCTION OF RETURN-TO-WORK AND DISABILITY MANAGEMENT, PARTICULARLY IN THE DEVELOPING WORLD

In perhaps one of the most influential recent reports, not only in the UK but also worldwide, on the relationship between health and workplace inclusion, Dame Carol Black, who had been commissioned by the UK government to conduct a review of the health of Britain's working age population, had the following to say – the relevance of this for the fields of Return-to-Work and Disability Management is obvious:

- Recent evidence suggests that work can be good for health, reversing the harmful effects of long-term unemployment and prolonged sickness absence. Yet much of the current approach to the treatment of people of working age, including the sickness certification process, reflects an assumption that illness is incompatible with being in work.
- A shift in attitudes is necessary to ensure that employers and employees recognise not only the importance of preventing ill-health, but also the key role the workplace can play in promoting health and well-being.
- Any improvement in work-related support for those who develop health conditions will need to be underpinned by a fundamental change in the widespread perception around fitness for work; namely, that it is inappropriate to be at work unless 100% fit and that being at work normally impedes recovery.
- Employers have significant scope to facilitate an employee’s early return from sickness absence. Early, regular and sensitive contact with employees during sickness absences can be a key factor in enabling an early return ...
- Emerging evidence suggests that for many people, early interventions help to prevent short-term sickness absence from progressing to long-term sickness absence and ultimately worklessness ...

The importance of introducing measures aimed at returning injured workers back to work is of course not something new to the social security debate, even in the developing world. This is also true as far as South Africa and Malaysia are concerned. For example, in the case of South Africa, already in 2002, the Committee of Inquiry into a Comprehensive System of Social security for South Africa in 2002 stated that modern social protection policy-making is no longer ‘merely curative (in the sense of providing compensation), but

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6 See Marius Olivier et al, Reflections on Developing an Integrated Comprehensive Policy Framework for Rehabilitation, Re-integration and Return-to-Work Strategies in Relation to Workers who Suffered Occupational Injuries or Diseases (Final research report prepared for the Compensation Fund of South Africa)(April 2011) 22-23, 30-32; as well as Marius Olivier et al, Rehabilitation, Reintegration and Return-to-Work of Workers who have Suffered Occupational Injuries or Diseases (Policy prepared for the Compensation Fund of South Africa)(April 2011) 22-27, from where this part has largely been taken.
8 The quotations are all from the Executive Summary of the Black report.
9 Black, above n 7, 9.
10 Ibid 10.
11 Ibid 11.
12 Ibid 11.
13 Ibid 12.
also as preventative and remedial [rehabilitative] in nature. However, rehabilitation and reintegrative measures are lacking in the South African employment accident and diseases system. This is the case despite the recognition that a comprehensive rehabilitation and RTW system is necessary and should be established. As the Committee of Inquiry concluded, the reality of the current situation is that there is often no proper rehabilitation (medical and vocational) available to persons who receive compensation in terms of the relevant workers' compensation law. In the meantime, the Compensation Fund of South Africa has taken decisive steps to undertake research and have a policy developed which will facilitate the country-wide introduction of RTW measures. As is indicated in this contribution, Malaysia has for some years now been implementing a successful RTW system.

The objective of a RTW system is to return workers to employment at the earliest possible date following any injury or illness. It attempts to speed recovery from injury or illness and reduce compensation costs while ensuring that participation in a return to work plan will not, in itself, prejudice an injured employee. Employees who sustain an injury or illness should safely return to work at the earliest medically practical time [at least in a temporary (modified or alternate duty) assignment]. By allowing an employee to perform modified duties, the employee is allowed to remain a productive member of the workforce while he or she maintains their human dignity.

Evidence indicates that the savings achieved in the establishment of a RTW system far outweigh the costs which employers and government/the Compensation Fund may incur when implementing the system. Generally, as recent evidence also from Malaysia suggests, it offers employers and/or the Compensation Fund (the government) a positive return on their expenditure. A RTW system will minimise the cost of disability to both the employer and the employee by enabling workers to either remain in work or return to work in a timely manner; it is intended to have a positive influence on the physical recovery and morale of an employee. The system also leads to a minimum disruption to the family and the social and working life of the injured or ill employee, and provides job and financial security, as well as guaranteeing that the injured worker will experience a smoother transition back to regular employment. It facilitates early identification of occupational injuries or illnesses to ensure that the worker receives a high quality and standard of health care and rehabilitation which can assist in ensuring that the worker returns to work in a timely and safe manner. The RTW system will also ensure that injured or ill employees are not unnecessarily dependent on disability pensions or incapacity payments, but are rather reintegrated into the workforce. Employment, earning money and being a productive member of society play an important role in the self-value of individuals, and this is particularly important when an individual is recovering from an injury or disease.

It ensures that the employer retains a skilled workforce, rather than losing a skilled employee as a result of injury. This assists in maintaining productivity in the workplace and can assist in ensuring that the workplace remains economically viable. It also improves

15 See, for example, the limited framework provided in the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 which states that the Compensation Commissioner may found, establish or subsidise organisations, bodies or schemes whose objects include preventing accidents, encouraging occupational health or safety or providing rehabilitation facilities for disabled employees (own emphasis).
16 Committee of Inquiry into a Comprehensive System of Social Security for South Africa, above n 14, 72.
17 For further remarks relating to addressing benefit dependence, exclusion among people with disability and the promotion of re-integration into employment, see Organisation for Economic Co-operation and Development (OECD), *Sickness, Disability and Work: Breaking the Barriers* (OECD, 2010) 11.
the relationship between employers and employees; and reduces insurance costs and costs of sick leave. The focus on the economic benefits of the RTW system means that employers are particularly open to complying with government regulations concerning disability, RTW and rehabilitation.19

The RTW system is also beneficial to the Compensation Fund (the government/workers' compensation institution) as it is essentially an expression of government's or the social security institution's mandate to provide (a framework) for the meaningful labour market and social integration of occupationally injured and diseased workers. It further entails a shift away from the obligations on the Compensation Fund solely to pay compensation, but also places obligations on the employer, the workplace itself and various stakeholders to provide rehabilitation and reintegration. Also, the number of people who are dependent on compensation payments as a result of occupational disability, injury or illness are reduced. The RTW system contributes to the long-term sustainability of the Compensation Fund and also alleviates some of the financial pressures on the Fund. The system will further cut government spending due to reduction or elimination of incapacity or disability pensions, which are often long-term or permanent payments, especially for young claimants.20

There are some barriers to the establishment of a RTW system. Rehabilitation and RTW obligations are seen by many employers as another burden imposed by government (they often object to the additional cost of basic rehabilitation training for affected workers).21 It is also sometimes viewed as a cost to be curtailed. Where employees and/or trade unions are not properly informed and consulted on the establishment of a RTW system, they may not be supportive as the system could be perceived as depriving the employees of their entitlement to long-term occupational injury and disease compensation. Other barriers that have been identified as hindering rehabilitation and RTW systems include lack of knowledge on modified work and negative attitudes of employees; a longer period of time off work; the presence of psychological problems; a long period until settlement of a compensation claim; greater number of injuries and/or significant disability; the status of the employment market (high unemployment rate); the age of the injured worker; the level of skills / occupation in question; a longer period until expected treatment; and the severity of (any) spinal injury. Further personal barriers include low morale and self-esteem; financial problems; family worries; unresolved anger or guilt; feelings of failure or anxiety; loss; depression; or insomnia.

Apart from barriers that may impact negatively on policy formulation and development, there are also barriers which could hamper the successful implementation and operation of RTW. An overview of some of the literature reveals that several shortcomings can be identified, including the following:

- The lack of appropriate applied work interventions and suitable adjustments to the working environment is a paramount consideration in significant cross-country differences in RTW, at least in the context of chronic occupational back pain: as explained by Anema et al, this has contributed largely to the difference in the range of sustainable RTW (after two years of follow-up) between Germany (22%) and the Netherlands (62%).22
- Anema et al also suggest that, based on the research undertaken by them, less strict criteria are more effective. They conclude: ‘Individual packages of work

20 See also OECD, Sickness, Disability and Work, above n 17.
interventions and flexible (partial) disability benefits adapted to the individual needs and capacities are important for preventing work disability due to LBP [low back pain].

- Dysfunctions in organisational dynamics across RTW systems, relating to the workplace, health care, vocational rehabilitation and workers' compensation, could also have a negative effect on the success of introducing RTW in a particular environment. These dysfunctions could have damaging effects on workers in the form of what is referred to as a "toxic dose" affecting the worker beyond the initial injury, and relate to RTW policies that do not easily accommodate conflict or power imbalances among RTW parties; to social relations and processes that impede adequate communication about RTW; employer fiscal strategies; untimely service referrals; incomplete health forms; and confusing paperwork.

- Often the focus is placed on the medical condition and the injury suffered by the workers. However, successful RTW requires the adaptation of the worker to the new health condition and personal circumstances, and a focus on the relationship between symptoms and disability, rather than on the disability itself.

- A poorly managed health care system serves as an impediment, as is the case with an inappropriately composed disability management team – in particular where the team is mismatched in terms of abilities and personalities, and was not formed with the needs of the client in mind.

- The relationship between the worker and the workplace is important. As has been noted: ‘Competing interests of employers (costs) and workers (recovery) can become acute during times of work injury, particularly when labour relations are already strained, leading to alienation between the worker and employer and subsequent problems with return to work. Other work-related problems occur when employers are unable or are unwilling to provide workplace accommodation to a worker.’

- Limited knowledge of the claims process, and of beneficiary rights and responsibilities, against a background of treating beneficiaries with suspicion, are further complicating factors.

- It has been questioned whether it is always appropriate to focus on ability. The borderlines between ability and disability may indeed be grey. It has been argued that the concept of worker ability requires strong consideration of the environment in which ability can be enacted: environmental conditions, including policies, programmes and implementation need to be considered.

- A further stumbling block is the lack of developed cooperation among the insurance industry, health care providers, employers and occupational health care providers: both competence and cooperation are required.

- Also, labour market activation/reintegration is important, but may be of little relevance to those who are not, as a result of their injury or disease, employable.

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23 Ibid.
25 Ibid, and authorities referred to there.
26 Ibid.
27 Ibid 350.
31 Ibid.
A RTW system should be constructed in a way which honours the minimum compensation and human rights framework embedded in international standards: an overemphasis on returning workers to the labour market can infringe respect for their dignity, fairness and justice, and could enhance their stigmatisation.  

Therefore, building trust at the micro-level, i.e. at the level of the individual workers, is of utmost importance. But so too is it necessary to create trust at the macro and meso levels, by ensuring trust in the system itself, and the ability of the system to deal with abuse of the system by those affected, including unwilling employers and employees.

Workplace size may have a significant impact on the success of RTW. Similarly, rural and remote geographical considerations need to be considered when implementing RTW. It might be that geographic distance, work cultures and limited availability of alternative job duties (with the same employer) may have a dramatic impact in this regard.

Protection of RTW beneficiaries against dismissal may be ineffective in the absence of a direct remedy of reinstatement, delays as regards recourse to the (industrial or other) courts and complex litigation; overall, these deficiencies may lead to continuation of payments, thereby rendering rehabilitation ineffective.

Measures to address these barriers should be adopted. These include the need for improved, context-sensitive, workplace-oriented system design and implementation. There is an evident need for RTW to be implemented with a focus on the individual worker, adjusting his/her work environment appropriately, accommodating his/her needs, health condition and personal circumstances, and ensuring that the individual's dignity is upheld. As has been noted by MacEachen et al, ‘problems as multi-faceted as RTW require analytic focus at different levels, ranging from the individual to the workplace to systems.’

In-plant (workplace) integration agreements should be concluded. Applicants for disability benefits or for extended sick leave could be routinely evaluated for rehabilitation and RTW. This may cause benefit entitlements to be reduced over time. Financial incentives could also be extended to compliant employers in the form of reduced compensation assessment premiums. Non-compliant employers (employers with a poor rehabilitation and RTW record) will have increased premiums. Transitional work and supervised work-based rehabilitation arrangements also enhance the potential of long-term absent employees to return to work either in their current job or through redeployment. It is also important to institute prevention strategies (risk management and health and safety measures).

Returning an injured worker to work is a shared responsibility primarily between government, trade unions, employers, employees and service providers. Therefore, these role players all have certain roles, responsibilities, and obligations to support early and safe

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34 Ibid.
38 Ibid 351.
39 Olivier et al, Reflections on Developing an Integrated Comprehensive Policy Framework for Rehabilitation, above n 6, 137-140.
40 See also Return to work, available at http://www.wsib.on.ca/wsib/wsbsite.nsf/public/ReturnToWork.
return to work. Communication and cooperation toward this common goal is thus essential, as effective injury/illness management relies on the cooperative efforts of all participants – employers, workers, insurers, doctors and other health practitioners. A co-ordinated approach is required to achieve the shared goal of early and safe return to work and full productivity. It is imperative to ensure that these role players are properly informed and consulted on the introduction and implementation of a RTW strategy/policy/programme in South Africa, given the crucial role that these providers will play.

III. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

International standards in relation to the status and treatment of persons with disabilities, including workers who have suffered an occupational injury or disease, provide crucial benchmarks for the development of an appropriate RTW policy. These standards have primarily been encapsulated by the International Labour Organisation (ILO) and the United Nations (UN). The widely ratified recent UN Convention on the Rights of Persons with Disabilities (UNCRPD) of 2006 is of crucial importance for the arguments being developed in this paper.\textsuperscript{41} South Africa ratified both the Convention and the Optional Protocol in 2007. Malaysia signed the Convention in April 2008 and ratified same during 2010.\textsuperscript{42}

By ratifying and being a party to instruments such as the UNCRPD, provisions pertaining to, for example, workers compensation and issues regarding workplace re-integration are binding upon South Africa and Malaysia, from the perspective of international law and should find expression in these countries’ domestic law. The UNCRPD contains several provisions which are of direct relevance and application to a RTW policy/programme.\textsuperscript{43} The core provision appears to be article 27, pertaining to the right to work and employment of Persons with Disabilities (PWDs).

In terms of this article, South Africa and Malaysia are obliged to “safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation”, to,\textit{ inter alia}:\textsuperscript{44}

a. Promote vocational and professional rehabilitation, job retention, and RTW programmes for PWDs;\textsuperscript{45}

\textsuperscript{41} Doc.A/61/611. Although the first ratifications only occurred in 2007, 130 countries have ratified this important instrument to date (there are 155 signatories to the Convention), while 76 countries have ratified the optional Protocol to the Convention (there being 91 signatories to the Optional Protocol). In terms of article 1 of the Optional Protocol to the UNCRPD, a State Party to the Protocol recognises the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention. See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en and http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en respectively – information obtained on 1 April 2013.

\textsuperscript{42} The Convention and the Optional Protocol were ratified by South Africa on 30 November 2007. While some may argue that the UNCRPD was the main impetus for the implementation of RTW in Malaysia, it must be noted that the Act which governs SOCSO, namely the Employees’ Social Security Act, 1969 (ESSA) pre-dates the Convention.

\textsuperscript{43} Article 26, for example, specifies that member countries ‘shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life … [by organising, strengthening and extending] comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services ….’

\textsuperscript{44} Article 27(1) – emphasis added.

\textsuperscript{45} Article 27(1)(k).
b. Enable PWDs to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; 46

c. Prohibit disability discrimination in employment 47 – which includes a prohibition on the denial of reasonable accommodation;48

d. Protect the rights of PWDs, for example with reference to equal opportunities and equal remuneration for work of equal value, and safe and healthy working conditions;49

e. Promote employment opportunities and career advancement for PWDs in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment,50

f. Promote employment opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business,51

g. Ensure that reasonable accommodation is provided to PWDs in the workplace;52

h. Promote the acquisition by PWDs of work experience in the open labour market.53

The UNCRPD, furthermore, explicitly requires compliance with the following objectives, which are equally relevant to RTW programmes:

a. Promotion of individual autonomy and independence;54

i. Involvement of those affected in (relevant) policy-making (ie at the macro-level)55 and when developing individual rehabilitation plans (i.e. at the micro-level);56

ii. Promotion of societal inclusion and participation;57

iii. Promotion of the availability, knowledge and use of assistive devices and technologies, designed for PWDs, as they relate to habilitation and rehabilitation;58 and

iv. Introduction of appropriate training, for both –

a. Professionals and staff working in habilitation and rehabilitation services;59 and

b. PWDs.60

In particular, as far as rehabilitation is concerned, the UNCRPD requires that State Parties must ‘organize, strengthen and extend comprehensive habilitation and rehabilitation programs  

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46 Article 27(1)(d).
47 Article 27(1)(a).
48 Article 27 (1)(i). See the definition of “discrimination” in article 2 of the Convention.
49 Article 27(1)(b) – emphasis added.
50 Article 27(1)(e).
51 Article 27(1)(f).
52 Article 27(1)(i). “Reasonable accommodation” means a necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms – see article 2 of the Convention.
53 Article 27(1)(j).
54 Articles 3(a), 19 and 26(1).
55 Article 4(3) stipulates: ‘In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.’
56 See par (o) of the Preamble: ’Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them’ (emphasis in original).
57 Articles 3(c) and 26(1)(b).
58 Article 26(3).
59 Articles 4(1)(i) and 26(2).
60 Article 27(1)(d).
services and programmes, particularly in the areas of health, employment, education and social services...’.

These multi-faceted rehabilitation services and programmes must –

• involve early intervention and a multi-disciplinary assessment of individual needs and strengths;

• support community and societal participation and inclusion;

• be voluntary; and

• be available to PWDs as close as possible to their own communities, including in rural areas.

Article 32 of the Convention requires progressive realisation of the rights contained in the Convention through international cooperation and through State Parties taking appropriate measures such as development cooperation, exchange programmes, bilateral and trilateral agreements, domestication of international instruments, development of mainstreaming norms and standards in line with international laws. According to Article 33 of the Convention, states must establish national focal points for the implementation of the Convention, co-ordination mechanisms, implementation mechanisms and legal and administrative frameworks to promote and monitor implementation, as well as ensure the participation of civil society.

For reasons considered below, South Africa, in particular, remains at a very early stage when it comes to developing and implementing such mechanisms. South Africa acknowledges the importance of national efforts, coupled with international cooperation, with regards to the implementation of the UNCRPD and its Optional Protocol in order to improve the living conditions of persons with disabilities in the country. Despite this, it has been argued that South Africa has not adequately incorporated the UNCRPD into its legal framework since ratifying the Convention in 2007. This has had the effect of reducing the impact of the Convention in South Africa. South Africa has, in addition, failed to submit a report to the United Nations Committee on the Rights of Persons with Disabilities. The Parliamentary Committee on Women, Youth, Children and People with Disabilities has, for example, expressed its concern at the disharmony of South African legislation pertaining to the disabled and the effect that the lack of implementation of the UNCRPD was having on people with disabilities.

Although the UNCRPD cannot be said to have informed the introduction of RTW in Malaysia, there is little doubt that it has proved to be a sound reference point for purposes of benchmarking SOCSO’s RTW programme. SOCSO’s RTW programme, in fact, covers practically all aspects contained in Articles 26 and 27 of the UNCRPD, having been

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61  Article 26(1).
62  Article 26(1)(a).
63  Article 26(1)(b).
64  Ibid.
65  Ibid.
66  Ibid.
68  Helen Combrinck has noted that South Africa presently has no specific national legal framework for the UNCRPD and that this has significantly weakened the effect of the Convention in South Africa: Parliamentary Monitoring Group (PMG) Report ‘South Africa’s compliance with the United Nations Convention on Rights of Persons with Disabilities: University of the Western Cape (UWC) Centre for Disability Law and Policy Presentation’ (1 March 2011).
69  See PMG Report, above n 68.
70  States are meant to submit reports to the Committee, which meets twice per year and was established to give guidance on the implementation of the Convention at national level. State Reports to the Committee are due within two years of ratification, and then subsequently every four years. South Africa missed the deadline for its first report, as well as the second extended deadline.
71  Ibid.
modified in the years since its introduction in order to comply more closely with these international obligations. \(^{72}\) The completion of SOCSO’s Rehabilitation Centre in 2014 will, for example, amount to another practical step in accordance with Malaysia’s international commitments in terms of the UNCRPD.

IV. ADJUSTING PRINCIPLES AND PRACTICES IN SOUTH AFRICA AND MALAYSIA

In Malaysia several adjustments have been made to develop an appropriate RTW framework, suited to the Malaysian context. Suitable RTW measures of a public nature have not yet been introduced in South Africa, as the policy framework for the country-wide introduction of a RTW system in relation to occupational injuries and diseases was only recently finalised. Yet, certain steps have been suggested, and apparently endorsed by government. \(^{74}\) This part of the contribution therefore deals with how the dedicated roll-out of the RTW system has occurred in Malaysia, and which steps are in the main foreseen in South Africa. It must be noted from the outset that any reform measures to be proposed must necessarily be designed in a way that takes into account the specific social, political and legal context of the system itself. \(^{75}\) The various barriers to the successful introduction of RTW in general, previously discussed, must also be identified (in both Malaysia and South Africa) and overcome. In addition, it is true that importing models from outside to a country that does not have the same type of social legislation (even though the countries may, for example, enjoy some similar, developing country characteristics) requires the development of a model which is properly adapted to that context. \(^{76}\)

A. Malaysia

1. Legal and Policy Framework

As far as Malaysia is concerned, the Employees’ Social Security Act 1969 (Act 4) applies to all industries and formal sectors in Malaysia. \(^{77}\) Some of the benefits provided under these schemes are: medical treatment coverage, periodical payments to dependents of insured persons who die as a result of employment injury, supply of artificial limbs, periodical payments to an injured person who becomes severely incapacitated and funeral benefits. The Act has also a provision for the rehabilitation and return to work for disabled workers, including the utilization of a case management approach. \(^{78}\)

\(^{72}\) SOCSO was established on 1 January 1971 as a Government Department to enforce the Employees’ Social Security Act, 1969 (ESSA). SOCSO became a statutory body on 1 July 1985. It provides two social security schemes to protect the welfare of employees and their dependants, namely the Employment Injury Insurance Scheme and the Invalidity Pension Scheme (introduced in 1974).

\(^{73}\) However, certain sectors, in particular the mining sector in South Africa, have developed and implemented their particular versions of RTW.

\(^{74}\) See the recent Ministerial announcement at [http://www.polity.org.za/article/sa-dlamini-briefing-by-the-minister-of-social-development-at-the-social-protection-and-community-development-ministerial-cluster-briefing-cape-town-14022012-2012-02-14](http://www.polity.org.za/article/sa-dlamini-briefing-by-the-minister-of-social-development-at-the-social-protection-and-community-development-ministerial-cluster-briefing-cape-town-14022012-2012-02-14), accessed on 14 February 2012: ‘The Compensation Fund is making strides in improving policy in the rehabilitation of employees and re-integration, post occupational injury or occupational diseases. Furthermore, a policy framework is being developed to provide guidelines for all stakeholders that include employees, employers, healthcare providers and the general public for vocational rehabilitation.’ Apparently, legislative changes to accommodate RTW have been developed, while steps have been taken to provide for RTW institutionally.

\(^{75}\) Lippel, above n 32, 532.

\(^{76}\) Ibid.

\(^{77}\) Various other labour-related laws also apply in Malaysia, including the Employment Act, 1955, the Industrial Relations Act, 1967, the Trade Unions Act, 1959, the Occupational Safety and Health Act, 1994, the Social Security Act, 1969, the Employees’ Provident Fund Act, 1991, and the Workmen’s Compensation Act, 1952.

\(^{78}\) Some tax incentives for participation in return to work interventions may be found in sections of the Income Tax Act, 1967 (Act 53 of 1967).
According to the Act, SOCSO may, in addition to the scheme of benefits specified in the Act, promote measures or co-operate with existing institutions for the improvement of the health, occupational safety and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured and may incur in respect of such measures expenditure from the funds of the Organization within such limits as may be prescribed by the Minister. Such measures may include provision of artificial limbs and appliances, and opportunities for gainful employment under suitable conditions. In addition, the Employees’ Social Security (General) Regulations, 1971 provide the basis for SOCSO to direct the Insured Persons to attend any course of physical or vocational rehabilitation provided by SOCSO.

Apart from that, ‘An Insured Person [under this Act] suffering from or claiming to suffer from invalidity or permanent disablement may be provided by the Organization, free of charge facilities for physical or vocational rehabilitation.’ Based on section 40 and section 57(1) of the Act, it may be argued that SOCSO has enough provisions in establishing a Return to Work framework to fulfill its obligation as a social insurance provider, although the Act contains no specific or technical definition of “return to work.”

The importance of return to work in the Malaysian context is also evident from jurisprudence emanating from the courts in Malaysia, which has seen workers’ security of tenure in employment as synonymous with the notion of property rights”. Cases have also viewed the right to employment as a fundamental right which forms part of a person’s right to livelihood, affording that notion a broad interpretation similar to that which is prevalent in India.

Besides the legal mandate provided under the Act, SOCSO had analysed its compensation trends. The current developments of accidents, temporary disablement benefit, permanent disablement benefit, invalidity pension and those claiming invalidity is alarming to SOCSO in the absence of any carefully planned interventions. As a result, the SOCSO Return to Work programme was established in the year 2007 with the objective of assisting SOCSO's Insured Persons with employment injuries as well as those claiming for invalidity pension to be able to return to work as quickly and safely as possible through a biopsychosocial and multidisciplinary case management approach. To achieve the most optimal outcome, SOCSO adopted the case management approach. SOCSO Case Management is a collaborative process that facilitates recommended efficient treatment plans to assure the appropriate medical care is provided to disabled, ill or injured individuals to ensure that they return to employment. Proper planning and coordination of health care services appropriate to achieve the goal of medical rehabilitation are designed by disability managers. Case management may include, but is not limited to, care assessment, including personal interviews with the client, and assistance in developing, implementing and coordinating a medical care plan with healthcare providers, as well as the clients and the clients' family, including evaluation of treatment results while promoting cost-effective care. Case management may also include examination of the

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79 Section 40, Employees’ Social Security Act 1969, Malaysia.
80 See Regulation 74(ii). This Regulation compels every claimant for and every beneficiary in receipt of disablement benefits to comply with every direction given to him / her by a competent office.
81 Section 57(1), Employees’ Social Security Act 1969, Malaysia. In terms of section 57(4), an insured person who has to undergo physical or vocational rehabilitation or who is to be fitted with prosthetic, orthotic or other appliances may be paid or reimbursed, as determined by the Organization, expenses reasonably incurred or to be incurred in respect of such measures.
82 For other definitions related to disability, see s 2 of the Disabilities Act, 2008 (Act 685 of 2008), including a definition of “persons with disabilities”.
83 See, for example, Hong Leong Equipment SDN. BHD v Liew Fook Chuan and Another (1996) MLJ 481, 509-510.
84 See Article 5(1) of the Federal Constitution of Malaysia and the judgment of Eusoff Chin CJ in R Rama Chandran v The Industrial Court of Malaysia and Another (1997) 1 MLJ 145 at 190. Also see Kirloskar Brothers Ltd v Employees’ States Insurance Corp (1996) LAD IC 1718 at 1721 (SC) and Francis Coralie v Union of India (1981) AIR 746 (SC).
workplace, in order to assess whether interventions in the working environment, or workplace modifications, might be appropriate.\(^{85}\) As has been noted,

it is important to recognize that work rehabilitation occurs within a network of workplaces, policies, programs, and professionals, which each play a role in worker outcomes. Therefore, a focus on the environments in which worker ability can be enacted might be as important as a focus on improving characteristics of the workers themselves.\(^{86}\)

This may also contribute to minimizing the impact of the various barriers, already identified, which could hamper the successful implementation and operation of RTW in a country such as Malaysia.

SOCSO’s scheme protects workers as defined under the Act and with this, SOCSO covers all workers below RM3000 which can range from the lower income earners to the middle income earners from the formal industries. The self-employed are not covered under this Act. Given this range, SOCSO covers most workers from every type of employment, various industries, cultures and education levels. On the income distribution side, it must be noted that there were 5.8 million households in Malaysia in 2007. Of these, 8.6% had a monthly income below RM1,000, 29.4% had an income between RM1,000 and RM2,000, while 19.8% earned between RM2,001 and RM3,000; 12.9% of the households earned between RM3,001 and RM4,000 and 8.6% between RM4,001 and RM5,000. Finally, around 15.8% of the households had an income between RM5,001 and RM10,000 and 4.9% had an income of RM10,000 and above.\(^{87}\) The effect of this distribution of income in Malaysia is that over half of Malaysian households earn below RM3000 per month, meaning that all workers from such households are likely to qualify for SOCSO RTW protection.

The Return to Work Programme commenced in 2005 by adopting an evidence-based, multidisciplinary rehabilitation protocol-based system, borrowed from Finland. During this period, the RTW Programme was implemented without the assistance of case managers and was highly dependent on service providers. In 2007, SOCSO decided to introduce case managers into the programme. In establishing the Return to Work Programme in 2007, SOCSO requested the assistance of the Commonwealth Rehabilitation Services (CRS) of Australia. CRS introduced SOCSO to their processes of return to work, such as initial assessments, rehabilitation plans, vocational assessments, worksite assessments and monitoring. These processes have since been adopted by SOCSO but have now been modified to suit the Organisation’s needs and legal framework. There were initially only five Case Managers in Malaysia. In 2009, SOCSO sent two of its case managers to the German Statutory Accident Insurance Organisation (DGUV) for a three month attachment in order to seek further best practice experience which could be adopted into SOCSO’s RTW programme. In 2010, SOCSO adopted the Canadian-based protocol from the National Institute of Disability Management and Research (NIDMAR) for the professional development of its case managers. SOCSO has, ever since, continued to improve its return to work processes to suit the community’s needs in Malaysia. SOCSO presently has 35 Case Managers (of which 18 are certified as Disability Management Professionals under the NIDMAR education standards) and 10 Job Placement Officers.\(^{88}\)

\(^{85}\) Ståhl et al have criticised sickness insurance reforms which have primarily targeted the compensation system in controlling in- and out flow from sickness benefits in countries, while the importance of involving the workplace arena has, according to the authors, been disregarded: Ståhl et al, above n 30, 1380. Also see Anema et al, above n 22, 425. A focus on environment has, in addition, been considered to be significant for complex processes such as vocational rehabilitation that involve a variety of institutions and social actors: MacEachen et al, ‘The “Ability” Paradigm’, above n 29, 105, 113, 115.


\(^{87}\) Puah, ‘Half of M’sian households earn below RM3,000 a month’, The Edge (Malaysia) 10 July 2008.

\(^{88}\) Marius Olivier et al, *SOCSO Return-to-work Programme in Malaysia: A Handbook 2012* (International Institute for Social Law and Policy / SOCSO, 2012) 73. The limited resources available in respect of the appointment of further Case Managers and the like has been noted as a constraint in the Malaysian
The SOCSO system was clearly motivated by a variety of considerations, including the legal obligation of SOCSO (as well as the high costs associated with the system prevailing in Malaysia at that time. Importantly, the actual roll out of the programme was not done simultaneously across the country, but was first implemented by way of a pilot project. The positive results obtained in this pilot study, which were closely monitored (relating mainly to back pain cases), provided the impetus for the further roll out of the programme.89

2. SOCSO's Centralised Model

SOCSO presently remains focused on its case-targeting model, rather than having an employer-liability model, due to the current centralised system. Case-targeting, which implies a focus on selected (generally more serious) injuries and illnesses, is necessary due to the limitation of human capacity, there being only 35 Case Managers serving throughout the country. A smart predictive modelling system has, however, assisted the SOCSO RTW Department to have a standardised case targeting and referral system.

While Disability Management may not presently be a liability for employers, there are indeed provisions in the ESSA to support a programme in terms of which employers are not allowed to dismiss or discharge an employee during a period of medical leave subsequent to an employment injury.90 Enforcing this provision would itself encourage employer participation in the RTW Programme and would afford the case managers a proper time frame to assist the injured worker to return to work. Nevertheless, the present approach of the Malaysian system to impose duties on SOCSO and insured persons in respect of return to work interventions (i.e. in terms of the provisions of Act 4, discussed above), without yet making it compulsory under Act 4 for employers to adopt a return to work approach may be criticised. There are, however, various tax incentives in the system which encourage employers to (continue to) employ disabled persons.91

3. Towards a Decentralised Model

As indicated above, SOCSO has adopted the NIDMAR protocols in its attempts to move towards a decentralised model. In terms of this model, SOCSO plans to offer the NIDMAR certification to employers. By doing this, SOCSO would be able to ensure that there exists a sufficient amount of generic disability management knowledge in the labour market needed for purposes of implementing a decentralised model in Malaysia. It is foreseen, for example, that larger companies may utilise part of their resources to manage their own cases in future (by employing or obtaining the service of a certified disability manager), while smaller companies may continue to rely on SOCSO’s Case Managers.92

B. South Africa93

1. Legislative framework

The workers’ compensation laws in South Africa lean, in a lopsided fashion, towards compensation, with little focus on rehabilitation and RTW.94 For example, as indicated
below, there is little provision in the Compensation for Occupational Injuries and Diseases Act, No 130 of 1993 (COIDA) which specifically attempts to enforce reintegration measures such as compulsory rehabilitation or vocational training programmes. Measures aimed at remedying or repairing damage, such as re-skilling or re-training, labour market and social integration need to be adopted as an integral part of the social security system, alongside compensatory measures. The establishment of a well-structured, co-ordinated and unified health system in South Africa is a state priority and the introduction of a RTW system in cases of occupational injury, disease or broader instances of disability must dovetail with such a system in South Africa.95

This requires multifaceted and multi-layered involvement of the government, as well as the meaningful contribution of all stakeholders to be involved in early RTW interventions. There are various legislative options for achieving this end. The mandate of the Director-General of the Department of Labour (DOL), or the Compensation Commissioner as the delegatee of the Director-General, is broad and incorporates matters wider than merely providing compensation. This mandate includes the provision and funding of facilities to assist injured employees in returning to work.96 The Director-General also has the discretion to apply unclaimed compensation for the general welfare of injured employees or employees suffering from occupational diseases, which will include the performance of any wider rehabilitation activities that the Compensation Fund decides to support.97 Nevertheless, various provisions currently contained in COIDA require expansion and amendment in order to clarify the Compensation Fund’s role beyond medical rehabilitation matters alone. Re-integration into the labour market is currently not an express goal of COIDA.98

A new chapter to be contained in COIDA will be the best vehicle to achieve the objective of relating a RTW strategy to the existing compensatory mechanisms contained in COIDA. Such an amending chapter has apparently been drafted. The changes which are required should –

- Describe and define the roles, functions and responsibilities of various role-players, in a manner which creates legal obligations;
- Identify the range of incentives (positive and negative) to promote participation of workers and employers in RTW interventions;
- Adjust, in COIDA, the notions of “benefits”, “medical aid” and “rehabilitation activities” to ensure that the complete range of RTW-linked rehabilitation activities is covered;
- Extend the range of benefits / services available in the event of occupational diseases to specifically include rehabilitation and reintegration within the framework of RTW;
- Introduce a legal obligation to keep the position of an occupationally injured / diseased employee open for a particular period of time, subject to participation in an agreed rehabilitation plan;
- Extend dismissal protection, also within the context of the Labour Relations Act 66 of 1995, to specifically protect occupationally injured / diseased employees from

95 The proposed National Health Insurance (NHI), for example, is a financing system that will ensure that all South African citizens (and long-term residents) are provided with essential healthcare, regardless of their employment status or ability to make a direct monetary contribution to a NHI Fund. The proposed introduction of the NHI system is also intended to give effect to the basic human right to health care, as reflected by the South African Constitution. Importantly, it is intended that NHI benefits will cover preventive, promotive, curative and rehabilitative health services, in an attempt to rectify the present healthcare system, which has been criticised for placing undue focus on the curing of disease and the performance of medical procedures: Department of Health “National Health Insurance” accessed at http://www.doh.gov.za/list.php?type=National%20Health%20Insurance (accessed on 3 April 2013).
96 Section 4(2)(b) COIDA.
97 Section 4(2)(d) COIDA.
98 Committee of Inquiry into a Comprehensive System of Social Security for South Africa, above n 14, 63.
being dismissed or otherwise disadvantaged while they are engaged in an agreed rehabilitation activity. This protection could be time-bound;

- Consider the adoption of similar interventions and forms of protection in ODMWA (Occupational Diseases in Mines and Works Act 78 of 1973, to ensure consistency of treatment of all workers in South Africa;
- Establish a new multi-level or multi-tiered dispute resolution framework, impacting on RTW and rehabilitation within the COIDA framework; and
- Reformulate COIDA provisions regarding the position of migrant workers and (South African) workers abroad, so that these workers too may benefit from RTW arrangements. 99

2. Role of the Compensation Fund and larger employers

It is envisaged that the Compensation Fund should play a three-pronged role in the new proposed system: firstly, by continuing to provide compensation for employees with an occupational injury or disease, while directing employers (and employees) to the obligations / recommendations of the new chapter proposed for introduction in COIDA (including compliance with the recommended new legal obligation to keep the position of an occupationally injured / diseased employee open for a particular period of time, subject to participation in an agreed rehabilitation plan). Secondly, in the event that the employer is unable to reasonably accommodate and retain such employees, the Compensation Fund may itself carry out / contract out activities which will contribute towards the attainment of the broader (and new) objectives of that Act. Thirdly, given the reality of the South African labour market, with specific reference to the large number of small- and medium-sized enterprises, and the perceived inability of these enterprises to provide rehabilitation, reskilling and reintegration services, it should only be expected of larger employers to roll-out RTW and Disability Management, and to provide rehabilitation and reskilling services. 100 Therefore, as far as workers employed by smaller employers are concerned, it is envisaged that the Compensation Fund should make available these facilities and services, bearing in mind that South Africa has a high unemployment rate and that such rehabilitation initiatives might, in practice, often occur despite their being limited available jobs for rehabilitated / rehabilitating workers to perform. 101

3. Training and workplace audits

Given the range of functions to be exercised by disability managers in the South African context, it is essential that the correct person is chosen for the role. Disability managers themselves require adequate training to ensure that they appreciate the significance of their

99 A wide range of employees are included within the sphere of COIDA. It is effectively only the issue of entitlement to employment injury benefits by undocumented / irregular non-citizens that requires a more streamlined approach, bearing in mind that the Director-General is (in terms of section 27 of the Act) empowered to treat an otherwise invalid employment or related contract as valid at the time of an accident. Regulations may, however, have to restrict access abroad (on the part of non-citizens) with respect to matters such as rehabilitation, on the basis that it would be too onerous for the country to establish the necessary safeguards in all countries to which injured / ill workers return in the absence of a bilateral / multilateral arrangement. Such matters, in respect of South African workers injured abroad (but seeking rehabilitation in South Africa) and rehabilitation of non-citizens who suffer an injury or disease while employed in South Africa, but who then return to their country of origin, should be clarified in the Act. Presently, section 22 of COIDA states only that an employee meeting with an accident resulting in his / her disablement or death shall, subject to the provisions of the Act, be entitled to the benefits provided for and prescribed by the Act, which refers mainly to the payment of compensation and, where applicable, medical aid or payment of the cost of such medical aid (also see section 1 of COIDA).

100 On the problem of “passive employers” (i.e. employers who make no contribution to the rehabilitation / return-to-work process), see Ståhl et al, above n 30, 1379.

101 For some of the difficulties associated with labour market reintegration (despite proper rehabilitation), see Ståhl et al, above n 30, 1378. On the critical need to increase employment opportunities for persons with disabilities, see OECD, *Sickness, Disability and Work*, above n 17, 12.
position and are able to properly do the job. There are a number of skill areas in which
disability managers need to be proficient in order to provide a high quality of service. It is
proposed that legislation or ministerial regulation be introduced to ensure that disability
managers are certified as being competent to coordinate, implement and manage RTW
programmes in these types of enterprises. A core institution in the provision of training and
certification for disability managers and RTW coordinators is the National Institute of
Disability Management and Research (NIDMAR). Training could also be provided in-
house, or outsourced to higher education institutions in South Africa. It is clear that
training needs will differ depending upon whether the person seeking to obtain
qualification as a disability manager is already in possession of a related-qualification or
not. The Disability Management training programme can, in other words, be more
intensive for people who have no other qualification or related experience as a service
provider in this area.

Proper planning of RTW and the creation of policies at the enterprise level play an
important role in ensuring that RTW outcomes are positive. Policies and programmes
should be tailor-made to suit each enterprise, and the policies should be clear and specific
regarding the roles of stakeholders, and regarding how the RTW programme is to be
implemented. The importance of communication, early intervention, clear planning and
detailed information regarding the role of the important stakeholders in the process can be
provided in this way. Disability management and RTW audits are available and have also
been used in a number of jurisdictions, and could be of relevance in the South African
context. In particular, NIDMAR has developed an audit / assessment tool in the field of
disability management and RTW. As such, it is also able to audit RTW programmes
implemented in companies around the world and to assist companies in achieving
international standards with respect to their RTW programmes. One example is the
Worksite Disability Management Audit (WDMA), which strives to monitor that RTW
programmes are being correctly implemented and to evaluate whether the correct policies
are being implemented at an enterprise level.102 Such an audit is able to provide
information to organisations and other stakeholders regarding the suitability and
receptiveness and preparedness of the workplace to RTW and rehabilitation. A workplace
audit, by, for example, measuring what is happening at the workplace when it comes to
rehabilitation, can accordingly play an important role in assisting workplaces in developing
policies and implementing plans which are relevant to their particular environment and
context. Use of an audit tool will enable enterprises to appreciate what they need to do in
order for disability management to be introduced in their environment. Once a designated
and trained disability manager has been appointed in a particular workplace, it may be
expected that the disability manager will himself / herself conduct periodic audits of the
workplace in order to maximise the potential of rehabilitation and early RTW.

4. Implementation and roll-out
The rolling out of the RTW programme in South Africa requires gradual implementation
and capacity building starting with large enterprises, the adoption of a comprehensive
approach to Disability Management, and education of and consultation with the various
stakeholders.103 The South African RTW programme must be properly integrated with the
existing system of compensation for occupational injuries and diseases and should be
introduced in a manner which is appreciative of the South African context. The design of
the RTW system must ensure that stakeholders have a vested interest in the system

102 Donald E Shrey and Norman C Hursh, ‘Workplace Disability Management: International Trends and

103 For example, it has been argued that workers’ problems with extended claims may be linked to RTW
policies that do not easily accommodate conflict or power imbalances among RTW parties and by social
relations and processes that impede communication about RTW situations and problems: see MacEachen
(including, for example, proper incentives for employer and employee participation) and
the Compensation Fund should take a leading role in the roll out of the RTW system.

The RTW programme in South Africa should be piloted with the results and
recommendations used for the further introduction of the RTW programme. Also, an
equitable roll-out is required, ensuring that all provinces and the different geo-economic
constituencies in South Africa be served. Appropriate funding arrangements have to be
developed for an early RTW framework in the South African context.

Finally, broad-based consultation with key stakeholder groups is required. Key
stakeholder groups include: Government; health professional bodies; disability movement,
employers and trade unions. There are different levels at which this new policy should be
communicated.

IV. THE NEED TO DEVELOP UNIQUE, COUNTRY-SPECIFIC APPROACHES IN
THE DEVELOPING WORLD

This paper argues that it is necessary to develop unique and country-sensitive RTW
approaches in the developing world, bearing in mind the nature of the national labour
market, and effective means to ensure stakeholder participation.

A variety of innovative, country-specific strategies may succeed in securing stakeholder
buy-in and, ultimately, RTW success in the developing world. For example, as the
Malaysian (SOCSO) experience has proved, establishing a tripartite body immediately
secures an element of stakeholder buy-in.104 In addition, labour inspection of occupational
safety and health standards in Malaysia, at times regarded as insufficient and expensive,
was strengthened by integrating RTW with an employer obligation to improve
occupational safety and health standards. Case Managers who arrange for worksite
assessments in Malaysia have played a role in preventing future accidents by advising
employers about safety and health matters pertaining specifically to their workplace. This
has served to illustrate to employers in Malaysia how RTW is able to act as an indicator of
good occupational health and safety policies. Positive outcomes have flowed from this.105

Also, in Malaysia, employer involvement is ensured by formally linking employer
support of the RTW system to the notion of corporate social responsibility.106 Simple
mechanisms such as conducting employers’ seminars, and facilitating consultations
with affected individuals, may also prove to be highly effective.107 Furthermore, supporting
self-employment and entrepreneurship may constitute appropriate interventions in the

104 The SOCSO Board comprises representatives from employers, trade unions and government agencies. As
at 2011, the number of active employers in Malaysia totalled 347,871. The number of active employees
presently totals 5,518,823. It has to be noted that the Board of the Compensation Fund, albeit a largely
advisory institution, is also a tripartite body.

105 For example, a few Malaysian employers now seek active assistance from SOCSO before implementing
disability management protocols in their human resource practices. Some Malaysian hospitals have
already established RTW clinics as part of the services offered; and SOCSO is attempting to replicate and
standardise such practices throughout the country.

106 In order to encourage employer participation in the RTW programme, their cooperation is regarded as part
of their corporate social responsibility. During worksite visits, the idea of having RTW as a corporate
social responsibility is suggested to employers. The cooperation of employers in the RTW programme is
acknowledged by the issuing of recognition certificates by SOCSO. In addition, SOCSO is currently
negotiating with the Kuala Lumpur Stock Exchange for the inclusion of RTW as one of the activities that
can be undertaken by employers as part of their corporate social responsibility (as a corporate social
responsibility criterion for listing on the Stock Exchange) – see Olivier et al, SOCSO Return-to-work
Programme in Malaysia, above n 88, 43.

107 SOCSO has, for example, taken the initiative to organise Annual RTW Conferences for purposes of
information sharing / knowledge transfer and also to convince stakeholders such as employers, members
from the medical fraternity, allied health practitioners and NGOs, of the benefits of RTW. SOCSO Case
Managers have been specifically involved in these initiatives and have played an important role in
establishing and explaining the relationship between RTW practices and good corporate social
responsibility.
developing world, as accommodation in formal employment may often not be possible, in view of the structure of the labour market.\textsuperscript{108}

Creativity and thought is also required in order to address critical concerns relating to lack of funding. In Malaysia, for example, contractual arrangements have been entered into with a range of service providers. As public hospitals are not suitable for RTW purposes, reliance has been placed on private providers. These providers must comply with criteria set by SOCSO, and have to be officially accredited. Payments to such providers are made in accordance with a fixed tariff.\textsuperscript{109}

It is interesting to note that the Malaysian RTW programme is entirely a Web-based system, which is also conducive for purposes of gathering statistics. Use is made of an interactive model, based on similar Australian and German systems, and containing information on, among others, clients’ profiles, ICD 10 classification, case notes and photographs, initial assessment, rehabilitation plans and job-seeking data.\textsuperscript{110}

Research conducted in Hong Kong has resulted in the identification of a range of other critical factors and intervention modalities.\textsuperscript{111} These interventions are considered to be essential for the future direction of facilitating workers with work injury in community reintegration and return to work in Hong Kong. Some of these factors, which may also be relevant for purposes of informing developing country RTW attempts, include:

- The importance of timely intervention.\textsuperscript{112}
- Workplace-based rehabilitation (work-site based rehabilitation is found to be particularly effective for better management of workers with work injury).\textsuperscript{113}
- Communication among different stakeholders: good communication throughout the occupational rehabilitation process is of the utmost importance for facilitating workers with injury to return to work.
- Company dynamics: dynamics of employers and the different personnel involved in interacting with workers with work injury within a company are also crucial to the success of the return to work process.\textsuperscript{114}
- Rehabilitation counselling: psychosocial factors play a role in influencing the worker’s rehabilitation outcome and the success of reintegration into competitive employment. Self-expectation (on the part of an employee) of return to work has a significant impact on determining the probability of a worker’s return to work and the reduction of pain intensity. Therefore, rehabilitation counselling, as one of the psychosocial interventions, could be used to tackle the worker’s psychological hurdles that may arise from the disability, loss of work role, and anxiety associated with reengagement in work role.\textsuperscript{115}

\textsuperscript{108} Even in the developed world context, the need to take into account the labour market context and distinct needs of rural and remote geographical areas has been emphasised: see Ciccarelli and Dender, above n 35.

\textsuperscript{109} See Olivier et al, \textit{SOCSO Return-to-work Programme in Malaysia}, above n 88, 45-46. A multi-disciplinary rehabilitation centre is currently being established by SOCSO: ibid 58-59.

\textsuperscript{110} Olivier et al, \textit{Rehabilitation, Reintegration and Return-to-Work of Workers}, above n 6, 38.

\textsuperscript{111} See generally Elaine Y L Chan, Karen W S Woo and Tina M Y Tang ‘Occupational Rehabilitation Services Provided by a Community Workers Health Centre in Hong Kong: A Case Study’ \textit{(2008) 30 Work} 5.

\textsuperscript{112} This has been defined as provision of rehabilitation at an optimum time so as to maximise rehabilitation outcomes.

\textsuperscript{113} This would include a job site visit, evaluation and developing strategies for transitional work, job accommodation and worksite modification.

\textsuperscript{114} In fact, many frontline supervisors and co-workers hesitate or are even reluctant to assist in job accommodation for workers with work injury due to their concerns for unfairness and imbalance in sharing the workload. Intervention on the part of a skilled human resources manager (for example, by meeting with an injured worker’s frontline supervisor and co-workers before the worker returns to transitional work) may address such concerns.

\textsuperscript{115} The counselling aims to enhance the worker’s work readiness by re-establishing the worker’s role. He/she can understand the meaning, value and demands of work, modify attitudes and work behaviour, relate to co-workers and employer, accept supervision and obtain information on the labour market.
• Community reintegration: voluntary work, in particular in a community setting, is one of the models to provide a platform for workers with injuries to share feelings, establish empowerment, regain self-confidence and obtain mutual support, in order to achieve better reintegration into the community and the workforce. 116

It is clear from the above that rehabilitation is not necessarily restricted to the area of occupational injuries and diseases. As is evident from the German example, a range of social security institutions could/should provide for rehabilitation, and can meaningfully share services and facilities. 117 A comprehensive approach to disability management should also involve the setting of in-company standards, relying on an audit system, and the accreditation of disability managers and return to work coordinators. A Code of Practice could further ensure informed and standardised RTW interventions. The National Institute of Disability Management and Research (NIDMAR), a private education, training and research organisation founded in Canada, provides an exemplary range of services in these areas. 119 A recent German experience shows that there is scope for including in RTW arrangements in-plant integration agreements between employers and worker representatives. 119

Prevention strategies should also be integrated in RTW frameworks. Employees should be prevented from and protected against developing or acquiring disabling conditions through effective risk management and health and safety measures with targeted responses to workers who are at risk. A range of other options may also enhance the potential of long-term absent employees to return to work either in their current job or through redeployment. Transitional work and supervised work-based rehabilitation are among the possible interventions.

Finally, in this regard, it is clear that a tailor-made individualised work resettlement programme which promotes trust and respect for the individual's human dignity is crucial

116 Olivier et al, Reflections on Developing an Integrated Comprehensive Policy, above n 6, 130.
118 However, it is argued that internationally applied training modules as well as an internationally valid certification system for Disability Management Professionals (DMPs) (as is provided by NIDMR) tend to take a generic approach to disability management; with programmes focused on the common needs of disability management across situations and jurisdictions – see Dörte Bernhard, Ellen MacEachen and Katherine Lippel ‘Disability Management Experts and the Impact of Jurisdiction on Practice: An Ontario Example’ (2010) 2(1) International Journal of Social Security and Workers Compensation 1, 13. This is because such a generic focus could miss out on a detailed application of problems and issues in different jurisdictions. These relate to the role of DMPs and the direction of their work, which depend on the specific jurisdictional context in which they do their work; and differences in disability management between work-related versus non work-related cases. These indicate that DMPs in different countries have significantly different skills, allegiances and practices despite having the same accreditation; and that jurisdictional issues have an impact on their work (such as the exclusion from coverage of several categories of workers and injuries from the purview of the workers’ compensation system and the DMPs’ focus on workers covered by the compensation system) - ibid 13-14. It is thus suggested that disability management training should include more specific analysis of jurisdictional issues such as laws and policies (the socio-political context) - ibid 15.
119 Section 83 of ‘The Act on the Promotion of Training and Employment of Persons with Severe Disabilities’ (part of the Social Code Book IX), recognises that employers are responsible stakeholders and are expected to sign agreements with key stakeholders on occupational injury and disease prevention and integration management. Employers are obliged to offer preferential selection for within-company training to workers with health problems and support them in attending training elsewhere. Moreover, these workers have not only a right to work assistance and an adapted workplace but they are also entitled to part-time employment - see OECD, Sickness, Disability and Work, above n 17, 127; and Mathilde Niehaus and Dörte Bernhard, ‘Corporate Integration Agreements and Their Function in Disability Management’ (2006) 1(1) International Journal of Disability Management Research 42, 43.
to enhancing workers’ work skill and knowledge, to be a productive part of the labour force and continue to contribute to society.

V. FURTHER MEASURES INFORMED BY SOME DEVELOPED WORLD EXPERIENCES

There is a need to introduce further measures to support the effective implementation of RTW and Disability Management systems in the developing world. In this regard, much can be learnt from the vast experience of countries in the industrialised world, where effective RTW systems have been in place for some time. Since new practices are rarely adopted in isolation, experts caution that any consideration of borrowing practices from other countries needs to take into account the unique economic, social, and political elements in each country. Although other countries appear to be relatively successful in their rehabilitation programmes, practices that are successful in one country may not necessarily work well in another.  

Despite this caution, there would appear to be a number of themes which emerge from an analysis of the RTW legislation and policies of countries such as Sweden, the Netherlands, Canada, Australia and New Zealand, which may be relevant for the implementation of RTW in South Africa and Malaysia.

A. Employer and workplace focus

The first important theme which is apparent is that RTW legislation and policies are largely centred on the employer, and the duties and responsibilities of the employer. The employer has a number of responsibilities under the various RTW systems already in operation in the developed world. The focus on the responsibilities of the employer is important as it is in the workplace where the employee contracts occupational diseases, or picks up occupational injuries, and it is the employer who has control over the workplace. This orientation can clearly be seen in the Swedish sickness insurance system, for example, which views the workplace as the best place for both preventative work and rehabilitation, and places pressure on the employer to implement RTW programmes.

It is particularly noteworthy that the responsibility of the employer is often dependent on the size of their organisation. The comparative perspective demonstrates that larger organisations have more responsibilities with reference to RTW than smaller organisations. This can especially be seen in the area of the disability manager, with larger organisations in a number of jurisdictions tasked with employing a disability manager.  

It must be noted that the focus on employers has resulted in some employers regarding rehabilitation and return to work obligations as another burden imposed by government, by insurance institutions as a cost to be curtailed. Such employers have thus failed of
employers to observe their legal responsibility for rehabilitation.\textsuperscript{123} This may have an impact on the successful establishment of RTW in developing countries.

In Malaysia, direct employer obligations are currently limited, as the roll-out of the programme is at this stage a SOCSO-initiated activity. Employers' duties are largely restricted to cooperating with SOCSO within the framework of the programme, and to ensure job protection for injured and diseased workers who are on the programme, in accordance with protection available under the labour laws of Malaysia.\textsuperscript{124}

**B. Incentives**

Motivation is a crucial issue in RTW, and incentives are used in order to ensure that RTW is correctly implemented. These incentives can either be negative or positive, and may be applied to employees, employers and/or new employers of those recovering or recovered from occupational disease or injury. Some possible incentives are rebates on insurance premiums and experience rating (through safety measures and the development of an early return to work programme, employers may lower their experience rating, thereby reducing their premium costs).

A number of the RTW laws and policies operating in the developed world provide innovative incentives. Positive incentives could, for example, be seen in the Swedish sickness insurance system before the adoption of new regulations, which provides financial incentives for both the employer and the employee to participate in RTW.\textsuperscript{125} However, positive employer incentives for participation in rehabilitation and return-to-work are generally low in the current Swedish system. This is due to requirements in the Work Environment Act and the National Insurance Act which ensure that employers take responsibility for rehabilitation. It has been argued that the recent change of regulations (the withdrawal of positive employer incentives, coupled with the failure of employers to observe their legal responsibility for rehabilitation) have further decreased employers’ incentives for engaging in rehabilitation.\textsuperscript{126}

An example of a negative incentive for the employer can be seen in the protection of the employment of injured or diseased workers.\textsuperscript{127} Incentives to new employers of injured workers are provided in a number of Australian jurisdictions, and include allowances, benefits and retraining of injured employees.\textsuperscript{128} Incentives can be introduced to ensure that stakeholders (such as employers, employees and new employers) are properly invested in participation and implementation of RTW programmes. In some jurisdictions, employees can even have their benefits reduced or taken away should they not fully participate in the rehabilitation process.\textsuperscript{129}

\begin{itemize}
  \item \textsuperscript{123} Ståhl et al, above n 30, 1380-81.
  \item \textsuperscript{124} See Olivier et al, \textit{SOCSO Return-to-work Programme in Malaysia}, above n 88, 40.
  \item \textsuperscript{126} Ståhl et al, above n 30, 1380-81.
  \item \textsuperscript{127} See the discussion under employment protection below.
  \item \textsuperscript{128} In New South Wales, for example, new employers of injured workers are incentivised to the tune of $300 per week, while in Victoria, wage subsidies up to an amount of $26000 for 12 months are offered as an incentive to employers employing workers ready to return to work but unable to do so with their former employer: \textit{Safe Work Australia Comparison of Workers Compensation Arrangements Australia and New Zealand 2009} (Commonwealth of Australia, 2010) 211-221.
  \item \textsuperscript{129} In New South Wales, for example, injured employees are obliged to participate and cooperate in the establishment of an Injury Management Plan. Such employees must make reasonable efforts to return to work with the pre-injury employer as soon as possible, having regard to the nature of the injury, and an unreasonable failure to comply with this requirement may result in the suspension of cessation of weekly payments: ibid.
\end{itemize}
C. Activating measures

Consideration should be given as to whether it is apposite to introduce measures aimed at ‘activating’ employees (e.g., by making compensation payments conditional upon their participation in such activities, or by reducing payments in the event of non-participation). Recently there has been a shift of focus by occupational injury and disease systems from passive compensation to active work reintegration. As an alternative, countries could build more re-skilling / alternative employment opportunities in addition to the existing compensation-focused frameworks.

A number of jurisdictions highlight the importance of activating measures to ensure that employees with occupational diseases or injuries are redirected to employment opportunities rather than claiming disability benefits. This can be seen in Netherlands (IVA and WGA schemes) and in Switzerland (Invalidity insurance (IV/AI) scheme), for example, where there are efforts to make it more difficult for employees who have suffered an occupational injury or disease to claim disability benefits, while at the same time ensuring that those employees are accommodated at their place of work either through an adaptation of their normal duties or through a new set of duties, or a new place of employment.

D. Disability manager and disability management

It is important for enterprises (especially large enterprises with a high number of employees) to make use of RTW coordinators, and disability managers. It can be legislated that enterprises above a certain size must employ RTW coordinators and disability managers, both of which are critical to the implementation and coordination of RTW and disability management.

The importance of disability management to the implementation of RTW is highlighted in the legislation of a number of foreign jurisdictions. This is with reference to both the appointment of a disability manager, and also the importance of proper disability management. The Swedish sickness insurance system, for example, contains legislation which is meant to ensure that the employer implements disability management in the workplace (employers are tasked with initiating RTW management programmes, including the appointment of a disability manager). The interests of employers in RTW and disability management are also encouraged through payments by the employer to the employee. The employer pays a “sickness salary” or “sick pay” during the first two weeks of an absence as a result of occupational injury or illness. Various jurisdictions in Australia require the employer to establish and comply with the provisions of an injury management plan. A number of jurisdictions also require the employer of larger companies

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130 See Ståhl et al, above n 30, 1373.
131 The Dutch Employment and Income in accordance with Capacity to Work Act (Werk en Inkomen naar Arbeidsvermogen or WIA Act) guarantees an income replacement benefit to employees who have been (partially) disabled for over two years. The WIA Act consists of the WGA (Werkhervatting Gedeeltelijk Arbeidsgeschikten) or Resumption of Work for Partially Disabled Persons and the IVA (Inkomensvoorziening Volledig Arbeidsongeschikten) or Income Provision for Long-term, Fully Disabled Persons.
133 The Workers Rehabilitation and Compensation Act 1986 of South Australia obliges certain employers to effectively manage the return to work of injured workers. The New South Wales (Australia) Workers Compensation Act 1998 also requires the employer to establish a Return to Work programme.
134 Ståhl et al, above n 30, 1380-81. See also Selander, above n 125.
135 Ståhl et al, ibid, 1373. See also Selander, ibid.
The size of a large company is dependent on the jurisdiction to employ a disability manager.\footnote{Such as the \textit{Workers Rehabilitation and Compensation Act} 1986 of South Australia which requires certain employers to appoint a rehabilitation and return to work coordinator to help maintain a safe workplace.}

The employer is also tasked with administration of the RTW system, with assisting the employee in obtaining an assessment of their injury or illness and with providing the link between the employee, those assisting in the employee’s rehabilitation and between the employee and the relevant government agency.\footnote{In Queensland (Australia), the \textit{Workers Compensation and Rehabilitation Act} 2003(s 228) requires employers to take every reasonable step to help with the worker’s rehabilitation.}

E. Employment protection

Legislation needs to be adopted or amended to ensure that an injured or ill employee is not dismissed due to their occupational injury or disease. This will further ensure that space is made for return to work interventions, prior to employers being permitted to dismiss employees suffering from an occupational injury or disease or from another form of disability. In particular, provision would have to be made for protection of the job of the affected employee to allow him/her to participate in a multi-faceted rehabilitation programme without the fear of losing his/her position.\footnote{This is the case in the Netherlands where the \textit{Wet Verbetering Poortwachter} (Gatekeeper Improvement Act) prohibits an employer from terminating the employment of an injured employee – see OECD, ‘Sickness and Disability Schemes in the Netherlands’, above n 132. This is also the case in New Zealand and in a number of Australian jurisdictions, such as New South Wales and Queensland, where the employer is guilty of an offence should they dismiss the injured worker within 6 months of the worker becoming injured – Safe Work Australia above n 128, 211-212.}

Ensuring that the injured or ill employee is not dismissed due to their occupational injury or disease is an integral part of RTW in a number of jurisdictions. The employer has the responsibility not to dismiss the worker in the case of occupational disease or injury, at least for a specified time period; and also, in many jurisdictions, to provide the employee with suitable work while they are recovering.\footnote{As an example, legislation and policies in the different jurisdictions in Canada place a duty on the employer to accommodate an injured employee – see Association of Workers Compensation Boards of Canada \textit{Rehabilitation/Return to Work} Available online at \url{http://www.awcbc.org/common/assets/benefits/rehab_return_to_work.pdf}.}

The Dutch labour law system, for example, prohibits an employer from terminating the employment of an injured employee, as is the case in a number of Australian jurisdictions, such as New South Wales, where the employer is guilty of an offence should they dismiss the injured worker within 6 months of the worker becoming injured. In fact, the Dutch system prohibits the employer from dismissing an injured employee for up to two years, with the employer tasked with assisting the employee in their rehabilitation and also with paying the employee a salary.

However, employment protection regulations have not been consistently applied. In some jurisdictions (notably in Australia) tribunals and courts have sometimes held the dismissal of injured or diseased workers contrary to return to work provisions to be unfair and of no effect.\footnote{Guthrie, above n 36, 545-561.}

However, there is no provision for the reinstatement or re-employment of injured or diseased workers who are unfairly dismissed (and undergoing a RTW programme). The only available remedies are compensation of the employee; and imposing a sanction on the employer who fails to provide suitable duties, but not providing the worker with a direct remedy for the loss of employment. This indicates that return to work provisions provide an inadequate remedy for workers, as they do not readily protect employees from the potential of dismissal while they are disabled.

\footnote{136 Such as the \textit{Workers Rehabilitation and Compensation Act} 1986 of South Australia which requires certain employers to appoint a rehabilitation and return to work coordinator to help maintain a safe workplace.}
\footnote{137 In Queensland (Australia), the \textit{Workers Compensation and Rehabilitation Act} 2003(s 228) requires employers to take every reasonable step to help with the worker’s rehabilitation.}
\footnote{138 This is the case in the Netherlands where the \textit{Wet Verbetering Poortwachter} (Gatekeeper Improvement Act) prohibits an employer from terminating the employment of an injured employee – see OECD, ‘Sickness and Disability Schemes in the Netherlands’, above n 132. This is also the case in New Zealand and in a number of Australian jurisdictions, such as New South Wales and Queensland, where the employer is guilty of an offence should they dismiss the injured worker within a specified time of the worker becoming injured – Safe Work Australia above n 128, 211-212.}
\footnote{139 As an example, legislation and policies in the different jurisdictions in Canada place a duty on the employer to accommodate an injured employee – see Association of Workers Compensation Boards of Canada \textit{Rehabilitation/Return to Work} Available online at \url{http://www.awcbc.org/common/assets/benefits/rehab_return_to_work.pdf}.}
\footnote{140 Guthrie, above n 36, 545-561.}
Some jurisdictions have attempted to strengthen the return to work provisions (such as New South Wales and South Australia). These have, respectively, directly linked return to work provisions to the jurisdiction of the (then) Industrial Relations Commission (which had jurisdiction to reinstate unlawfully dismissed workers); and in South Australia, employers are required to notify WorkCover SA of any intended termination of disabled workers. This implies that dismissal protection in labour laws will need to be extended to include the remedies of reinstatement or re-employment of injured or diseased workers who are unfairly dismissed while undergoing RTW (e.g. within the context of South Africa’s Labour Relations Act, such protection will need to be extended to specifically protect occupationally injured/diseased employees from being dismissed or otherwise disadvantaged while they are engaged in an agreed rehabilitation activity).

F. Funding source – essentially an employer responsibility

The responsibilities of the employer also involve the making of contributions to the relevant compensation or invalidity fund in their jurisdiction. The funding source of RTW in the above examples is mostly through contributions, especially from the employer. In jurisdictions where the employer is obliged to appoint a disability manager or Return-to-Work Coordinator (RTWC), the employer bears the cost of these, together with that of establishing a RTW programme. The Dutch system (IVA and WGA schemes), for example, requires the employer to make two payments: the first is a base payment which is the same for all employers, and the second payment is dependent on the number of employees which that employer has on disability benefits.

Each province and territory in Canada has its own exclusive Workers Compensation Board/Commission (North West Territories and Nunavut has a combined Workers Compensation Board), with contributions from the employer being paid to the Compensation Boards/Commissions. This is then used either for disability benefits, rehabilitation of injured workers or administration of the fund.

In Malaysia, the Employment Injury Scheme is fully funded by the employer, while the employer and employee equally share the cost of the Invalidity Pension Scheme. South African employers would also bear the costs of the proposed RTW programme, as in terms of COIDA, all employers are required to register with and pay annual fees (i.e. assessments) to the Compensation Fund. In addition, it would be expected of larger employers to provide appropriate RTW and Disability Management services.

G. Employee obligations

The employee has a number of obligations in relation to RTW. These include such areas as ensuring that employees participate in the rehabilitation programme, by attending relevant therapy and rehabilitation sessions, as well as communicating and interacting with their employer and the compensation fund/insurance institution in their jurisdiction. In some jurisdictions the refusal to participate is met by penalties and negative incentives – e.g., the loss or substantial reduction of benefit payments.

141 Ibid.
142 See, for example David Walters, An International Comparison of Occupational Disease and Injury Compensation Schemes (A Research Report prepared for the Industrial Injuries Advisory Council (IIAC)) March 2007, for the funding of specific insurance schemes for compensating occupational injuries and diseases in the European Union.
143 See Olivier et al, SOCSO Return to Work Programme in Malaysia, above n 88, 31.
144 See South Australia’s Workers Rehabilitation and Compensation Act 1986 obliges a worker to participate in an approved RTW programme. It requires the worker not to participate in a way that frustrates the objectives of a programme and to comply with actions specified in the programme. He or she must also undertake suitable employment or take reasonable steps to find such employment and not unreasonably discontinue suitable employment. Where the worker fails or refuses to participate in – or participates in a way that frustrates – the programme, his or her disability payments may be discontinued – see ss 36(1)(f) and 36(1a)(d) of the Act and WorkCoverSA, Claims Operational Guidelines Chapter 7: Rehabilitation.
Therefore, in the South African case, the relevant provision in the Unemployment Insurance Act which disqualifies a beneficiary from drawing benefits in the event of an unjustified refusal or failure to undergo medical treatment be extended to also disqualify a beneficiary in the event of refusal or failure to participate in a RTW-based rehabilitation programme. This will strengthen employees’ participation in a RTW programme that is introduced.

H. Disability insurance administrative institution and government responsibilities

The tasks of the disability insurance administrative institution or relevant government body which administers RTW are also indicated in the legislation and policies of the various jurisdictions considered. The tasks of the administrative body include: providing a supervisory function in relation to whether both the employer and employee comply with their respective obligations and responsibilities under the RTW system, as well as in relation to work and other assessments. The relevant administrative body must also provide incentives for new employers, and implement regulations regarding incentives for both employers and employees. This can involve checking to ensure that organisations have created rehabilitation plans and that their plans are implemented, checking that employers have completed their duties to the injured or ill employee, and also that employees are fully participating in their rehabilitation programme.

I. Maintaining a balance between rehabilitation and benefit payments

In compensation-focused systems, high amounts of benefits paid to injured employees by the relevant disability insurance institutions place financial pressure on the institutions. Therefore, with the establishment of a RTW system, disability insurance institutions and the relevant government bodies must find the correct balance between, on the one hand, assisting an employee who has suffered an occupational disease or injury with rehabilitation and returning to work in a speedy manner, and ensuring that the employee does not return to work before they are fully able to, which could result in another injury and, on the other hand, the payment of benefits in appropriate circumstances.

Both the Dutch (IVA and WGA schemes) and Swiss (IV/AI scheme) examples have tried to ensure that there are fewer employees on disability benefits, and more employees successfully completing rehabilitation in order to enable them to return to work. One of the principles of the new system in Switzerland, for example, is enforcing stricter eligibility criteria for disability in an attempt to ensure that there are fewer people claiming disability benefits. This means, therefore, that compensation funds and the relevant government bodies are tasked with finding the correct balance between, on the one hand, assisting an employee who has suffered an occupational disease or injury with rehabilitation and returning to work in a speedy manner, and ensuring that the employee does not return to work before they are fully able to, which could result in another injury and, on the other hand, the payment of benefits in appropriate circumstances. It provides an environment

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146 Under the Swedish sickness insurance system, work ability assessments for decisions on eligibility for sickness benefits are performed by the Social Insurance Agency and primary health care professionals – see Ståhl et al, above n 30, 1376.
147 As an example, WorkCover South Australia establishes and approves rehabilitation programmes – see WorkCoverSA, above n 144, 17.
148 This is the case in Switzerland where, as a result of increasing overloading by dependants, the Invalidity Insurance (IV) scheme has been changed so as to focus on early detection/intervention and integration.
which results in employees and employers ensuring that they attempt rehabilitation and return to work instead of receiving disability benefits without question. The relevant government bodies in some of the jurisdictions are also tasked with an extension of this, namely to decide whether an injured or ill employee is likely to be able to return to work after rehabilitation, or whether they should be given disability benefits from the beginning.149

J. Accreditation

In introducing an RTW programme, disability managers and return to work coordinators need to be accredited by the relevant disability insurance institutions or government department. In the case of South Africa, an accreditation system and standards have to be developed by the Compensation Fund, in consultation with professional bodies and relevant government departments (in particular the Department of Health). These standards have to be developed in relation to RTW and rehabilitation coordinators/disability managers, health and related services and also vocational rehabilitation providers and other service providers.

As indicated above, in the case of Malaysia, health service providers contracted by SOCSO must be officially accredited and must comply with criteria set by SOCSO.150 Accreditation of RTW and rehabilitation coordinators/disability managers as well as of vocational rehabilitation providers and other service providers is also a task of the disability insurance administrative institution or relevant government body in some of the jurisdictions discussed above.151

VI. IMPROVING THE MALAYSIAN SOCSO RTW REGIME: SOME RECOMMENDATIONS

In conclusion, as the experience of Malaysia and developments in South Africa are indicating, there is no reason why state of the art and internationally RTW and Disability Management principles, practices and tools cannot be implemented in the developing world. Yet, there is need to factor in the particular contexts of developing world realities and socio-economic contexts, to ensure appropriate and country-sensitive roll-out of RTW and Disability Management. Certain suggestions as to how this could be achieved in the South African context were made in this contribution. For Malaysia, in addition to the range of existing measures described in this paper, there is scope to consider and introduce several other interventions that are regarded as needed and important:

A. Future direction in Malaysia

Though the RTW Programme in Malaysia has enjoyed some positive and sustainable results, there are a few further measures and future improvements needed to further strengthen and expand the system.

149 See, for example, Ståhl et al, above n 30, 1376 on the role of the Social Insurance Agency in undertaking work ability assessments for decisions on eligibility for sickness benefits.

150 Olivier et al, SOCSO Return-to-work Programme in Malaysia, above n 88, 45.

1. **Legal Framework: Protecting Employment**

It is, for example, necessary to improve the legal framework in order to better secure employment for those who have suffered an occupational injury or disease. Though there are provisions for securing employment during the course of temporary disablement (Medical Leave) due to employment injury, there are no provisions in securing employment for those suffering from invalidity, apart from the very basic but incomplete protection enjoyed under the Employment Act of 1955. A law should be drafted to extend protection against dismissal to those who may be disabled as a result of an occupational injury or disease but who qualify for RTW and disability management. This would ensure employer participation in accommodating a worker with some form of disability. The proposed law should also clearly outline the roles and responsibility of the employer, unions, PWD Representatives and Human Resource Department to ensure that appropriate steps are taken in order to retain workers with disabilities.

2. **Incentives & Disincentives**

Besides providing greater legislative protection against dismissals, proper incentives should be designed to support the programme, as discussed elsewhere in this contribution. The incentives could be awarded to both employers and workers to participate in the programme. For employer incentives, a levy could be implemented for companies who do not have disability management policies in place. The levy collected from such employers could be given to support employers who have accommodative or disability management policies for workers with disabilities. This could be similar to the levy and grant system for employing persons with disabilities imposed by the Japan Organization for Employment of the Elderly and Persons with Disabilities (JEED) or Germany’s Landschaftsverband Rheinland (LVR). Such a levy has played a role in providing incentives for employers who are willing to employ people with disabilities. A similar model could be adopted by SOCSO. One of the fastest ways to achieve this would be to use SOCSO’s statutory contributions mechanism in order to implement the levy system by JEED and LVR. This would act as an incentive or disincentive to employers in terms of adopting disability management protocols. In addition, it could be considered to grant a rebate on SOCSO contributions to employers who introduce appropriate RTW and Disability Management arrangements at their workplaces.

Financial support to workers with disabilities is also a very important factor in a disability management programme. Such support can take the form of job trial allowances or job seeker allowances and would have to be designed carefully in order to serve as an incentive to workers who may suffer temporarily from, or who are otherwise temporarily unable to work as a result of, their disability. A wrongly-designed compensation system to support these affected workers during this period may become a “disincentive” to the programme.

3. **Decentralization**

With all these benefits in place, it could also be an appropriate time to implement legislation compelling (larger) employers to appoint disability managers in Malaysia. This would be particularly applicable to the larger organisations who should be able to afford to have a disability manager within their organisations. The smaller to medium enterprises could still be supported by the SOCSO Disability Managers. This would result in

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152 Section 53, Employees’ Social Security Act 1969, Malaysia.
153 See also Olivier et al, *SOCSO Return-to-work Programme in Malaysia*, above n 88, 65: an amendment to the Employment Act of 1955 this may also be required to improve the rather weak protection available under that law.
154 [http://www.jeed.or.jp/english/levy_and_grant_system.html](http://www.jeed.or.jp/english/levy_and_grant_system.html).
155 [http://www.lvr.de/de/nav_main/](http://www.lvr.de/de/nav_main/).
156 See Olivier et al, *SOCSO Return-to-work Programme in Malaysia*, above n 88, 57.
in employers playing an active role in disability management at the (large) workplace and SOCSO could accordingly move from a centralised model to a decentralised one. This could be a most appropriate strategy for providing disability management and RTW to all workers and would have the added benefit of relieving some of the burden presently placed on SOCSO.

4. **Infrastructure**

SOCSO could also improve its rehabilitation infrastructure pending the building of the SOCSO Rehabilitation Centre. The SOCSO Rehabilitation Centre is one of the main future projects for improving the RTW services in Malaysia, directed specifically towards assisting injured workers to return to work.\(^{157}\)

### VII. CONCLUSION

The successful introduction of return-to-work interventions in the developing world requires careful conceptualisation. Successful implementation of RTW holds the potential of enabling workers with disabilities to retain their employment and to properly reintegrate into the labour market and broader society. While scientific advancements pertaining to RTW have increasingly been documented in the developed world, there is a comparative dearth of literature in respect of RTW in the developing world. In establishing RTW programmes in countries such as South Africa and Malaysia, international standards and best practices discerned from other countries must be properly contextualised to fit the workplace experiences of countries which are still emerging on the global landscape. This contribution has argued that unique, country-sensitive RTW approaches are likely to be required in the developing world, given the nature of national labour markets in these countries. Nevertheless, and with due regard to the fact that success stories from other countries (particularly in the developed world) may not necessarily apply, there is much that may be learned (such as the need to establish innovative incentives for employer/employee participation and the importance of disability management) from the long-standing RTW experiences of the industrialised world.

Both South Africa and Malaysia have committed (in terms of the UNCRPD) to safeguard and promote the realisation of the right to work, also for people who acquire a disability during the course of employment. Various international obligations have been acknowledged by both countries, such as the promotion of vocational and professional rehabilitation and job retention for persons with disabilities and the promise to enable such persons to access technical and vocational guidance programmes and placement services effectively. The provisions of the UNCRPD indicate the core components of an effective rehabilitation and return-to-work programme, including that rehabilitation services must be multi-faceted and should involve early intervention, be voluntary and make use of assessments of individual needs and strengths. Such principles are particularly useful for developing countries which are on the cusp of introducing RTW mechanisms and approaches.

Given Malaysia’s recent experiences with RTW, and South Africa’s policy decision to embark on a path which will lead to the introduction of a publicly directed RTW and Disability Management system for occupationally injured and diseased workers, there exists a good basis for applying the available RTW literature to these countries’ RTW-related initiatives. The literature review conducted suggests that there are numerous advantages (for employees, employers and the state / Compensation Fund) to the proper introduction of RTW mechanisms aimed at returning injured and ill workers back to the workplace. There are, however, also serious barriers which might jeopardise the proper establishment of a RTW system in both the developed and developing world contexts. Such barriers (such as a lack of trust in the system and failure to construct RTW systems in

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a fashion which honours the minimum compensation and human rights frameworks embedded in international standards), if not properly considered and overcome, could hamper the successful implementation and operation of RTW. Strategies for countering these hurdles are being implemented in various parts of the world and established techniques for countering the difficulties of RTW introduction and implementation should be adopted in countries which have recently initiated such interventions.

Although South Africa, in particular, is at an early stage in respect of developing and implementing RTW mechanisms, it has been criticised for failing to incorporate international instruments such as the UNCRPD adequately into its legal framework. Workers’ compensation laws in South Africa have, until now, completely favoured compensation, with little attempt to enforce reintegration measures. The proposed establishment of a new, unified, health system in South Africa presents a fresh opportunity to correct the weaknesses of the past and the introduction of a proper RTW system for cases of occupational injury and disease (by way of a new chapter to be included in the main employment injury benefit law, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)) should be prioritised in a manner which is synergised with the broader health-related policy and legal developments. The actual roll out of this RTW programme is likely to occur gradually, and should include a pilot phase. Large enterprises are well placed to appoint disability managers and the state should foster the development of capacity in this regard, educate and consult with the various stakeholders in a manner which encourages their participation in this initiative.

The results emanating from the Malaysian experience provide a benchmark for countries in the developing world. It is clear from the advancements in Malaysia that countries in the developing world should be encouraged to attempt to introduce RTW systems, just as South Africa has started to do. A critique of the Malaysian approach results in the conclusion that a proper legislative framework for the introduction of RTW is imperative. This needs to be coupled with appropriate incentives and disincentives targeted at both employers and employees. In addition, the Malaysian example illustrates that large employers should ideally be required to appoint their own disability managers as soon as possible (as already proposed in South Africa), so that they can demonstrate a hands-on approach to RTW and alleviate some of the pressure on the state in this regard.