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2022
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TWELFTH PARLIAMENT – SIXTH SESSION

Approved
19/05/2022

STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE

REPORT ON THE PETITION CONCERNING APPROPRIATE LEAVE RIGHTS FOR WOMEN WHO MISCARRY AND SUFFER STILL BIRTHS

Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI

PAPERS LAID	
DATE	7 June 2022
TABLED BY	Sen. Madzaga
COMMITTEE	labour
CLERK AT THE TABLE	M. Agibodun

May, 2022

DC-EG
Recommended & Forwarded for Approval
19/05/2022

DATE	PREPARED

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PREFACE

Mr. Speaker, Sir

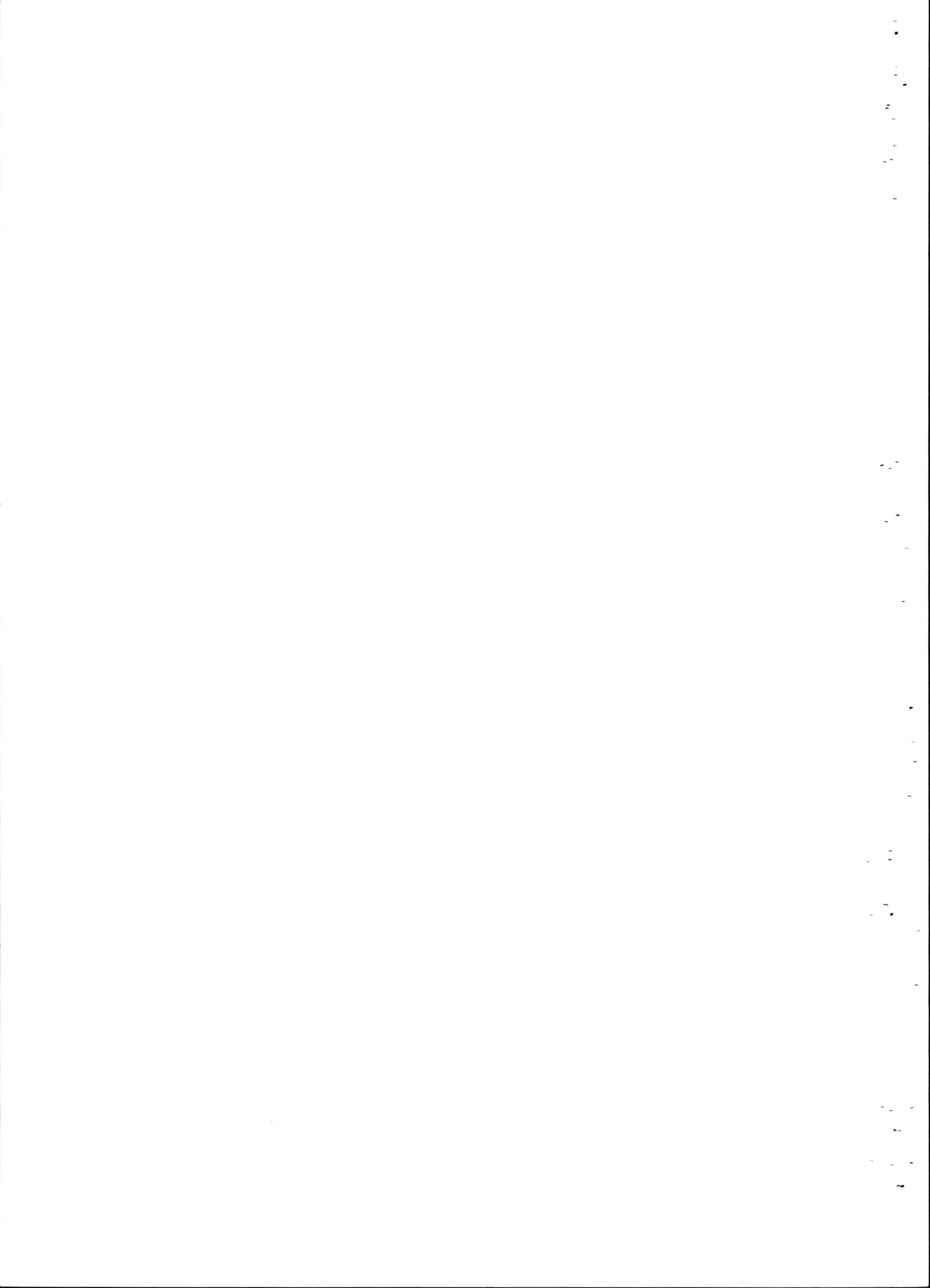
The Standing Committee on Labour and Social Welfare is established under Standing Orders 187 and 218 (3) of the Senate Standing Orders.

The Committee is mandated to consider all matters related to *manpower and human resources planning, pension, gender, culture and social welfare, youth, National Youth Service, children's welfare; national heritage, betting, lotteries and sports, public entertainment, public amenities and recreation.*

In executing its mandate, the Committee oversees the Ministry of Labour; the Ministry of Public Service, Gender, Senior Citizens Affairs and Special Programmes; and the Ministry of Sports, Culture and Heritage.

Membership of the Committee

- | | |
|---|---------------------------|
| 1) Sen. Sakaja Johnson Arthur, CBS, MP | - Chairperson |
| 2) Sen. Mwaruma Johnes Mwashushe, MP | - Vice Chairperson |
| 3) Sen. Madzayo Stewart Mwachiru, CBS, MP | - Member |
| 4) Sen. Mwangi Paul Githiomi, MP | - Member |
| 5) Sen. Kihika Susan Wakarura, MP | - Member |
| 6) Sen. Makori Beatrice Kwamboka, CBS, MP | - Member |
| 7) Sen. (Dr.) Mwaura Isaac, CBS, MP | - Member |
| 8) Sen. (Dr.) Milgo Alice Chepkorir, MP | - Member |
| 9) Sen. Masitsa Naomi Shiyonga, MP | - Member |



EXECUTIVE SUMMARY

Mr. Speaker Sir,

The Petition concerning appropriate leave rights for women who miscarry and suffer still births was reported to the Senate on Tuesday, 15th February, 2022 by the Speaker of the Senate.

The salient issues raised in the Petition are that though Section 29 of the Employment Act provides for Maternity and Paternity Leave, it does not provide for a definition of Maternity leave. This has led to the practise that Maternity leave is entitled to a woman who has given birth, excluding those who suffer from miscarriages and stillbirths.

Mr. Speaker Sir, taking into consideration the physiological and psychological trauma that usually accompanies Miscarriages and Still births, the Petitioner humbly prayed that the Senate intervenes in the matter with a view to introducing an amendment to the Employment Act to make a provision for appropriate leave for women who miscarry or experience stillbirths during pregnancies.

Honorable Speaker, Pursuant to Standing Order 232(1) and the Second Schedule to the Standing Orders of the Senate, the Petition was committed to the Standing Committee on Labour and Social Welfare.

Pursuant to Article 37 and 119(1) of the Constitution, section 5(2) of the Petition to Parliament (Procedure) Act and Standing Order 232 of the Senate Standing Orders, the Committee is mandated to consider the Petition and respond to the Petitioner within the prescribed period.

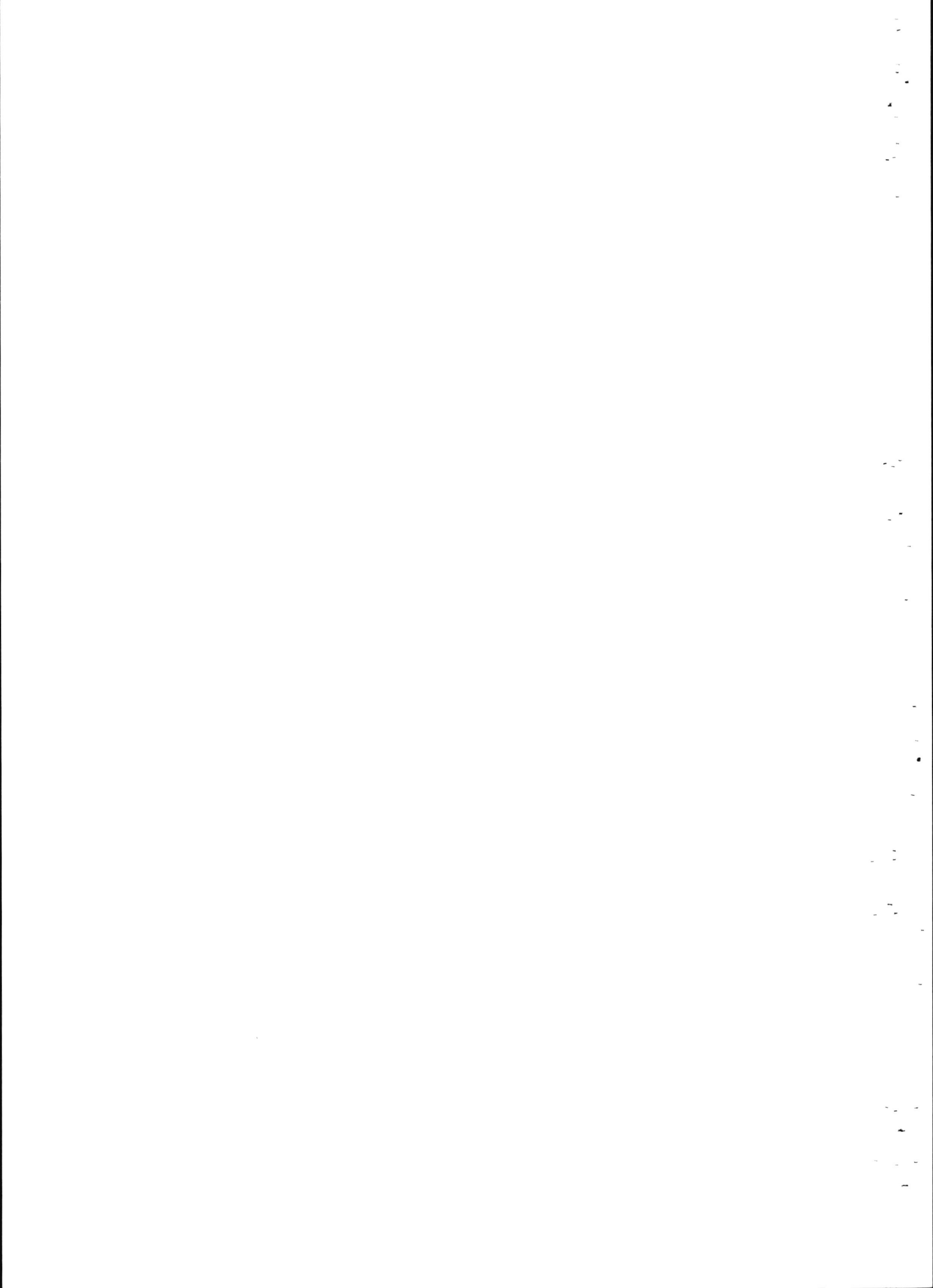
Mr. Speaker Sir, during the Committee's enquiry on the Petition, the Committee was not able to reach the Petitioner to prosecute on her Petition, as she had failed to provide her contacts. The matter was considered at a meeting held on Friday, 13th May, 2022.

The Committee noted the grave concerns raised by the Petitioner in the Petition and compared how other jurisdictions dealt with the issue. The Committee noted that in Philippines, the law provides for 60 days of paid leave for miscarriage or emergency termination of a pregnancy, while India allows for 6 weeks of Paid leave. The United Kingdom provides for a two-weeks for bereavement of a child from a pregnancy of after 24 weeks to a child of 18 years, while the United State Federal Laws are silent on the matter.

Mr. Speaker Sir,

The Committee appreciates the efforts made by women and the contribution of Mothers to the economy and the Country in general. The Committee also takes note that Kenya is a developing economy and any laws that touch on its labour market have to be well researched and carefully thought through.

The Committee also observes that though Maternity Leave for mothers who carry their pregnancies to full term and give birth to live children has been legislated upon, leave for Women who suffer still births and miscarriages is currently being handled



administratively and on case by case basis depending on the medical status of the specific woman diagnosed by a medical doctor and her employer.

Mr. Speaker Sir, taking into consideration the remaining duration of the 12th Parliament, the Committee recommends that the matter, for now, be handled administratively by the Ministry of Labour for policy considerations of the Petitioner's pleas and a progress report be presented within six (6) months of the commencement of the next Parliament after stakeholder engagement is undertaken.

The Committee wishes to acknowledge the time and considerable effort made by all parties who submitted information. I also wish to express my gratitude to my colleagues for their thoughtful input and engaged contributions to the matter.

Further, the Committee is indebted to the Office of the Speaker and the Clerk of the Senate for facilitating all the actions that led to the production of this report.

Mr. Speaker Sir,

It is now my pleasant duty, pursuant to Standing Order 232 to table the report of the Standing Committee of Labour and Social Welfare in relation to a Petition concerning appropriate leave rights for women who miscarry and suffer still births.

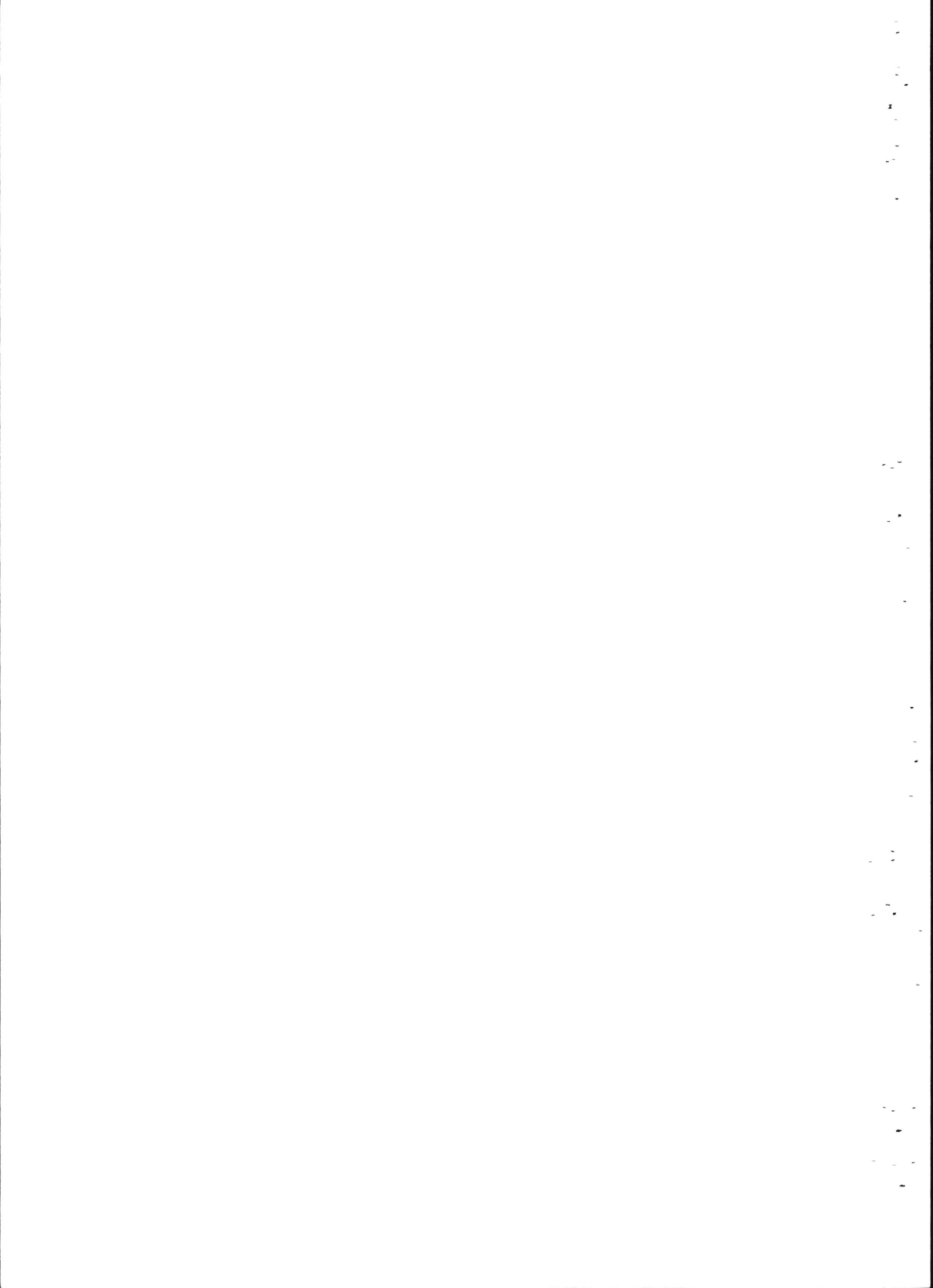


SIGNATURE.....

SEN. NAOMI SHIYONGA, MP.

FOR (CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: SATURDAY, 14TH MAY, 2022



CHAPTER ONE: INTRODUCTION

1.1 Background Information

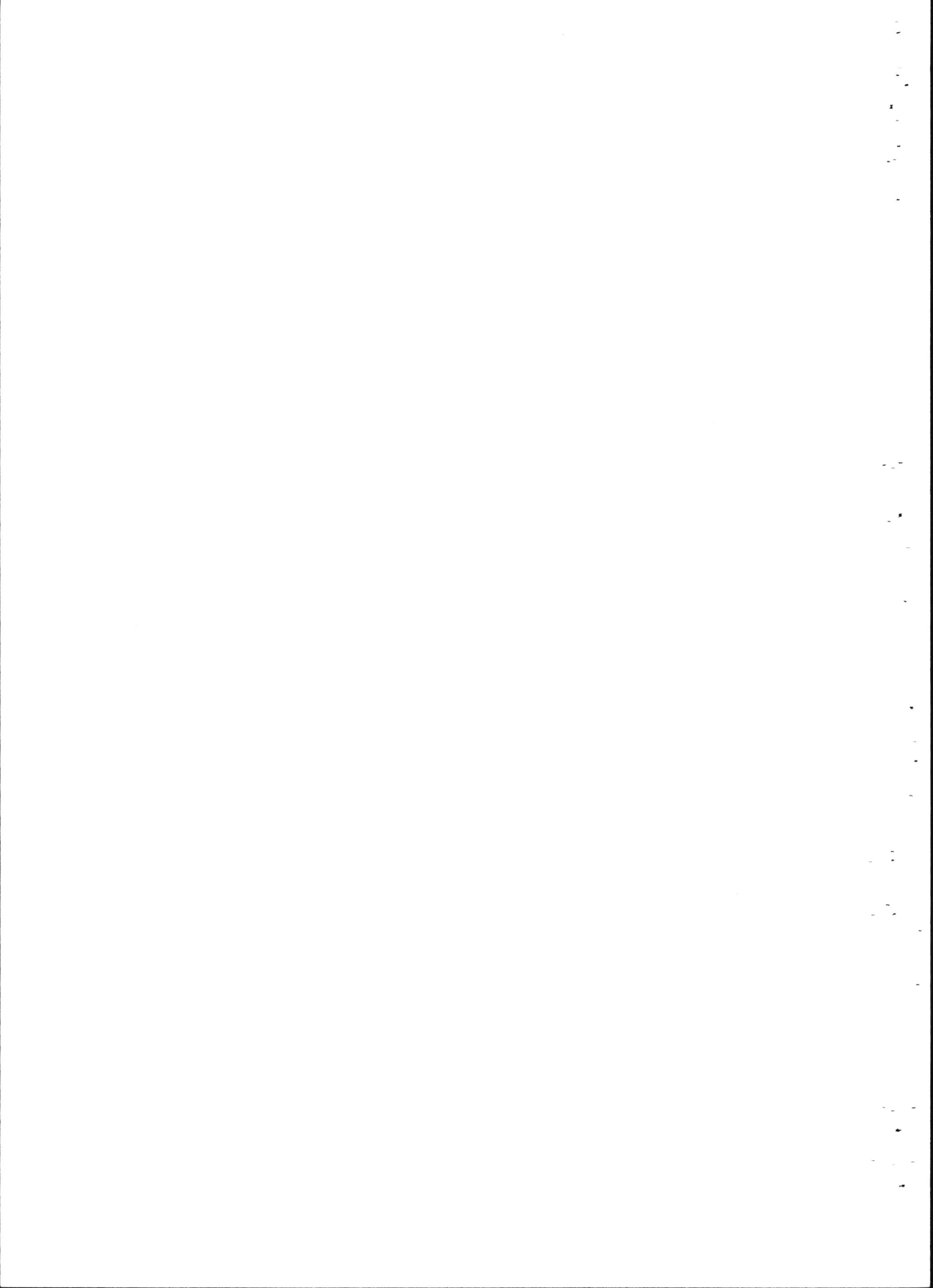
At the sitting of the Senate held on Tuesday, 15th February, 2022, the Speaker of the Senate reported to the Senate a Petition submitted by Ms. Julia Diffu a resident of Nairobi concerning appropriate leave rights for women who miscarry and suffer still births.

The salient issues raised in the said Petition are as follows-

- (1) That Section 29 of the Employment Act 2007 makes provision for maternity and paternity leaves.
- (2) The Act does not provide a definition for maternity leave. However, practice has been such that the maternity leave is entitled to a woman who has given birth. When a working woman miscarries or experiences stillbirths, the presumption in the workplace is that she should go for either compassionate or sick leave, which is inadequate for them.
- (3) That the loss of a pregnancy for a woman has profound effects associated with physical and mental effects, which makes it difficult for a woman to work. Additionally, the psychological and social effects of pregnancy loss may be severe and long-lasting. For instance, depression, fear, anxiety, obsessive compulsive behaviours, suicidal ideation, guilt, shame, substance use, marital conflict and posttraumatic stress.
- (4) These effects are often misunderstood by the society, thereby leaving the victim disenfranchised.
- (5) THAT the Employment Act is silent on cases where a woman miscarries or experiences a stillbirth on the need to allow such a woman a leave period for recovery, which may include medical or psychological treatment.
- (6) THAT women who either miscarry or experience stillbirths are entitled to the highest attainable healthcare. Furthermore, a woman who has had this experience should not be expected to work and operate with normalcy and, therefore, time for recovery should be allowed in such instances.
- (7) THAT Section 6 of the Health Act, 2017, states that every person has a right to reproductive healthcare. Specifically, Section 6(1) (c) states that:
“Every person has a right to access treatment by a trained health professional for conditions occurring during pregnancy, including abnormal pregnancy, conditions such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or the health of the mother is threatened.”

The Petitioner humbly prayed that the Senate intervenes in the matter with a view to introducing an amendment to the Employment Act to make a provision for appropriate leave for women who miscarry or experience stillbirths during pregnancies.

Pursuant to Standing Order 232(1) and the Second Schedule to the Standing Orders of the Senate, the Petition was committed to the Standing Committee on Labour and Social Welfare.



CHAPTER TWO: ANALYSIS OF THE PETITION CONCERNING APPROPRIATE LEAVE RIGHTS FOR WOMEN WHO MISCARRY AND SUFFER STILLBIRTHS

This section contains highlights on the analysis of the petition concerning appropriate leave rights for women who miscarry and suffer stillbirths.

2.1 Definition and Statistics on Stillbirth and Miscarriage

1. Pregnancy loss is defined differently around the world. However, in general a baby who dies before 28 weeks of pregnancy is referred to as a miscarriage, while one who dies at or after 28 weeks are stillbirths¹. According to World Health organization (WHO) there are estimated 2.6 million stillbirths every year around the world. In Kenya, stillbirth rates is at 19.7 per 1000 births²
2. Miscarriages and still births vary in severity. Some women require surgery while others experience intense grief, stress and anxiety for long periods, leading to those working women incapable of working³. Just like with pregnancy and maternity, miscarriages and still births can increase vulnerability among working women. In as much as some employers provide supportive management and access to for instance contractual compassionate leave or flexible working, gaps persist. This explains the calls and clamour for legal reforms aimed at providing better protection to working women who miscarry.

2.2 Why Pregnancy Loss Should be a Legislative Concern

3. Studies, (Burden, 2016)⁴ show that suffering still birth can lead to depression, anxiety and post-traumatic stress. A study⁵ found women with no history of depression at risk of depressive symptoms for several years post stillbirth. A different study⁶ found that 29 percent of people who had a pregnancy loss during the first trimester had symptoms of post-traumatic stress one month later.
4. Further, that this impact can also extent to a partner. In this respect, the Article 42 of the Constitution bestows every Kenyan the right to the highest attainable standard of health. Since loss of an unborn child is considered a pregnancy related health issue and Article 29 of the Employment Act 2007 provides for maternity leave, bereavement leave should not be an exception. Such a contradiction may be considered as discrimination against women who face losses occasioned by the loss of a child before birth.

¹ World Health Organization. (n.d.). Retrieved from www.who.int.

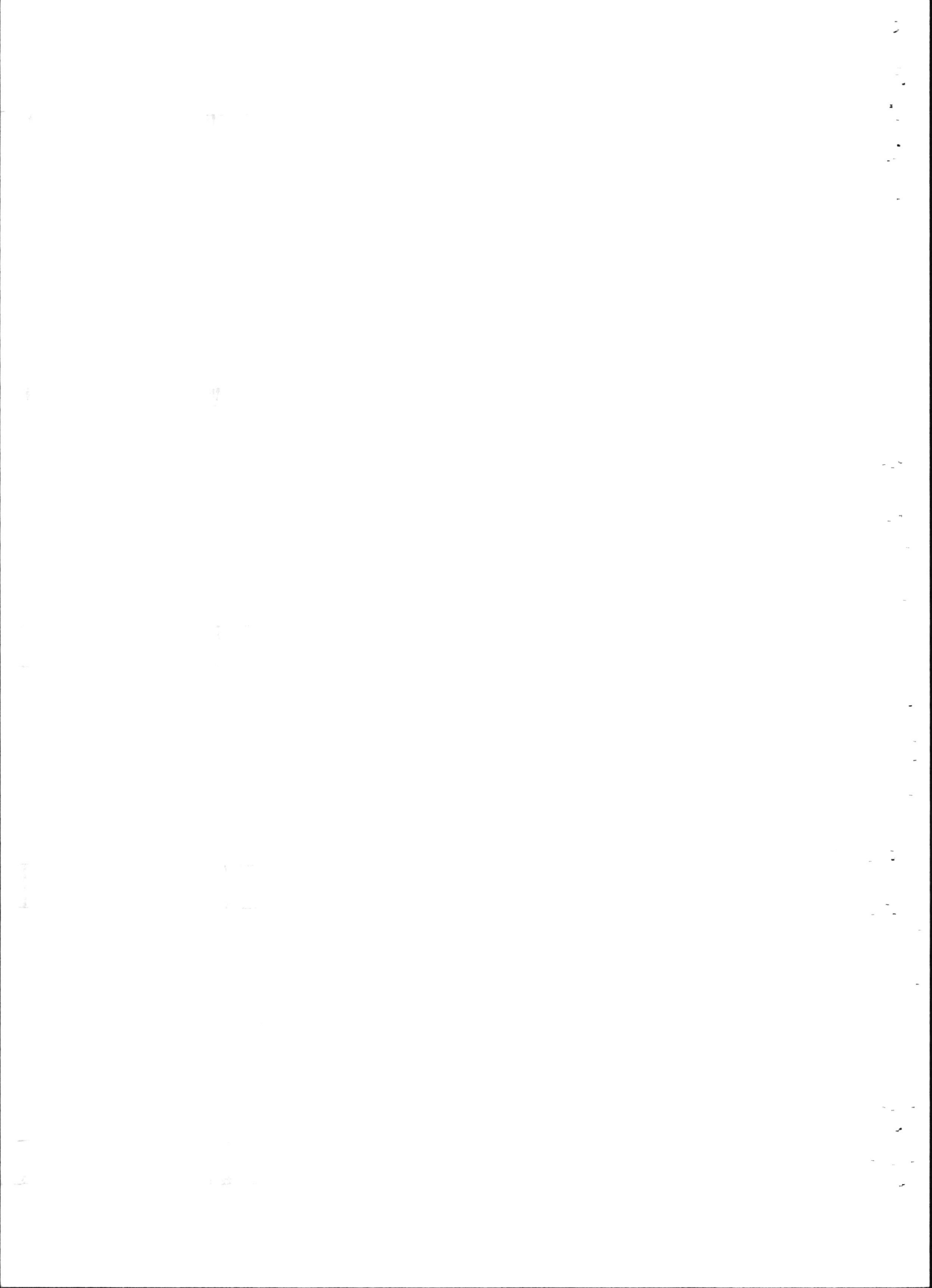
² Ministry of Health 2021

³ *Opcit.*

⁴ Burden, C. B. et al (2016). *From grief, guilt pain and stigma to hope and pride - a systematic review and met-analysis of mixed -method research of the psychosocial impact of stillbirth.* *BMC Pregnancy and Childbirth*, 16(9). doi:10.1186/s12884-016-0800-8

⁵ Sponsored by the Eunice Kennedy Shriver National Institute of Child health and Human Development

⁶ Published by in the *American Journal of Obstetrics and Gynaecology*



2.3 Comparative Reviews on Bereavement Leave Laws in Other Jurisdictions

5. The table summarizes some of the legislative and policy initiatives across various jurisdictions offered to women following a pregnancy loss.

NO.	JURISDICTION	DESCRIPTION
1	Philippines	The law provides for 60 days of paid leave for miscarriage or emergency termination of a pregnancy.
2	India	Allows 6 weeks of paid leave after miscarriage.
3	United Kingdom	<p>The Parental Bereavement (Leave and Pay) Act 2020 provides for a 2 weeks' statutory bereavement leave for pregnancy loss after 24 weeks (stillbirth), which extends to loss of a child up to 18 years. Parents are also entitled to take any maternity leave or shared parental leave planned prior to the stillbirth. However, if the pregnancy ends before 24 weeks (miscarriage), parents have no right to bereavement leave and are ineligible for maternity or paternity leave. Instead, women who miscarry before 24 weeks are entitled to sick leave with the additional protections accorded by the Equalities Act 2010</p> <p>Section 18 of the Equality Act 2010, provides for a woman who suffers a stillbirth after the end the 24th week of pregnancy. The entitlements include maternity leave, maternity pay and is legally protected against discrimination or unfavourable treatment on grounds of pregnancy until the end of her maternity leave (or until she returns to work, whichever is earlier). The Act does not accord women who miscarry before the end of the 24th week of pregnancy any entitlement to leave, other than to sick leave and are only protected from discrimination or unfavourable treatment on grounds of pregnancy for a period of two weeks after the end of the pregnancy.</p> <p>The illness must be certified as pregnancy or miscarriage-related by a GP or other medical practitioner, and that sick leave is legally protected in the same way as sick leave for a pregnancy-related illness. This means that women are not limited in how much miscarriage-related sick leave they can take – they can take sick leave for as long as their miscarriage-related illness lasts – and their employer must record that sick leave separately and not count it for disciplinary or redundancy purposes.</p> <p>Currently, in the UK, there are calls for-</p> <ul style="list-style-type: none"> (a) An extension of the two-week protected period; (b) A clearer legal definition of 'the end of pregnancy' (so as to adequately cover the time off that a woman might need following a miscarriage); and (c) A lowering of the 24-weeks' threshold, and/or new legal protection against dismissal, redundancy or detrimental treatment for a period (perhaps six months) after the miscarriage. <p>The challenges being experienced in the UK in the quest for legal reforms is the possibilities of covering all possible situations arising from a miscarriage. Additionally, the lack of awareness of employment rights by majority of the women who miscarry. Experts however agree that existing law provides a degree of legal protection against discrimination or unfair treatment to women who miscarry before the 24th week of pregnancy. This is through the right to sick leave and the right to bring a claim for either pregnancy or maternity discrimination.</p> <p>Specifically, pregnancy-related sick leave cannot be used against women regarding redundancy or career progression. Women can self-certify for 7 days, after which medical certification is required.</p>

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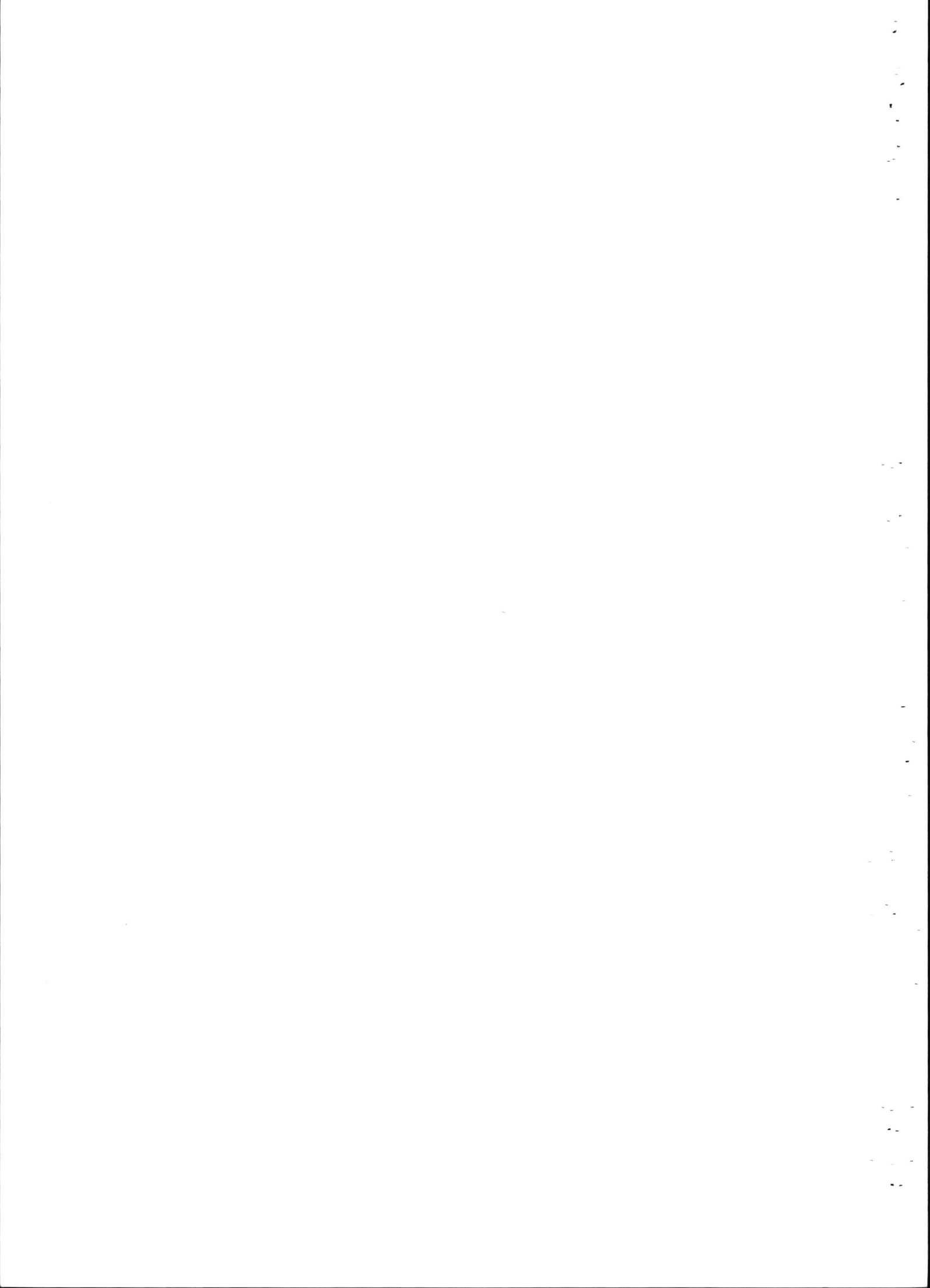
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4	United Arab Emirates	<p>Through a Decree No. (14) Of 2017 issues concerning maternity, miscarriage/ stillbirth, and childcare leave for female employees of the Government have been addressed. <i>On miscarriage/ stillbirth leave</i>, Article (4) provides that ‘a female employee who suffers a miscarriage before the start of the 24th week of pregnancy will be entitled to sick leave for a period to be determined based on a medical report approved by the competent entity. Where a female employee gives birth to a stillborn baby or suffers a miscarriage after the start of the 24th week of pregnancy, she will be entitled to sixty-day miscarriage/ stillbirth leave based on a medical report approved by the competent entity.</p> <p><i>Rights associated with maternity, miscarriage/ stillbirth, and childcare leave</i>, Article (7) provides that a female employee granted maternity, miscarriage/ stillbirth, or childcare leave pursuant to the decree will be entitled to monthly salary throughout the period of the leave. However, the female employee is not, throughout the leave period, entitles to any bonus or allowance related to performing her employment duties, such as work-related allowance, mobile phone allowance, or any other similar allowances. Further that weekends and official holidays falling within maternity, miscarriage/ stillbirth, or childcare leave will be deemed as part of that leave. The leave period will be deemed as part of an employee's period of service for all purposes, including calculating air ticket and annual leave entitlement. Maternity, miscarriage/ stillbirth, or childcare leave or any part thereof is not to be carried forwarded to the following year, and a female employee may not be paid cash in lieu thereof.</p>
	New Zealand	<p>In March 2021, New Zealand’s ruling Labour Party introduced 3 days of bereavement leave for women and their partners following miscarriage. In that regard, New Zealand’s legislation offers paid leave to workers who have experienced miscarriages. Legislation, also applies to lost pregnancies through adoptions and surrogacies but does not apply to abortions. New Zealand’s Holidays (Bereavement Leave for Miscarriage) Act classifies miscarriage as a relevant bereavement under the Holidays Act 2003. This change allows women and partners 3 days’ paid leave, unlimited by gestational age, or proof of pregnancy.</p>
	Australia	<p>Policies on miscarriages and stillbirth provide that women <u>can take unpaid leave</u> if they lose a baby after at least 12 weeks of pregnancy.</p>
	United States	<p>There is no federal law addressing bereavement leave and any form of miscarriages or stillborn births at the workplace. For instance, the Pregnancy Discrimination Act of 1978, defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. The Family and Medical Leave Act of 1993 requires covered employers to provide employees with job-protected, unpaid leave for personal or family illness. The Americans with Disabilities Act of 1990 mandates both non-discrimination and reasonable accommodations for employees with disabilities. The Occupational Safety and Health Act of 1970 is supposed to ensure that American workplaces are free of recognized hazards that may cause serious physical harm to workers. However, despite the foregoing, none of these laws clearly addresses the experience of miscarriage.</p> <p>Nevertheless, parental leave policies vary from state to state ad these polices continue to be improved as new scenarios emerge.</p>

Source: n.d



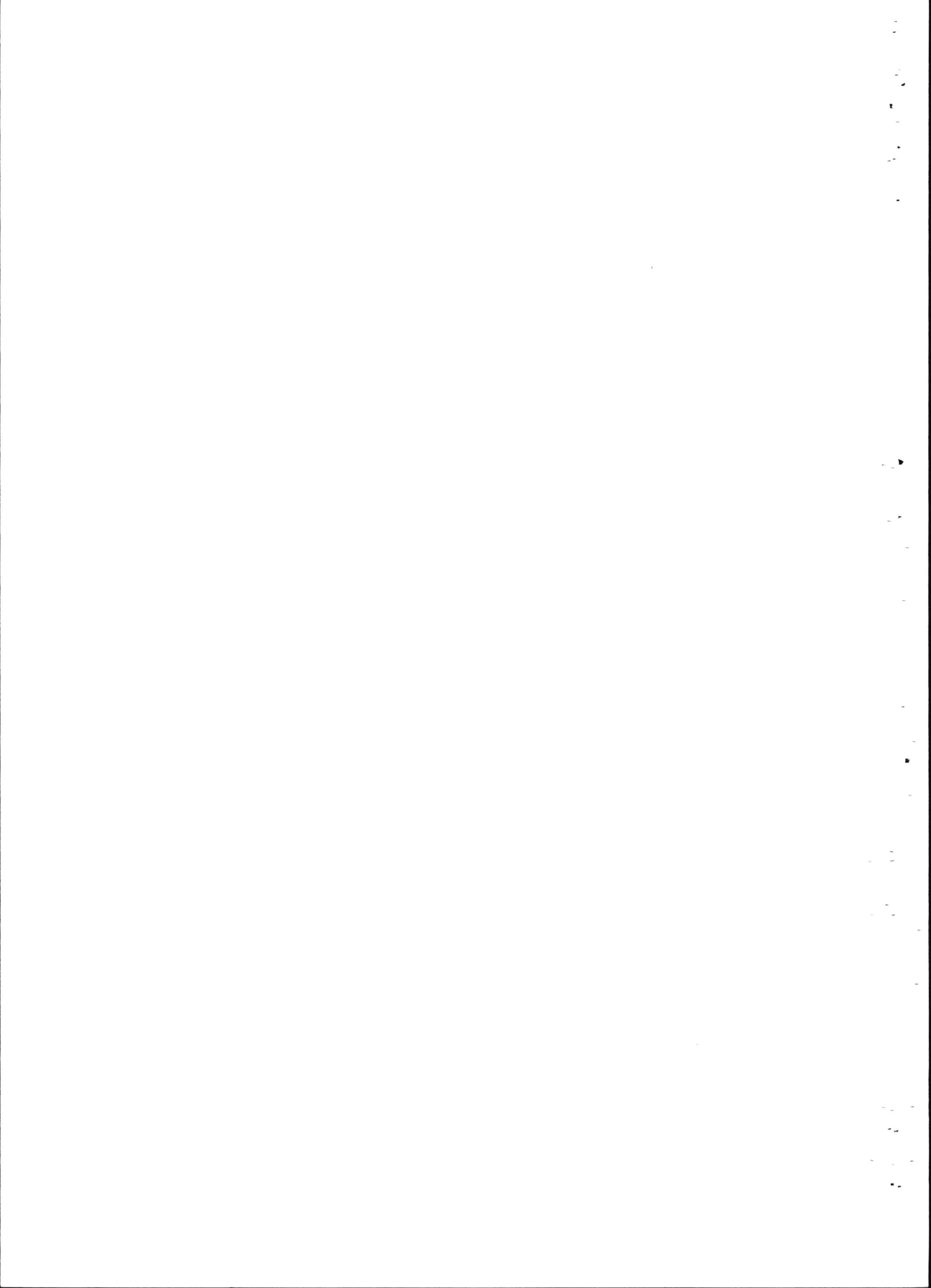
2.4 Key Observations

6. While there exist laws providing for the protection of women post-delivery, minimal laws exist for working women and their spouses in cases of loss of an unborn child. Majority of countries with existing legislation or policies are in developed countries.
7. In some jurisdictions, bereavement leave following the loss of an unborn child is provided through policies
8. Stillbirth and miscarriage are compensated as they are regarded as health conditions arising from pregnancy related complications and which may result in other psychological conditions like depression, anxiety and post-traumatic stress.
9. In as much miscarriage and stillbirth are both regarded as pregnancy related health conditions, benefits accrued differ in quantity and scope. Majority of the countries under investigation show that the rights bestowed to women who have suffered stillbirth are almost similar to rights for women preceding on maternity.
10. In Kenya, the Employment Act 2007 provides for paid leave for women proceeding for maternity, while bereavement leave and benefits for women following loss of their unborn child is considered as an administrative issue.

2.5 Policy and Legal Framework

11. Article 26 (2) of the Constitution on the right to life states that the life of a person begins at conception.
12. Section 29 (1) of the Employment Act on maternity leave provides that a female employee shall be entitled to three months' maternity leave with full pay.
13. As such, Kenyan law does not provide for maternity leave for women who miscarry or suffer still births.
14. Northern Ireland became the first European country to provide for leave and pay for employees whose children have died or who have experienced a miscarriage.
15. The Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022 amended the Employment Rights (Northern Ireland) Order 1996 by inserting provisions on—
 - (a) stillbirths references to a child to include a child stillborn after twenty-four weeks of pregnancy; and
 - (b) miscarriages.
16. Section 25 (4) of the Basic Conditions of Employment Act of South Africa provides—

“An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of miscarriage or stillbirth.”
17. The Kenyan law is silent on provision of maternity leave for women who miscarry or suffer stillbirths.



CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

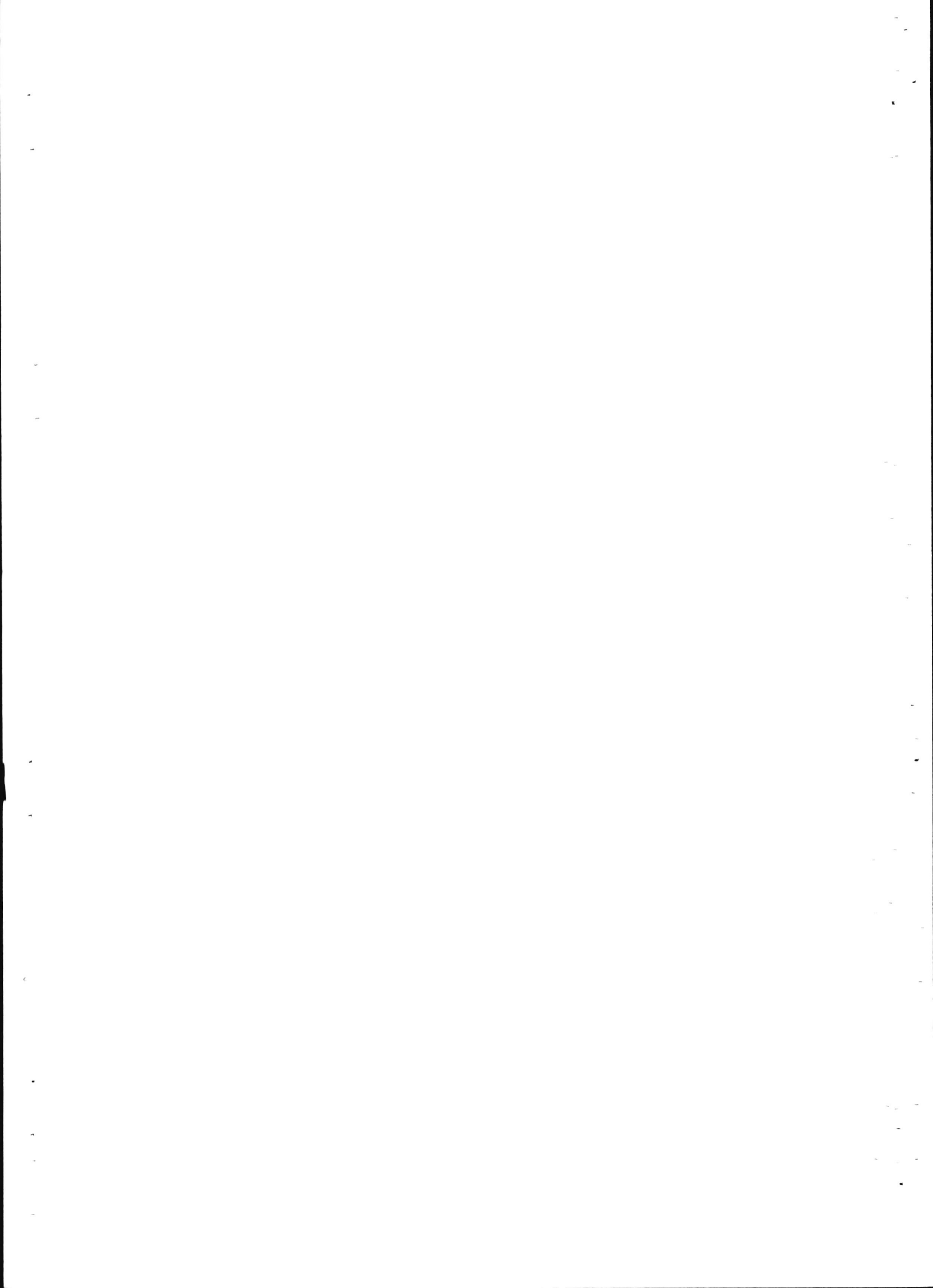
3.1 Committee Observations

18. Following the Committee's deliberations on the Petition and analysis of practices in other jurisdictions, the Committee made the following observations -

- (i) Kenya has existing legislation that caters for women proceeding on maternity leave, however there is no clarity on women who suffer miscarriages and still births;
- (ii) The current recourse for women who suffer miscarriages and still births is through internal administrative processes by an employer, on case by case basis;
- (iii) Comparative analysis indicates that majority of the jurisdictions with existing legislation in support of women who experience miscarriages and stillbirths, compensate employees on an hourly basis; and
- (iv) Compensation of employees who experience miscarriages and stillbirths is an emerging concern in the labour market, with countries continuously striving to provide solutions through enactment of bereavement leave legislation.

3.2 Committee Recommendations

19. Taking into consideration the remaining duration of the 12th Parliament, the Committee recommends that the matter, for now, be handled administratively by the Ministry of Labour for policy considerations of the Petitioner's pleas and a progress report be presented within six (6) months of the commencement of the next Parliament after stakeholder engagement is undertaken.



Annex A: Minutes of the sittings of the Committee

MINUTES OF THE 24TH MEETING OF THE STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE HELD ON SATURDAY, 14TH MAY 2022 AT 11.30 AM IN BONI CONFERENCE ROOM, PRIDE INN HOTEL, MOMBASA COUNTY.

MEMBERS PRESENT

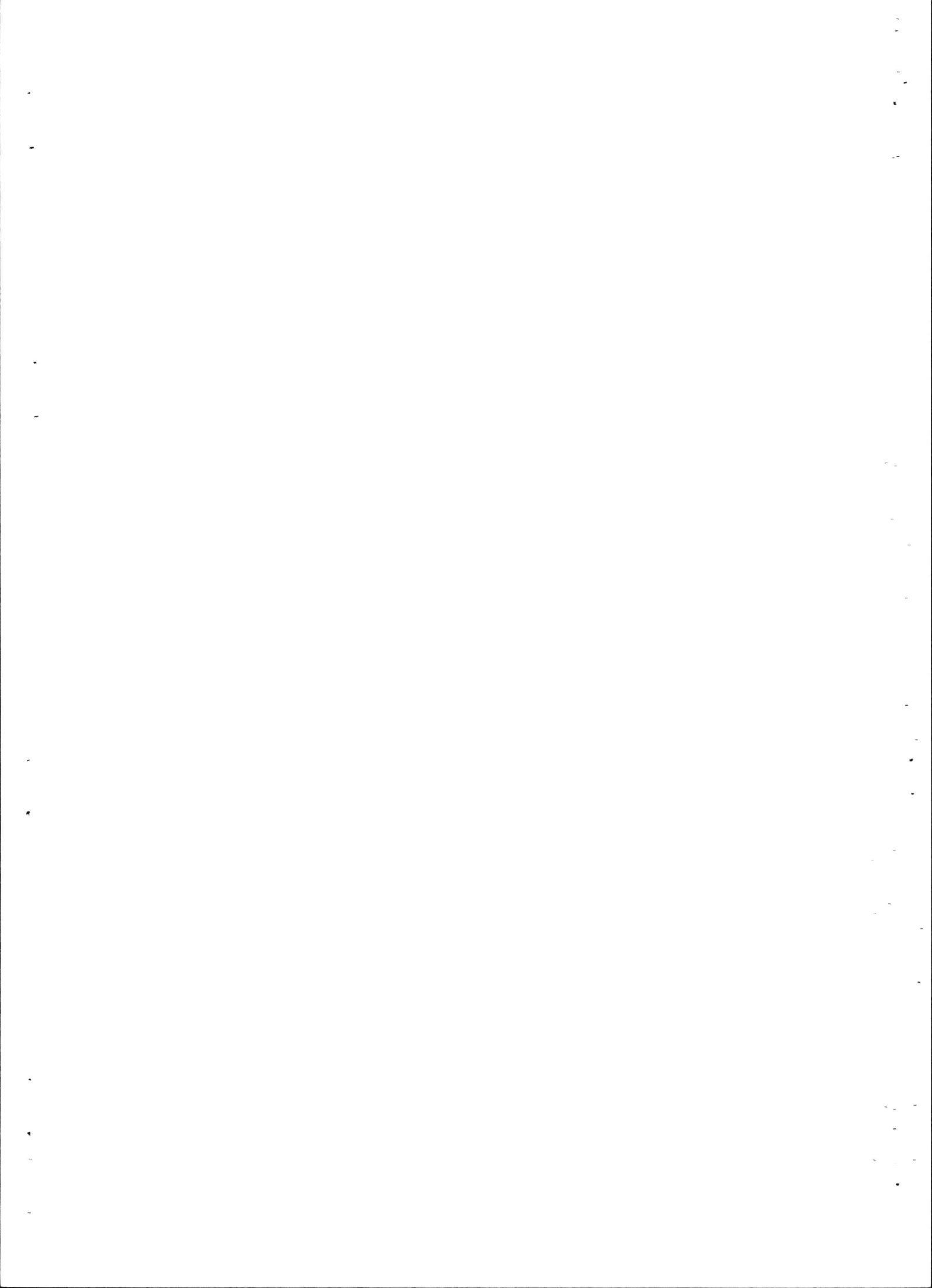
1. **Sen. Naomi Masitsa Shiyonga** - **Member (Ag. Chair)**
2. **Sen. Johnes Mwaruma** - **V. Chairperson**
3. **Sen. Madzayo Stewart Mwachiru, CBS** - **Member**
4. **Sen. (Dr.) Milgo Alice** - **Member**
5. **Sen. Makori Beatrice Kwamboka** - **Member**
6. **Sen. Paul Mwangi Githiomi** - **Member**

ABSENT WITH APOLOGIES

1. **Sen. Johnson Sakaja, CBS** - **Chairperson**
2. **Sen. Susan Kihika** - **Member**
3. **Sen. (Dr.) Isaac Mwaura, CBS** - **Member**

SENATE SECRETARIAT

1. **Ms. Mwanate Shaban** - **Clerk Assistant**
2. **Mr. Kevin Kibet** - **Clerk Assistant**
3. **Ms. Marale Sande** - **Principal Research Officer**
4. **Mr. Jeremy Chabari** - **Legal Counsel**
5. **Mr. Humphrey Ringera** - **Research Officer**
6. **Mr. Frank Mutulu** - **Media Relations Officer**
7. **Ms. Roselyne Omanywa** - **Secretary, Deputy Clerk's Office**
8. **Ms. Anne Mumbi** - **Committee's Accountant**
9. **Ms. Rita Chudi** - **Office Assistant**
10. **Ms. Fatuma Abdi** - **Audio Officer**
11. **Mr. Ruben Kimosop** - **Serjeant-At-Arms**
12. **Mr. Jonathan Lemurt** - **Fiscal Analyst**



MINUTE SEN/SCLSW/104/2022: PRELIMINARIES

The Ag. Chairperson called the meeting to order at 11.37 am. followed by a word of prayer.

MINUTE SEN/SCLSW/105/2022: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted after it was proposed by Sen. (Dr.) Alice Milgo, MP and seconded by Sen. Stewart Madzayo, MP as follows -

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
3. **Consideration and Adoption of the Report on the Petition concerning Leave Rights for Women who suffer Miscarriages and Stillbirths;**
4. **Confirmation of Previous Minutes 20, 21 and 22;**
5. **Consideration of Correspondence before the Committee;**
6. **Consideration of Statements before the Committee; and,**
7. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/106/2022: CONSIDERATION AND ADOPTION OF THE REPORT ON THE PETITION CONCERNING LEAVE RIGHTS FOR WOMEN WHO SUFFER MISCARRIAGES AND STILL BIRTHS

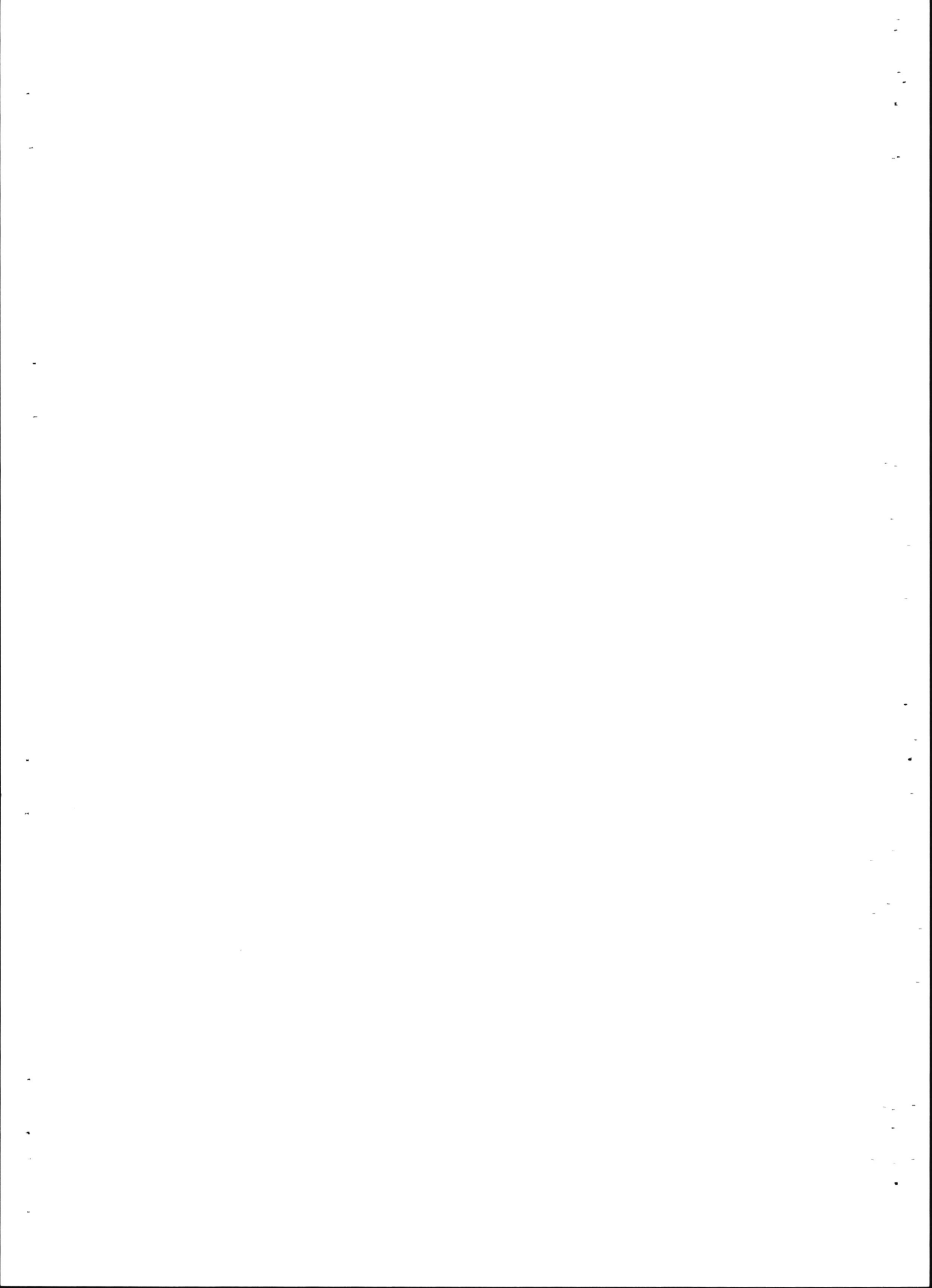
The Committee considered the Report on the Petition concerning leave rights for women who suffer miscarriages and Still births, and adopted it adopted after being proposed by Sen. (Dr.) Alice Chepkorir Milgo, MP and seconded by Sen. Beatrice Makori Kwamboka, CBS, MP.

MINUTE SEN/SCLSW/107/2022: CONSIDERATION OF RESPONSES TO STATEMENTS BEFORE THE COMMITTEE

The Committee noted the responses to the two Statements that had been raised by Sen. Mwaruma and resolved that copies should be shared with the Members for internalization, subject to comprehensive discussion in the next Sitting.

MINUTE SEN/SCLSW/108/2022: CONSIDERATION OF CORRESPONDENCE BEFORE THE COMMITTEE

1. The Minutes of the 22nd Sitting held on Friday, 13th May, 2022 at 3.00 pm were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. Paul Mwangi Githiomi, MP and seconded by Sen. (Dr.) Alice Milgo, MP;



2. The Minutes of the 21st Sitting held on Friday, 13th May, 2022 at 12 noon were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. Mwaruma Johnes, MP and seconded by Sen. Beatrice Kwamboka, CBS, MP; and
3. The Minutes of the 20th Sitting held on Friday, 13th May, 2022 at 10.00 am were confirmed as a true record of the proceedings of the Committee having been proposed by Sen. (Dr.) Alice Milgo, MP and seconded by Sen. Beatrice Kwamboka, MP.

MINUTE SEN/SCLSW/109/2022: ANY OTHER BUSINESS AND ADJOURNMENT

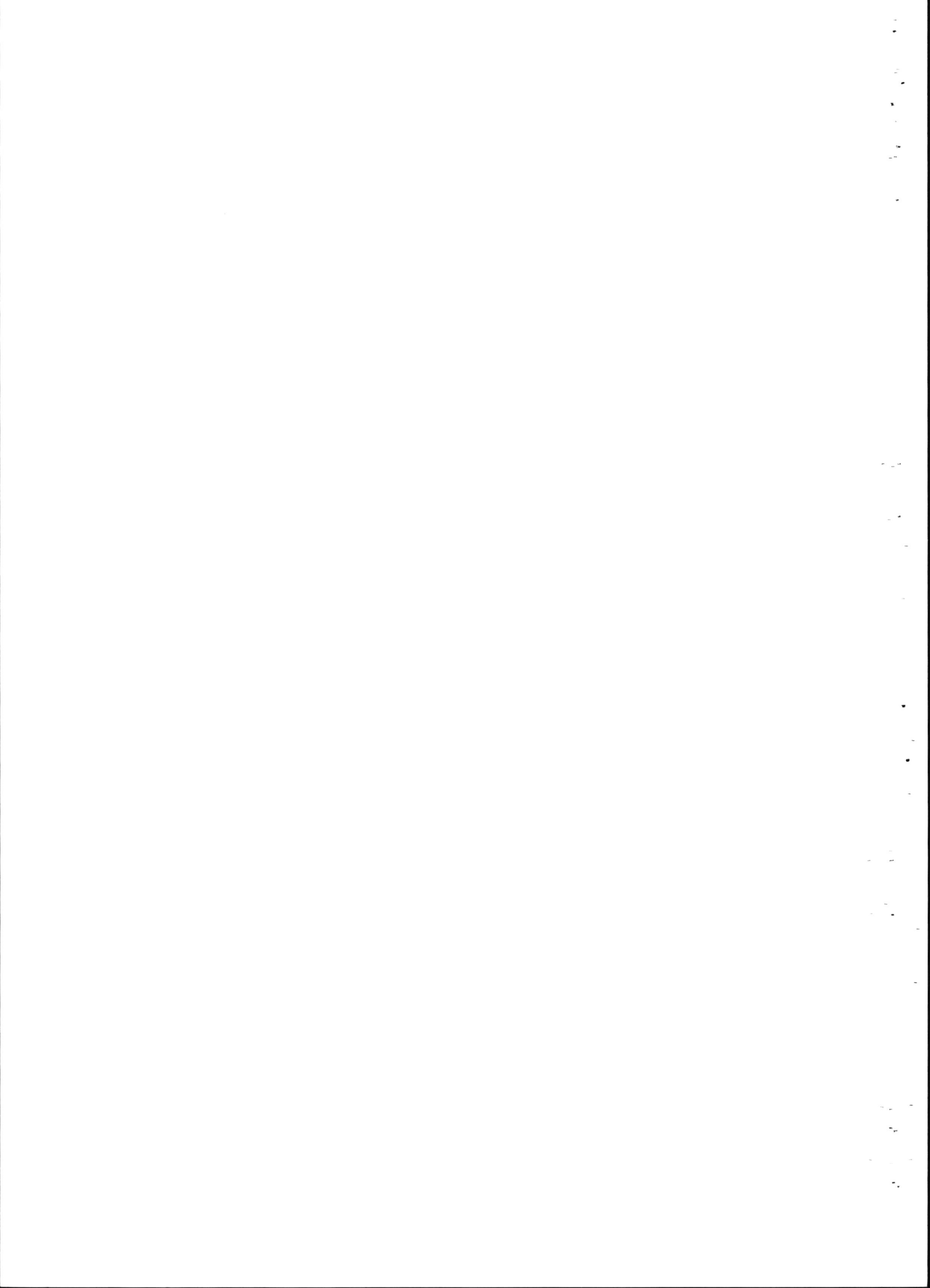
1. The Chairperson reminded the Committee that there will be a virtual in-house meeting on Tuesday, 17th May at 10.00 am to consider Pending Legislative business so as to fast-track the processing of the adopted reports.
2. There being no other business, the meeting was adjourned at 12.57 pm.



SIGNATURE:

**SEN. MWARUMA JOHNES, MP
FOR (CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)**

DATE: Tuesday, 17th May, 2022



MINUTES OF THE 20TH MEETING OF THE STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE HELD ON FRIDAY, 13TH MAY 2022 AT 10.00 AM IN CONFERENCE ROOM BONI, PRIDE INN HOTEL, MOMBASA COUNTY.

MEMBERS PRESENT

1. Sen. Naomi Masitsa Shiyonga, MP - Member (Ag. Chair)
2. Sen. Johnes Mwaruma, MP - V. Chairperson
3. Sen. Makori Beatrice Kwamboka, CBS, MP- Member
4. Sen. (Dr.) Milgo Alice Chepkorir, MP - Member
5. Sen. Paul Mwangi Githiomi, MP - Member

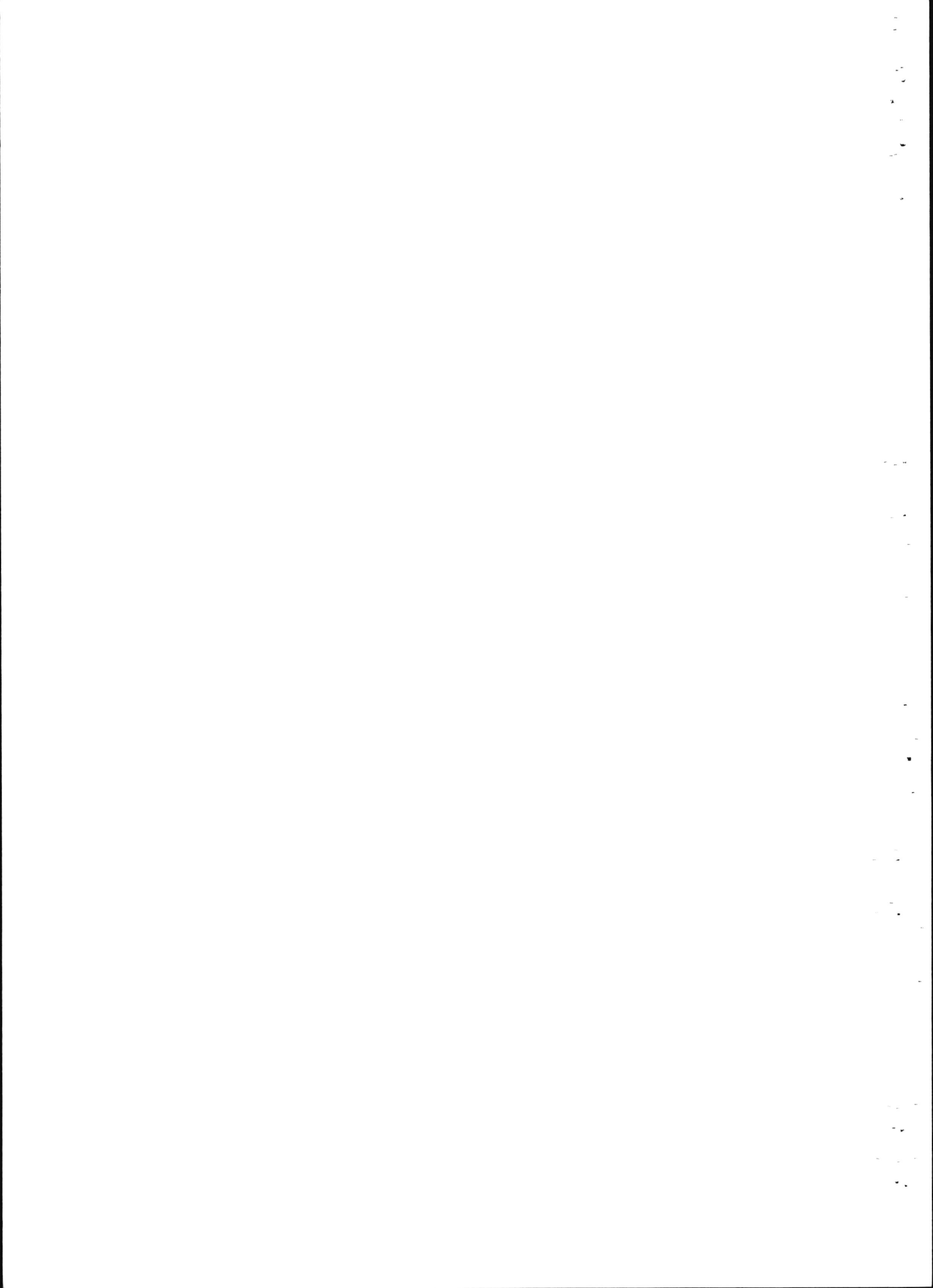
ABSENT WITH APOLOGIES

1. Sen. Johnson Sakaja, CBS, MP - Chairperson
2. Sen. Madzayo Stewart Mwachiru, CBS, MP - Member
3. Sen. Susan Kihika, MP - Member
4. Sen. (Dr.) Isaac Mwaura, CBS, MP - Member

SENATE SECRETARIAT

1. Ms. Mwanate Shaban - Senior Clerk Assistant
2. Mr. Kevin Kibet - Clerk Assistant/HO
3. Ms. Marale Sande - Principal Research Officer
4. Mr. Jeremy Chabari - Legal Counsel
5. Mr. Humphrey Ringera - Research Officer
6. Mr. Frank Mutulu - Media Relations Officer
7. Ms. Roselyne Omanyua - Secretary, Deputy Clerk's Office
8. Ms. Anne Mumbi - Committee's Accountant
9. Ms. Rita Chudi - Office Assistant
10. Ms. Fatuma Abdi - Audio Officer
11. Mr. Ruben Kimosop - Serjeant-At-Arms
12. Mr. Jonathan Lemurt - Fiscal Analyst

MINUTE SEN/SCLSW/87/2022: PRELIMINARIES



The Ag. Chairperson called the meeting to order at 10.18 am. followed by a word of prayer.

MINUTE SEN/SCLSW/88/2022: ADOPTION OF THE AGENDA

The agenda of the Meeting was adopted after it was proposed by Sen. Beatrice Makori Kwamboka, MP and seconded by Sen. (Dr.) Alice Chepkorir Milgo, MP as follows-

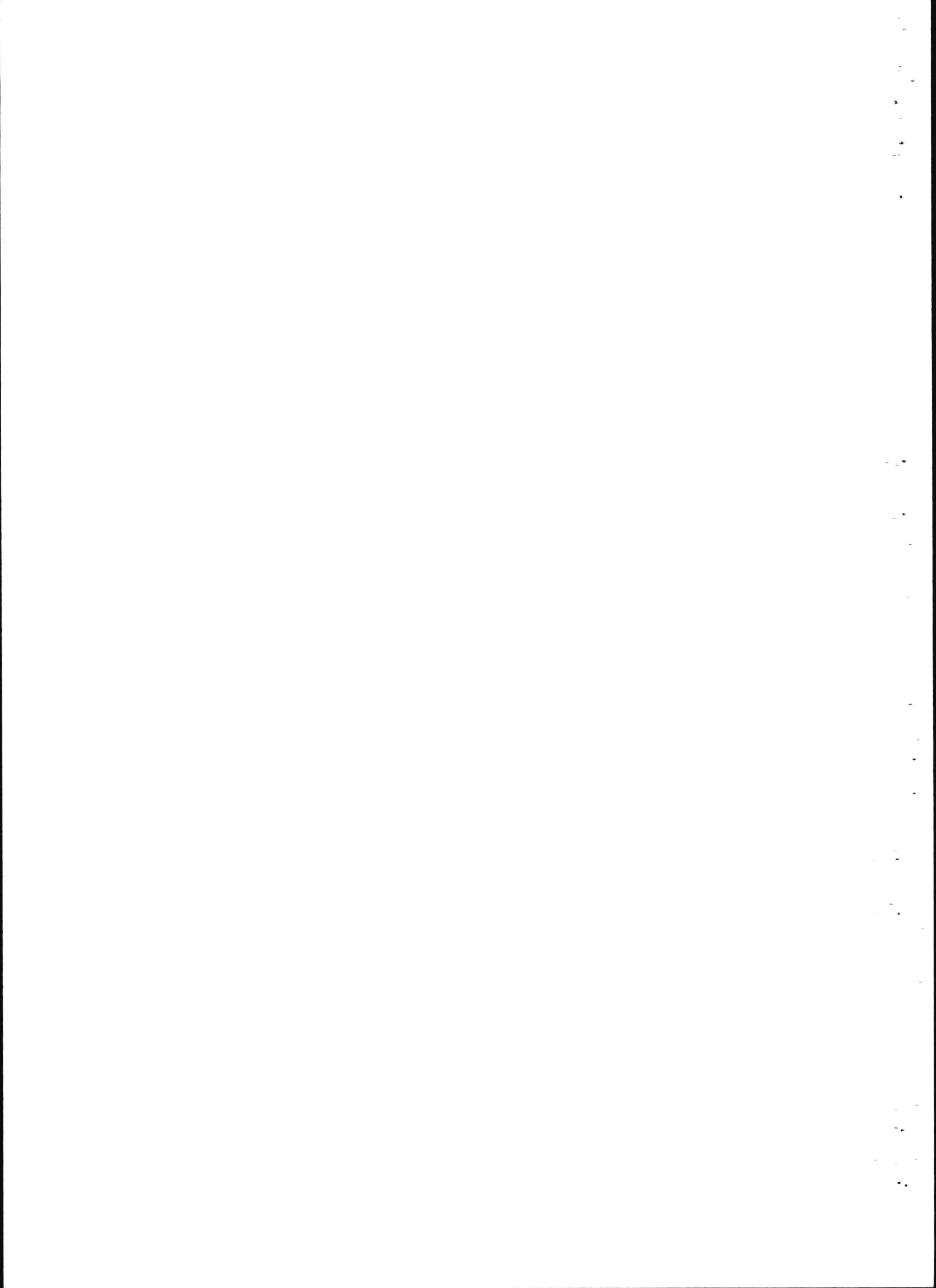
AGENDA

1. Preliminaries (Prayers & Introductions);
2. Adoption of the Agenda;
3. Meeting on the Petition concerning Leave Rights for Women who suffer Miscarriages and Still births; and,
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/89/2022: MEETING ON THE PETITION CONCERNING LEAVE RIGHTS FOR WOMEN WHO SUFFER MISCARRIAGES AND STILL BIRTHS

The Committee considered the Petition concerning Leave Rights for Women who suffer Miscarriages and still births, The Committee went through the salient issues raised as follows-

1. That Section 29 of the Employment Act 2007 makes provision for maternity and paternity leaves.
2. The Act does not provide a definition for maternity leave. However, practice has been such that the maternity leave is entitled to a woman who has given birth. When a working woman miscarries or experiences stillbirths, the presumption in the workplace is that she should go for either compassionate or sick leave, which is inadequate for them.
3. That the loss of a pregnancy for a woman has profound effects associated with physical and mental effects, which makes it difficult for a woman to work. Additionally, the psychological and social effects of pregnancy loss may be severe and long-lasting. For instance, depression, fear, anxiety, obsessive compulsive behaviours, suicidal ideation, guilt, shame, substance use, marital conflict and posttraumatic stress.
4. These effects are often misunderstood by the society, thereby leaving the victim disenfranchised.
5. THAT the Employment Act is silent on cases where a woman miscarries or experiences a stillbirth on the need to allow such a woman a leave period for recovery, which may include medical or psychological treatment.
6. The Petitioner prayers were that the Senate intervenes in the matter with a view to introducing an amendment to the Employment Act to make a provision for appropriate leave for women who miscarry or experience stillbirths during pregnancies.



7. The Meeting was informed that the Committee was not able to reach out to the petitioner to give further views and engage on the matters raised.

a) Presentation by the Principal Research Officer

The Principal Research Officer briefed the Committee as follows –

On the definition of Still births, she stated that Pregnancy loss is defined differently around the world. However, in general a baby who dies before 28 weeks of pregnancy is referred to as a miscarriage, while one who dies at or after 28 weeks are stillbirths. According to World Health organization (WHO) there are estimated 2.6 million stillbirths every year around the world. In Kenya, stillbirth rates is at 19.7 per 1000 births according to the Ministry of Health.

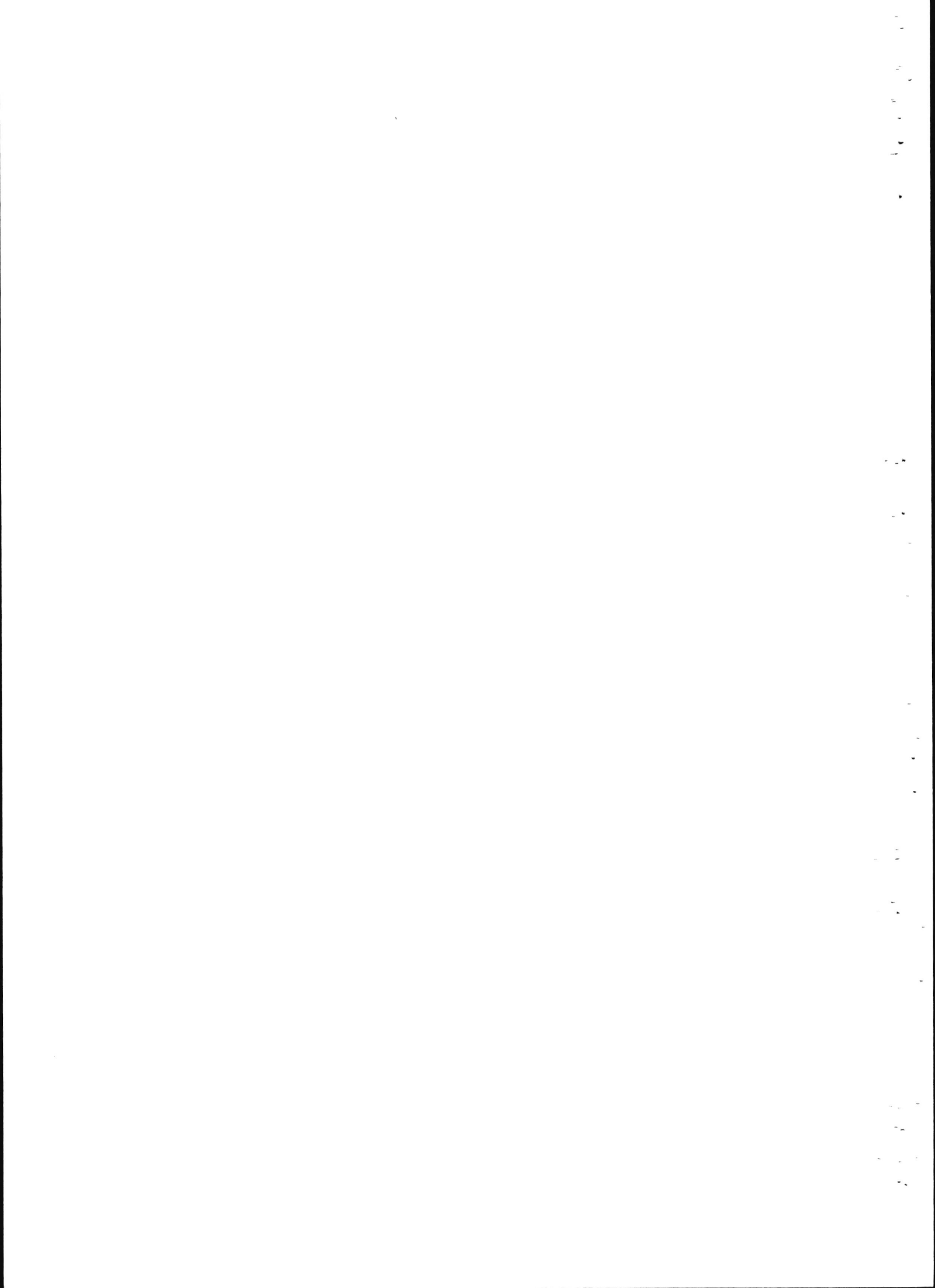
She also mentioned that Miscarriages and still births vary in severity. Some women require surgery while others experience intense grief, stress and anxiety for long periods, leading to those working women incapable of working. Just like with pregnancy and maternity, miscarriages and still births can increase vulnerability among working women. In as much as some employers provide supportive management and access to for instance contractual compassionate leave or flexible working, gaps persist. This explains the calls and clamor for legal reforms aimed at providing better protection to working women who miscarry.

She continued by saying that Pregnancy loss should be a legislative concern because Studies, (Burden, 2016)⁷ show that suffering still birth can lead to depression, anxiety and post-traumatic stress. A study⁸ found women with no history of depression at risk of depressive symptoms for several years post stillbirth. A different study⁹ found that 29 percent of people who had a pregnancy loss during the first trimester had symptoms of post-traumatic stress one month later. Further, that this impact can also extent to a partner. In this respect, the Article 42 of the Constitution bestows every Kenyan the right to the highest attainable standard of health. Since loss of an unborn child is considered a pregnancy related health issue and Article 29 of the Employment Act 2007 provides for maternity leave, bereavement leave should not be an exception. Such a

⁷ Burden, C. B. et al (2016). *From grief, guilt pain and stigma to hope and pride - a systematic review and met-analysis of mixed-method research of the psychosocial impact of stillbirth.* *BMC Pregnancy and Childbirth*, 16(9). doi:10.1186/s12884-016-0800-8

⁸ Sponsored by the Eunice Kennedy Shriver National Institute of Child health and Human Development

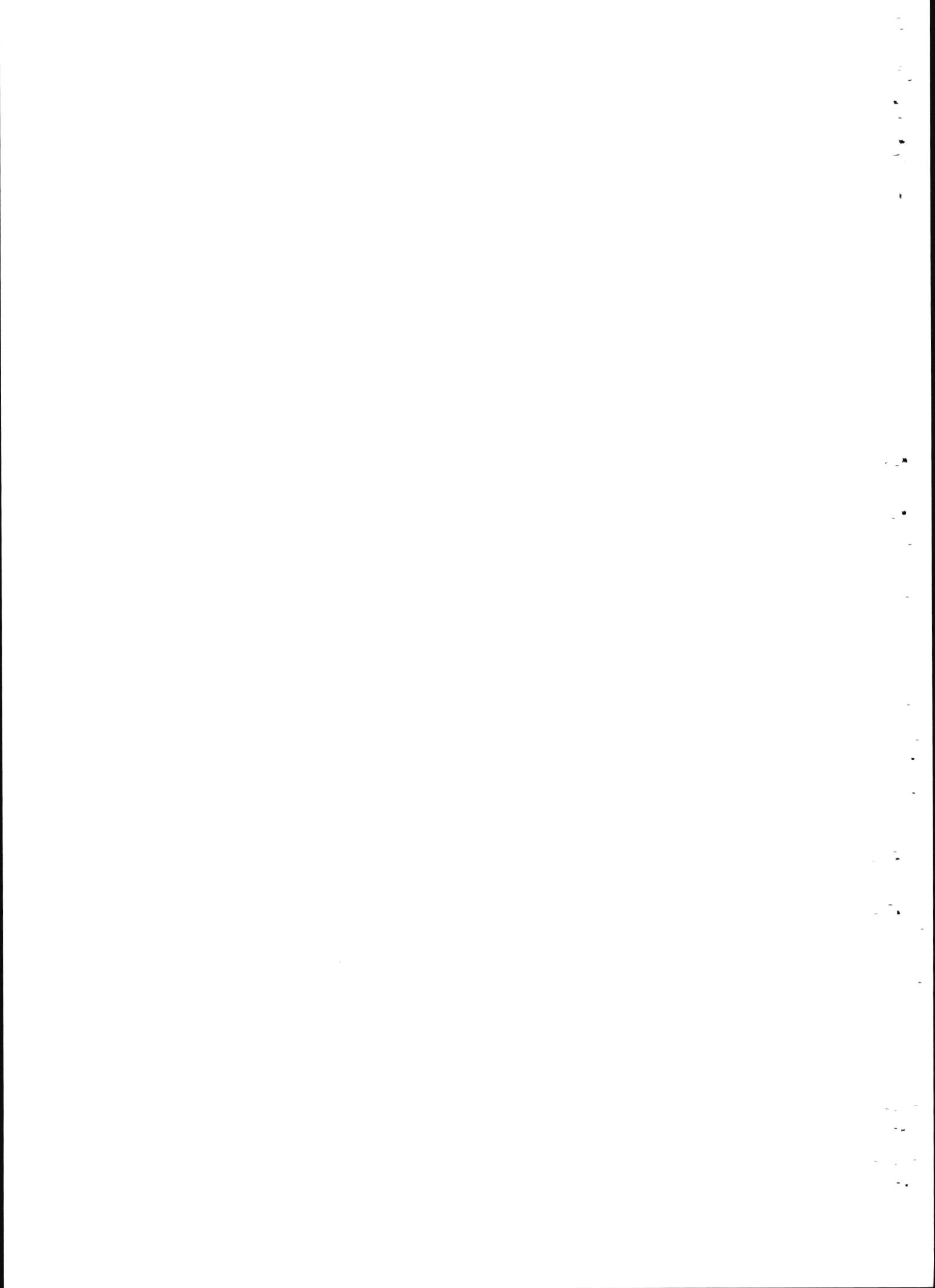
⁹ Published by in the *American Journal of Obstetrics and Gynaecology*



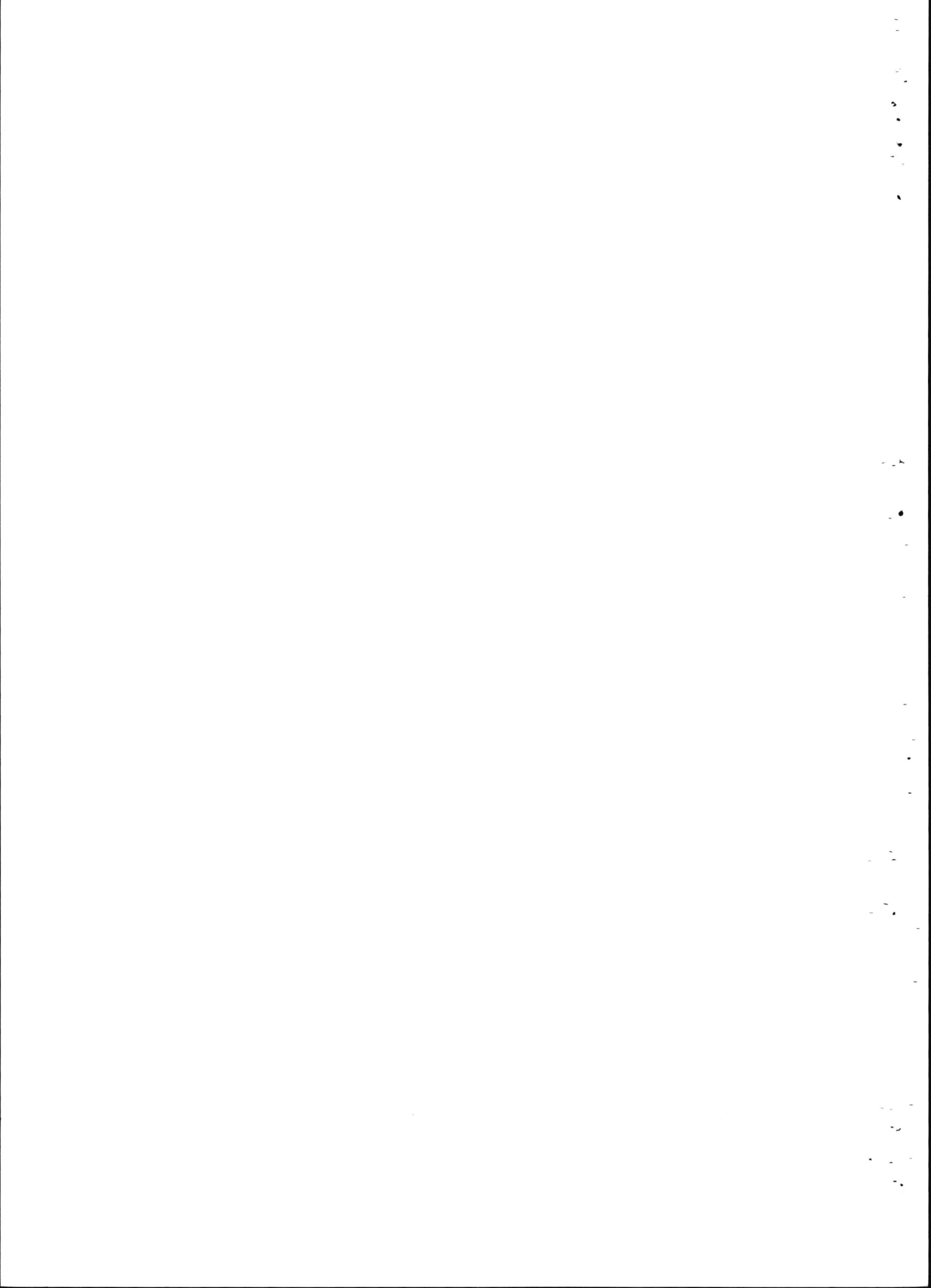
contradiction may be considered as discrimination against women who face losses occasioned by the loss of a child before birth.

She presented a comparative review the legislative and policy initiatives on bereavement in other Jurisdictions as outlined in the table below –

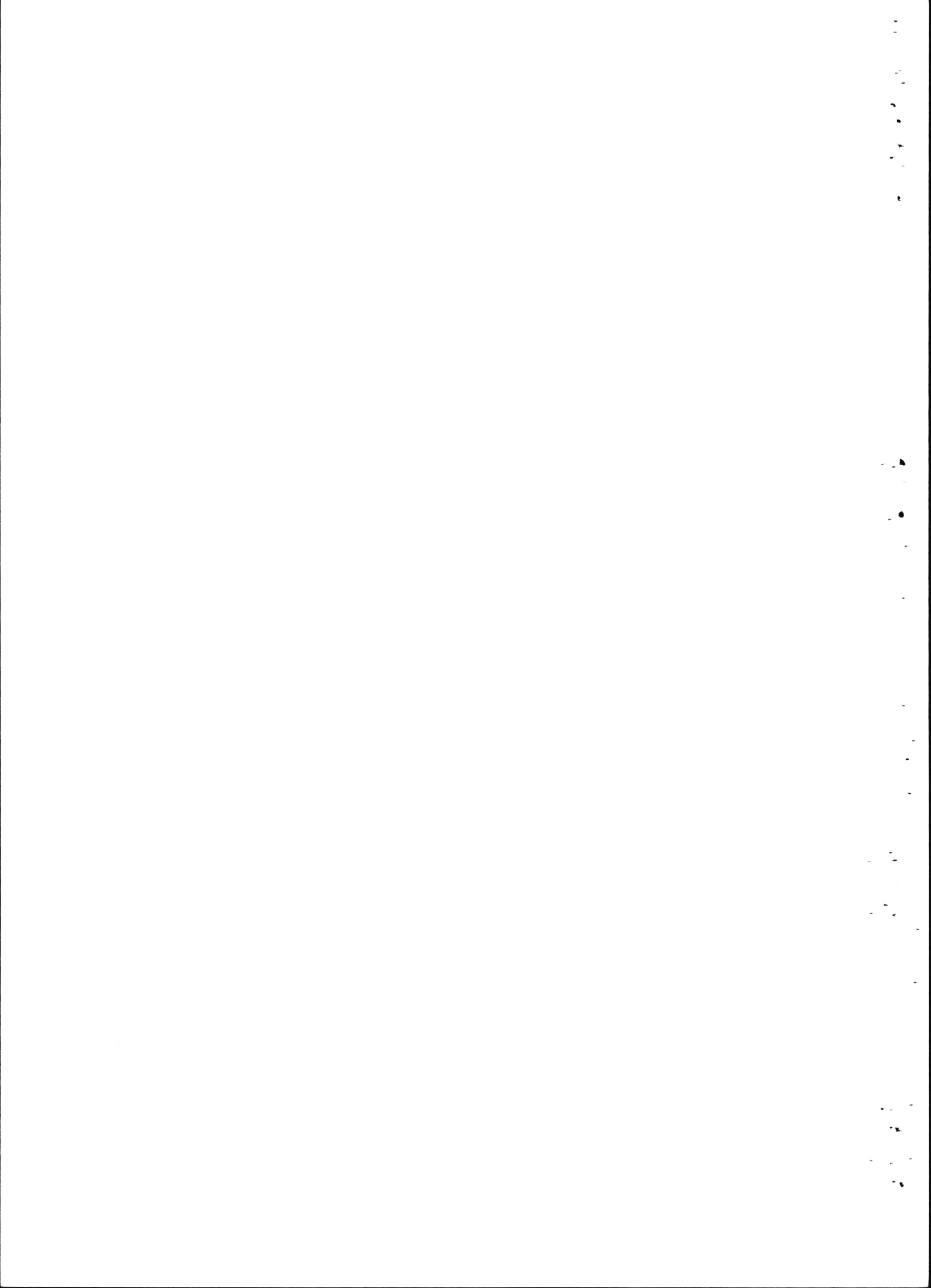
NO.	JURISDICTION	DESCRIPTION
1	Philippines	The law provides for 60 days of paid leave for miscarriage or emergency termination of a pregnancy.
2	India	Allows 6 weeks of paid leave after miscarriage.
3	United Kingdom	<p>The Parental Bereavement (Leave and Pay) Act 2020 provides for a 2 weeks statutory bereavement leave for pregnancy loss after 24 weeks (stillbirth), which extends to loss of a child up to 18 years. Parents are also entitled to take any maternity leave or shared parental leave planned prior to the stillbirth. However, if the pregnancy ends before 24 weeks (miscarriage), parents have no right to bereavement leave and are ineligible for maternity or paternity leave. Instead, women who miscarry before 24 weeks are entitled to sick leave with the additional protections accorded by the Equalities Act 2010</p> <p>Section 18 of the Equality Act 2010, provides for a woman who suffers a stillbirth after the end the 24th week of pregnancy. The entitlements include maternity leave, maternity pay and is legally protected against discrimination or unfavorable treatment on grounds of pregnancy until the end of her maternity leave (or until she returns to work, whichever is earlier). The Act does not accord women who miscarry before the end of the 24th week of pregnancy any entitlement to leave, other than to sick leave and are only protected from discrimination or unfavorable treatment on grounds of pregnancy for a period of two weeks after the end of the pregnancy.</p>



		<p>The illness must be certified as pregnancy or miscarriage-related by a GP or other medical practitioner, and that sick leave is legally protected in the same way as sick leave for a pregnancy-related illness. This means that women are not limited in how much miscarriage-related sick leave they can take – they can take sick leave for as long as their miscarriage-related illness lasts – and their employer must record that sick leave separately and not count it for disciplinary or redundancy purposes.</p> <p>Currently, in the UK, there are calls for:-</p> <ul style="list-style-type: none"> (d) An extension of the two-week protected period; (e) A clearer legal definition of ‘the end of pregnancy’ (so as to adequately cover the time off that a woman might need following a miscarriage); and (f) A lowering of the 24 week threshold, and/or new legal protection against dismissal, redundancy or detrimental treatment for a period (perhaps six months) after the miscarriage. <p>The challenges being experienced in the UK in the quest for legal reforms is the possibilities of covering all possible situations arising from a miscarriage. Additionally the lack of awareness of employment rights by majority of the women who miscarry. Experts however agree that existing law provides a degree of legal protection against discrimination or unfair treatment to women who miscarry before the 24th week of pregnancy. This is through the right to sick leave and the right to bring a claim for either pregnancy or maternity discrimination.</p> <p>Specifically, pregnancy-related sick leave cannot be used against women regarding redundancy or career progression. Women can self-certify for 7 days, after which medical certification is required.</p>
4	United Arab Emirates	Through a Decree No. (14) Of 2017 issues concerning maternity, miscarriage/ stillbirth, and childcare leave for female employees



	<p>of the Government have been addressed. <i>On miscarriage/ stillbirth leave</i>, Article (4) provides that ‘a female employee who suffers a miscarriage before the start of the 24th week of pregnancy will be entitled to sick leave for a period to be determined based on a medical report approved by the competent entity. Where a female employee gives birth to a stillborn baby or suffers a miscarriage after the start of the 24th week of pregnancy, she will be entitled to sixty-day miscarriage/ stillbirth leave based on a medical report approved by the competent entity.</p> <p><i>Rights associated with maternity, miscarriage/ stillbirth, and childcare leave</i>, Article (7) provides that a female employee granted maternity, miscarriage/ stillbirth, or childcare leave pursuant to the decree will be entitled to monthly salary throughout the period of the leave. However, the female employee is not, throughout the leave period, entitled to any bonus or allowance related to performing her employment duties, such as work-related allowance, mobile phone allowance, or any other similar allowances. Further that weekends and official holidays falling within maternity, miscarriage/ stillbirth, or childcare leave will be deemed as part of that leave. The leave period will be deemed as part of an employee's period of service for all purposes, including calculating air ticket and annual leave entitlement. Maternity, miscarriage/ stillbirth, or childcare leave or any part thereof is not to be carried forward to the following year, and a female employee may not be paid cash in lieu thereof.</p>
New Zealand	<p>In March 2021, New Zealand’s ruling Labour Party introduced 3 days of bereavement leave for women and their partners following miscarriage. In that regard, New Zealand’s legislation offers paid leave to workers who have experienced miscarriages. Legislation, also applies to lost pregnancies through adoptions and surrogacies but does not apply to abortions. New Zealand’s</p>

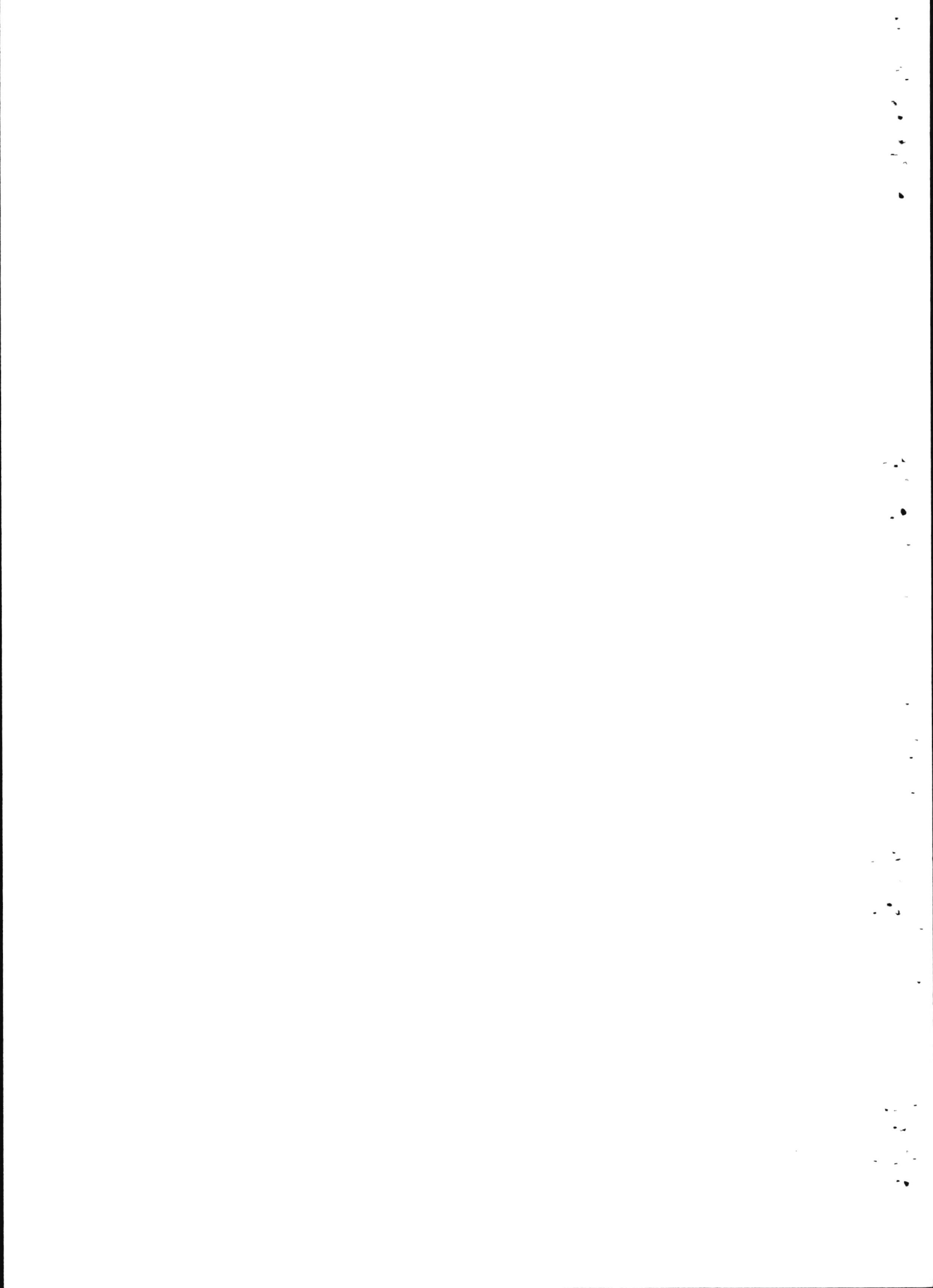


		Holidays (Bereavement Leave for Miscarriage) Act classifies miscarriage as a relevant bereavement under the Holidays Act 2003. This change allows women and partners 3 days' paid leave, unlimited by gestational age, or proof of pregnancy.
	Australia	Policies on miscarriages and stillbirth provide that women <u>can take unpaid leave</u> if they lose a baby after at least 12 weeks of pregnancy.
	United States	<p>There is no federal law addressing bereavement leave and any form of miscarriages or stillborn births at the workplace. For instance, the Pregnancy Discrimination Act of 1978, defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. The Family and Medical Leave Act of 1993 requires covered employers to provide employees with job-protected, unpaid leave for personal or family illness. The Americans with Disabilities Act of 1990 mandates both non-discrimination and reasonable accommodations for employees with disabilities. The Occupational Safety and Health Act of 1970 is supposed to ensure that American workplaces are free of recognized hazards that may cause serious physical harm to workers. However, despite the foregoing, none of these laws clearly addresses the experience of miscarriage.</p> <p>Nevertheless, parental leave policies vary from state to state and these policies continue to be improved as new scenarios emerge.</p>

Source: n.d

b) Committee Observations

- 1) While there exist laws providing for the protection of women post-delivery, minimal laws exist for working women and their spouses in cases of loss of an unborn child. Majority of countries with existing legislation or policies are in developed countries.



- 2) In some jurisdictions, bereavement leave following the loss of an unborn child is provided through policies
- 3) Stillbirth and miscarriage are compensated as they are regarded as health conditions arising from pregnancy related complications and which may result in other psychological conditions like depression, anxiety and post-traumatic stress.
- 4) In as much miscarriage and stillbirth are both regarded as pregnancy related health conditions, benefits accrued differ in quantity and scope. Majority of the countries under investigation show that the rights bestowed to women who have suffered stillbirth are almost similar to rights for women preceding on maternity.

c) Presentation by the Legal Counsel

The Legal Counsel began by mentioning that Article 26 (2) of the Constitution on the right to life states that the life of a person begins at conception.

He also mentioned that Section 29 (1) of the Employment Act on maternity leave provides that a female employee shall be entitled to three months' maternity leave with full pay, and as such, the Kenyan law does not provide for maternity leave for women who miscarry or suffer still births.

He added that Northern Ireland became the first European country to provide for leave and pay for employees whose children have died or who have experienced a miscarriage as below -

The Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022 amended the Employment Rights (Northern Ireland) Order 1996 by inserting provisions on—

- (c) stillbirths references to a child to include a child stillborn after twenty-four weeks of pregnancy; and
- (d) miscarriages.

He concluded by stating that in South Africa, Section 25 (4) of the Basic Conditions of Employment Act provides—

“An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of miscarriage or stillbirth.”

d) Committee Observations

Members observed that the Kenyan law is silent on provision of maternity leave for women who miscarry or suffer stillbirths.

e) Committee Recommendations

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The Committee noted that since the term of the 12th Parliament was almost coming to an end, the matter should continue being handled administratively on a case by case basis, between the Employer, Patient and Doctor, and that further review be undertaken upon Stakeholder engagement by the 13th Parliament.

MINUTE SEN/SCLSW/90/2022: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the meeting was adjourned at 11.53 a.m.



SIGNATURE:

**SEN. NAOMI SHIYONGA, MP
FOR: (CHAIRPERSON: SEN. JOHNSON SAKAJA, MP, CBS)**

DATE: 14TH MAY, 2022

