

MODEL HARMONISATION ACT REGARDING EQUALITY OF OPPORTUNITY AND TREATMENT IN EMPLOYMENT AND OCCUPATION

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PART I - PRELIMINARY

Objectives

1. The objectives of this Act are:

- (a) to give effect to the provisions of the National Constitution; to the ILO Convention concerning Discrimination In Employment and Occupation, no 111 (1958) and ILO Convention concerning Equal Remuneration, No. 100 (1951); and to certain provisions in the UN Convention on the Elimination of All Forms of Discrimination Against Women;
- (b) to eliminate, as far as possible, discrimination in employment and occupation against persons on the grounds of race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability, family responsibilities, pregnancy or marital status;
- (c) to promote recognition and acceptance of the principle of equal opportunity and treatment on the above grounds in employment, occupation and other related activities including education, vocational training, employment services, provision of goods and services, partnerships and professional trade organisations.

Interpretation

1. In this Act:

"commission agent" means an agent who is remunerated by commission;

"contract worker" means a person who performs work for another person pursuant to a contract between the employer of the first-mentioned person and that other person;

"de facto spouse" in relation to a person, means a person of the opposite sex to the first-mentioned person who lives with the first-mentioned person as a husband or wife of that person although not legally married to that person;

"dependent contractor" means a person, whether or not employed under a contract of employment, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for that person more closely resembling the relationship of employee than that of an independent contractor.

"disabled person" means an individual whose prospects of securing, retaining, and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment;

"educational authority" means a body of persons administering an educational institution;

"educational institution" means a school, a college, university or other institution at which education or training is provided;

"employee" means a person who offers his or her services under a contract of employment, a managerial employee and a dependent contractor and includes, where appropriate, a former employee;

"employer" means any person or undertaking, corporation, company, public authority or body of persons who or which employs any person under a contract of employment or uses the services of a dependent contractor, commission agent or a contract worker; and includes the heirs, successors and assigns of an employer;

"employment" includes -

- (a) part time, temporary employment and employment under a contract of service or of apprenticeship;
- (b) employment under a contract for services;
- (c) engagement as a commission agent;

"employment agency" means any person who, whether for payment or not, assists persons to find employment or assists employers to find employees;

"family responsibilities" means responsibilities in respect of any dependent family member;

"functions" includes powers, authorities, and duties;

"marital status" means the status or condition of being -

- (a) single;
- (b) married;
- (c) married but living separately and apart from one's spouse;
- (d) divorced;
- (e) widowed; or
- (f) the *de facto* spouse of another person;

"principal" means -

- (a) in relation to a commission agent, a person for whom work is done by that commission agent;
- (b) in relation to a contract worker, a person for whom a contract worker performs work otherwise than under a contract of employment;

"sexual harassment" means unwanted conduct of a sexual nature in the workplace or in connection with the performance of work which is threatened or imposed as a condition of employment on the employee or which creates a hostile working environment for the employee.

PART II - PROTECTION AGAINST UNLAWFUL DISCRIMINATION

Definition of Discrimination

3. (1) For the purposes of this Act, a person discriminates against another person if the first-mentioned person makes, on any of the grounds mentioned in subsection (2), any distinction, exclusion or preference the intent or effect of which is to nullify or impair equality of opportunity or treatment in occupation or employment.

Prohibited Grounds of Discrimination

(2) The grounds referred to in subsection (1) are -

(a) race, sex, religion, colour, ethnic origin, indigenous population, national extraction, social origin, political opinion, disability, family responsibilities, pregnancy, marital status or age except for purposes of retirement and restrictions on work and employment of minors.

(b) any characteristic which appertains generally or is generally imputed to persons of a particular race, sex, religion, colour, ethnic extraction, social origin, political opinion, disability, family responsibility, pregnant state, marital status, or age except for purposes of retirement and restrictions on work and employment of minors.

(3) Any act or omission or any practice or policy that directly or indirectly results in discrimination against a person on the grounds referred to in subsection (2), is an act of discrimination regardless of whether the person responsible for the act or omission or the practice or policy intended to discriminate.

PART III - MATTERS RELATING TO EMPLOYMENT

Unlawful discrimination

4. (1) This Act covers all workers and employees and employers in the public and private sectors who are engaged in an employment relationship.

(2) It is unlawful for any person who is an employer or any person acting or purporting to act on behalf of a person who is an employer, in relation to recruitment, selection or employment of any other person for purposes of training, apprenticeship or employment of any other person for purposes of training, apprenticeship or employment, to discriminate against that other person on the grounds listed in section 3(2) -

(a) in the advertisement of the job;

(b) in the arrangements made for the purpose of determining who should be offered that employment;

(c) in determining who should be offered employment;

(d) in the terms or conditions on which employment is offered;

(e) the creation, classification or abolition of jobs.

(3) It is unlawful for an employer to discriminate against an employee on the grounds listed in section 3(2) -

(a) in terms or conditions of employment afforded to that employee by the

- employer;
- (b) in conditions of work or occupational safety and health measures;
- (c) in the provision of facilities related to or connected with employment;
- (d) by denying access, or limiting access to opportunities for advancement, promotion, transfer or training, or to any other benefits, facilities or services associated with employment;
- (e) by retrenching or dismissing the employee;
- (f) by subjecting the employee to any other disadvantage;

Bonafide occupational qualifications

5. (1) Nothing in section 4 shall apply to any distinction, exclusion, or preference based on the grounds listed in section 3(2) where a genuine occupational qualification exists.

(2) For the purposes of this Act a genuine occupational qualification for a job exists where -

(a) the essential nature of the job calls for a particular race, sex, religion, national extraction, indigenous population, ethnic origin, social origin, disability, pregnancy, family responsibilities marital status or age for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a person of the opposite sex or different race, ethnic origin or religion, etc.; or

(b) in a religious institution, the essential nature of the job calls for a particular religious affiliation or belief and the essential nature of said job would be materially different or unable to be carried out if performed by a person of a different religious affiliation or belief; or

(c) the job needs to be held by a man or a woman to preserve decency or privacy because -

(i) it is likely to involve physical contact with persons of the same sex as the employees in circumstances where those persons might reasonably object to its being carried out by persons of the opposite sex;

(ii) the holder of the job is likely to do work in circumstances where persons of the same sex might reasonably object to the presence of a person of the opposite sex because they are in a state of undress or are using sanitary facilities;

(d) the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer and -

(i) the only such premises which are available for persons holding that kind of job are same sex and are not equipped with separate sleeping accommodation and sanitary facilities for persons of the opposite sex; and

(ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for persons of the opposite sex or to work out a practicable solution of usage of such facilities for members of both sexes; or

(e) the job requires a married couple; or

(f) the nature of the establishment, or the part of it where the work is carried out, requires the job to be held by a person of a particular sex because -

- (i) it is, or is part of, a hospital, prison, or other establishment for persons requiring special care, supervision, or attention; and
 - (ii) those persons are all of the same sex (disregarding any person of the opposite sex whose presence is exceptional); and
 - (iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a person of the opposite sex; or
- (g) the holder of the job provides individuals with personal services promoting their health, welfare or education, and those services can most effectively be provided by a person of a particular sex; or
- (h) on the grounds of disability when it is shown that -
- (i) the disability in question was a relevant consideration in relation to the particular requirements of the employment concerned and the performance of the job would not be able to be carried out as a result of the disability; or
 - (ii) special facilities or modifications, whether physical, administrative, or otherwise, are required to be made at the workplace to accommodate the disabled person which the employer cannot reasonably be expected to perform.

Special positive action

6. Special measures taken by employers of a temporary nature to promote equality of opportunity in employment based on the grounds set out in section 3(1) shall not be deemed to be unlawful discrimination within the meaning of section 4 of this Act.

Sexual Harassment

7. Any act of sexual harassment against an employee committed by an employer, managerial employee or coworker shall constitute unlawful discrimination based on sex within the meaning of section 4 of this Act -

- (a) "sexual harassment" means unwanted conduct of a sexual nature in the workplace or in connection with the performance of work which is threatened or imposed as a condition of employment on the employee or which creates a hostile working environment for the employee.

PART IV - PROMOTION OF EQUAL REMUNERATION

Equal remuneration

8. Employers and those acting on behalf of employers shall be obligated to pay equal remuneration to men and women performing work of equal value for the employer.

- (a) "equal remuneration" means rates of remuneration that have been established without differentiation based on the grounds of sex (gender).
- (b) "work of equal value" means work equal in value in terms of the demands it makes in relation to such matters as skill levels, duties, physical and mental effort, responsibility and conditions of work.
- (c) The burden of proof to establish that equal remuneration has been paid shall rest on the employer.

PART V - DISCRIMINATION BY OTHER BODIES

Professional Partnership

9. (1) Where employment in a particular profession is largely provided through partnership firms, it is unlawful for such firms of professionals consisting of (six) or more partners or for six or more persons proposing to form themselves into such a partnership firm, to discriminate against any person on the grounds set out in section 3(2) -

- (a) in the arrangements they make for the purpose of determining who should be offered a position as partner in the firm; or
- (b) by expelling persons from the firm or subjecting persons in the firm to detrimental treatment.

(2) Subsections 1(a) and 1(b) above do not apply if the treatment afforded to the partner or potential partner is based on a genuine occupational qualification.

Professional or trade organisations

10. (1) It is unlawful for an organisation of employers, trade unions and other organisation of employees or any other organisation whose members carry on a particular profession or trade for the purpose of which the organisation exists to discriminate against any person on the grounds set out in section 2(2) -

- (a) by refusing or failing to accept that person's application for membership; or
- (b) in the terms on which it is prepared to admit that person to membership; or
- (c) in the case of a person who is a member of the organisation -
 - (i) by denying, limiting or deliberately omitting to afford access to any benefits, facilities or services provided by the organisation;
 - (ii) by depriving that person of membership or varying the terms of membership;
 - (iii) by limiting or depriving that person of access or acquisition to leadership positions within the organisation; or
 - (iv) by subjecting that person to any other detriment.

Qualifying bodies

11. (1) It is unlawful for an authority or body that is to confer, renew, extend, revoke, or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation, to discriminate against a person on the grounds set out under section 3(2) -

- (a) by refusing or failing to confer, renew or extend the authorisation or qualification;
- (b) in the terms or conditions on which it is prepared to confer the authorisation or qualification or to renew or extend it; or
- (c) by revoking or withdrawing the authorisation or qualification or varying the terms or conditions upon which it is held.

(2) In this section, "authorisation or qualification" includes recognition, registration, enrolment, approval and certification.

Vocational training bodies

12. (1) It is unlawful for any association which comprises employers and has as its principal objectives, or one of its principal objectives, affording their employees access to training facilities, and for any other person recognised as providing facilities for training for employment occupation to discriminate on the grounds set out in section 3(2) against a person who is seeking or undergoing technical or vocational training which would help to fit that person for any kind of employment or occupation -

- (a) in the arrangements made for the purpose of determining who should be offered training;
- (b) in the terms and conditions on which that person is afforded access to training courses or other facilities and services including vocational counseling and guidance;
- (c) by refusing or deliberately omitting to afford such access to that person;
- (d) by terminating that person's training.

(2) It shall not be unlawful under subsection (1) to give preference to nationals above non nationals.

Employment agencies

13. (1) It is unlawful for an employment agency to discriminate against a person on the grounds set out in section 3(2) -

- (a) by refusing to provide that person with any of its services;
- (b) in the terms on which it offers to provide that person with any of its services; or
- (c) in the manner in which it provides that person with any of its services; or
- (d) in any other manner in which it facilitates the hire or employment of that person.

(2) This section does not apply if the discrimination concerns employment which the employer could lawfully refuse to offer that person.

(3) An employment agency shall not be liable under this section if it proves -

- (a) that it acted in reliance on a statement made to it by an employer to the effect that, by reason of the operation of subsection (2), its action would not be unlawful; and
- (b) that it was reasonable for it to rely on the statement.

(4) Any person who knowingly, or recklessly, makes a statement referred to in subsection (3)(a) which is false or misleading in a material respect commits an offence and is liable on summary conviction to a fine of \$().

PART VI - DISCRIMINATION IN OTHER AREAS

Goods, services and facilities

[14. It is unlawful for a person who, whether for payment or not , provides goods and services, or makes facilities available, to discriminate against a person on the grounds set out in section 3(1) -

- (a) by refusing to provide that person with those goods or services or to make those facilities available; or
- (b) in the manner in which or in the terms and conditions on which those goods or services are provided or made available to that person.]

Subterfuge

15. Where a requirement or condition which is not apparently in contravention of any provision in the Act, has the effect of giving preference to a person on the grounds set out in section 3(2) in a situation where such preference would be unlawful under this Act, the imposition of that condition or requirement shall be unlawful unless the person imposing it established good reason for its imposition and shows that its imposition is not a subterfuge to avoid complying with this Act.

Advertisements

16. (1) It shall be unlawful for any person to publish or display or to cause to allow to be published or displayed, any advertisement or notice which indicates or could reasonably be understood as indicating, an intention to commit a breach of any provision under this Act.

(2) The Publisher of an advertisement made unlawful by subsection (1) shall not be subject to any liability under that subsection if the publisher proves -

- (i) that the advertisement was published in reliance on a statement made by the person who caused it to be published to the effect that the publication would not be unlawful; and
- (ii) that it was reasonable for the publisher to rely on that statement.

(3) A person who knowingly or recklessly makes a statement referred to in subsection (2) which is false or misleading in a material respect commits an offense and is liable on summary conviction to a fine of \$().

Application forms, etc.

17. Where by virtue of any provision of Part II or III, it would be unlawful, in particular circumstances, for a person to discriminate against another person on the grounds set out in section 3 (2), it is unlawful for that person to request or require that other person to provide information (whether by way of completing a form or otherwise) that would not, in the same or substantially similar circumstances be required or requested of the person of the opposite sex, or of a different race, religion, colour, political opinion, ethnic origin, indigenous population, social origin, pregnant state or marital status or with different family responsibilities.

PART VII - GENERAL EXCEPTIONS

Charities

18. (1) Nothing in Parts III and IV affects -

- (a) a provision of a deed, will or other document, whether made before or after the

coming into operation of this Act, that confers charitable benefits or enables charitable benefits to be conferred on persons on the basis of the grounds set out in subsection 3(2) of this Act; or
(b) an act that is done in order to give effect to such a provision.

(2) In this section "charitable benefits" means benefits for purposes that are exclusively charitable according to national laws.

Religious bodies

19. Nothing in this Act affects -

- (1) religion or members of that body;
- (2) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (3) the selection or appointment of persons to perform duties or functions for the purposes of, or in connection with, or otherwise to participate in any religious observance or practice; or
- (4) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents to that religion.

PART VIII - OFFENSES RELATED TO DISCRIMINATION

Pressure to discriminate

20. (1) It is unlawful to induce or attempt to induce, a person to do any act which contravenes Part III or IV by -

- (a) providing or offering to provide the person with any benefit; or
- (b) subjecting or threatening to subject the person to any detriment.

(2) An offer or threat is not prevented from falling within subsection (1) because it is not made directly to the person in question, if it is made in such a way that the person is likely to hear it or hear of it.

(3) A person who contravenes subsection (1) commits an offense and is liable on conviction to a fine not exceeding \$().

Victimisation

21. (1) A person who commits an act of victimisation against another person shall be guilty of an offence and shall be liable to a fine not exceeding \$().

(2) For the purposes of subsection (1), a person shall be taken to commit an act of victimisation against another person if the first-mentioned person subjects or threatens to subject the other person to any detriment -

- (a) on the ground that the other person -
 - (i) has made, or proposes to make, a complaint under this Act;
 - (ii) has brought, or proposes to bring proceedings under this Act against any

person;

(iii) has furnished or proposes to furnish, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act;

(iv) has attended or proposes to attend an inquiry under this act or to provide evidence or testimony as a witness; or

(v) has made a good faith allegation that a person has committed an act of discrimination in contravention of this Act.

(b) on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in paragraph (a) (i)-(v).

PART IX - BURDEN OF PROOF

Burden of proof

22. Except where otherwise provided in this Act, the person alleging a violation of this Act shall bear the burden of presenting a prima facie case of discrimination or of an offense related to discrimination under this Act. Upon a prima facie showing of discrimination, the burden or persuasion shall shift to the respondent to disprove the allegations.

Exceptions

23. Proof of exceptions where by any provision of this Act, conduct is excepted from conduct that is unlawful under this Act or that is a contravention of this Act, the onus of proving the exception lies upon the party claiming the exception.

PART X - PENALTIES AND REMEDIES

Violations

24. Any person who contravenes the provisions of this Act, unless otherwise set out under the Act, shall be guilty of an offense and shall be liable to a fine not to exceed \$ ().

Remedies

25. Without prejudice to any other remedy that may be available in any competent court, any person who is aggrieved by any act or omission of an employer in contravention of the provisions of Parts II, II, shall be entitled to claim or apply for either or both of the following remedies -

(1) damages from the employer, or any other person or body covered under the provisions of this Act, for any loss caused directly or indirectly as a result of the contravention;

(2) an order directing the employer or other relevant person or body covered under this Act to redress the contravention including an order to employ, re-employ or reinstate any person, notwithstanding that the vacancy in question has already been filled and notwithstanding that the employer may be liable to any claim arising from the need to dismiss or terminate the services of any other employee who has been engaged.

(3) an order making any decision found to have been based on unlawful discrimination voidable.

(4) any other order the court may deem fair and just to remedy the cause and effect of the discrimination.