



LAW REFORM COMMISSION

Issue Paper

Equality/Anti-Discrimination Legislative Framework (Re Equal Opportunities Bill No. XXXVI of 2008)

[November 2008]

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About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (e) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission and taking the minutes of all the proceedings of the Commission.



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Re Equal Opportunities Bill No. XXXVI of 2008

1. The Equal Opportunities Bill No. XXXVI of 2008 has been introduced in the National Assembly on 18 November 2008. This Bill is welcome in as much as it prohibits discrimination, in a direct or indirect manner or by way of victimization, in the field of employment (both the public and the private sector) and other spheres of life¹, and it provides the mechanism for the effective enforcement of the anti-discrimination/equal opportunities provisions.² In order to better protect equality, States have adopted equality/anti-discrimination legislation.³

¹ The object of this Bill is to ensure that every person has an equal opportunity to attain his objectives in various spheres of activities and that no person is placed, or finds himself, at a disadvantage, by reason of his status, namely, his age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex or sexual orientation.

The Bill accordingly prohibits any form of discrimination in a direct or indirect manner on the ground of status. Additionally, it prohibits discrimination by victimisation. These prohibitions from discrimination shall apply to employment activities, education, provision of goods, services or facilities, accommodation, disposal of immovable property, companies, partnerships, "société" or registered associations, clubs, access to premises and sports.

With respect to discrimination in employment, the Bill provides that every employer shall henceforth have the responsibility to draw up and apply an equal opportunity policy at his place of work, in conformity with such guidelines and codes as are prepared by the Equal Opportunities Division, in order to minimise the risk of an employee being discriminated against. Moreover, it shall be incumbent on every employer to recruit, select and promote a person on the basis of merit.

Nevertheless, a number of exceptions have been provided where in some circumstances, an employer or prospective employer may discriminate –

- (a) in cases where being of a particular sex is a genuine occupational qualification;
- (b) against a person who has an impairment;
- (c) on the ground of age, where the offer of employment is limited to persons of a particular age;
- (d) on the ground of religion where being of a particular religion is a necessary qualification for employment in a religious shop;
- (e) in determining who should be offered employment in relation to the provision of domestic or personal services in, or in relation to, any person's home; or
- (f) on the basis of political belief or activity. The Bill repeals sections 16 and 18(1)(b) of the Training and Employment of Disabled Persons Act and the Sex Discrimination Act 2002, each of which only caters for one form of discrimination. The provisions dealing with victimisation and sexual harassment in the Sex Discrimination Act 2002 have been transferred to the present Bill.

² The Bill provides for an Equal Opportunities Division which shall be a division of the National Human Rights Commission. The functions of the Equal Opportunities Division shall, inter alia, be to –

- (a) work towards the elimination of discrimination and the promotion of equality of opportunity and good relations between persons of different status;
- (b) carry out investigations proprio motu or following a complaint and attempt to reconcile the parties involved;
- (c) develop research and programmes to promote equality of opportunity and good relations between persons of different status;

This Bill constitutes a landmark in the history of our nation, which opens the door to a fairer and therefore brighter future. We nevertheless consider it is our duty to draw the attention of policy makers to some issues, which are of concern to us.

Structural Dimension of the Equality/Anti-Discrimination Provision

2. The grounds on which discrimination is prohibited are quite exhaustive (though ‘language’ is not retained as a prohibited ground). UK legislative experience over the past decades must have inspired the drafting. We nonetheless consider the structure of the anti-discrimination provision does not reflect best international practices in the field. The anti-discrimination provision is *self-contained* [discrimination is prohibited on specified grounds, as is the case in sections 3 and 16 of the Constitution], whereas our international obligation under articles 2 and 26 CCPR [International Covenant on Civil and Political Rights] requires of us that we enact an *open-ended provision* [whereby discrimination is prohibited on the basis of an indeterminate number of grounds, the grounds mentioned being merely instances of discrimination].

(d) prepare appropriate guidelines and codes for the avoidance of discrimination and give the widest publicity to them; and

(e) where necessary, refer any matter to the Director of Public Prosecutions or to the Equal Opportunities Tribunal.

There shall be an Equal Opportunities Tribunal, consisting of a President who shall be a law practitioner of not less than 10 years’ standing, and 2 other members, to be appointed by the Public Service Commission.

The Tribunal shall have jurisdiction to hear and determine complaints referred to it by the Equal Opportunities Division, issue interim orders and determine whether the complaint was justified and require a respondent to pay compensation to an aggrieved party in an amount not exceeding 500,000 rupees. Any compensation ordered by the Tribunal shall become due and payable and shall be recoverable as a civil debt on expiry of the time fixed for compliance. The Tribunal may also issue such directives as it considers necessary to ensure compliance with the provisions of the Bill.

Finally, the Bill provides for a right of appeal to the Supreme Court against orders of the Tribunal.

³ Vide, for instance, UK Sex Discrimination Act 1975, UK Race Relations Act 1976, UK Disability Discrimination Act 1995, the UK Equality Act 2006, the French ‘Loi n°2004-1486 du 30 décembre 2004 portant création de la haute autorité de lutte contre les discriminations et pour l’égalité’, Canada Human Rights Act 1985, and the Australian Human Rights and Equal Opportunity Commission Act 1986.

3. A non-discrimination, or equality provision, which is *open-ended* or indeterminate, as to the possible grounds of discrimination that will engage the right, has one particular significant interpretative result. Determining whether a given distinction violates the non-discrimination principle will never concern whether the given distinction is covered by the non-discrimination provision or not. Every distinction, of any kind, will invoke the non-discrimination or equality principle. History shows that the legislature cannot beforehand foresee all forms of prejudice and discrimination that may crop up in a given society.⁴
4. There is indication that even in UK such approach is now preferred.⁵ Indeed as pointed out by Lord Lester of Herne Hill QC in his Foreword to *Tolley’s Discrimination in Employment Handbook* (LexisNexis, 2008) “the aim of effective equality legislation is to eliminate unlawful discrimination and to promote equality regardless of sex, race, colour, ethnic or national origin, religion or belief, disability, age, sexual orientation, or other status”. It is noteworthy that Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] is an open-ended clause.
5. The Commission therefore considers that the definition given to “status” in clause 2 [Interpretation section] should be amended by deleting the word “means” and replacing it with the word “includes”, thereby making the anti-discrimination provision an ‘open-ended’ rather than a ‘self-contained’ provision.

⁴ With the development of science and technology, new forms of discrimination are likely to emerge, such as genetic discrimination: *vide* Australian Law Reform Commission Report No. 96 on ‘Protection of Human Genetic Information’ vol. 1 at pp. 289-318 and vol. 2 at pp. 651 seq.

⁵ *Vide* ‘Fairness and Freedom: The Final Report of the Equalities Review’ (Feb 2007) and the UK Government Consultation Paper on ‘Discrimination Law Review: A Framework for fairness: Proposals for a Single Equality Bill for Great Britain’ (published in June 2007)].

Positive Action Measures to foster Equality

6. Whilst the objective of the Bill is to promote equal opportunity between persons, the proposed legislative framework is silent about the propriety of *positive action measures* to foster equality. This is the subject-matter of much debate in UK, as well as in other jurisdictions.⁶
7. Outlawing discrimination will not necessarily be enough by itself to ensure genuine equality in practice for everyone in our society, because not everyone is in the same position from the outset. In some cases, specific balancing measures may be required to achieve full equality in practice. This is consistent with the principle of equal treatment which recognizes that comparable situations are not to be treated differently and different situations are not to be treated alike.⁷
8. The need for affirmative action or special measures was recognized by the UN Human Rights Committee [HRC] in its 1989 General Comment No. 18 on Article 26 of the International Covenant on Civil and Political Rights [CCPR] as something, which can diminish or eliminate conditions which have caused or helped to perpetuate discrimination. The Committee had this to say:

“The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”⁸

⁶ *Vide* Observations of US Supreme Court Judges in *Grutter v Bollinger et al.* (2003) 539 US 306-395.

⁷ In *Police v. Rose* [1976] M.R. 81, it was pointed out that treating unequal entities alike foster existing discrimination, perpetuate inequality, and it may at times therefore be necessary to provide differential treatment so as to avoid discrimination, so as to bring about some form of equality.

⁸ At para. 10.

The Committee most probably had in mind the situation where part of the population may be disadvantaged because of the general conditions in which its members find themselves. In some instances, this may be because there has been a long-standing practice of deliberate discrimination against them, notable examples being the position of the majority population at the end of the apartheid era in South Africa and the situation of the descendants of the former slaves in the US, who continued to be subject to many legally-sanctioned restrictions as to what they could or could not do, until the 1950s, when the equal protection guarantee in the US Constitution only began to be taken seriously. However, a population may be particularly disadvantaged not because of legally-sanctioned discrimination, but because of the failure to respond to practices, which are discriminatory in effect, or because of economic conditions affecting a particular group – perhaps those engaged in traditional skills which have not adapted well to a changing environment – so that its members are not in a position to take advantage of opportunities, which might be on offer.

9. The legitimacy of affirmative action has been accepted both in the interpretation of the CCPR and the CESCR [International Covenant on Economic, Social and Cultural Rights], but also in the express provisions of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (Article 4), the International Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] (Article 4), as well as the UN Convention on the Rights of Persons with Disabilities (Article 5). It is thus entirely legitimate for States to adopt such special measures where a situation of inequality exists and, indeed, it might well be considered that adopting them is something that is required of States, once they appreciate there is an injuring situation of inequality since, although they are not themselves discriminating, they are either effectively endorsing a situation where it is practically impossible for some members of a group ever to get out of their disadvantaged situation, or they are condoning the effects of ill-treatment (where this is the cause) in the past. However, special measures can only be applied to the extent that they are strictly required and, this

underscores the need to ensure that such measures are never more than a temporary device.

10. We consider greater visibility in the public eye of a wide variety of people with different personal characteristics may only be achieved by permitting targeted measures to prevent or compensate for disadvantage or to meet special needs, so that persons from disadvantaged groups (who have been traditionally/historically oppressed and/or against whom there are deep-rooted prejudices) can compete on equal terms. Protected groups may, for instance, benefit from measures to meet particular needs in relation to education, training, welfare or other benefits.
11. Employers could be permitted, where they feel it is appropriate, to take under-representation into account when selecting for appointment or promotion between two equally qualified candidates. However, making decisions irrespective of merit (such as quotas) or having an automatic policy of favouring those from under-represented groups would be unlawful.
12. Positive action, in our opinion, would not permit under-represented groups to be given favourable treatment regardless of merit. It is distinct from “positive discrimination”, which disregards merit and is generally unlawful.
13. In UK, the Government has acknowledged there is a need for ‘positive actions measures’, which will form part of the proposed new Equality Bill.⁹

The Commission therefore invites policy-makers to reflect on the pertinence of embodying in the law this approach.

⁹ Cm 7454, ‘The Equality Bill – Government Response to the Consultation’ [July 2008], at pp. 60 seq.

Public Sector Equality Duty on Public Bodies

14. In UK Government responded favourably to the proposal that in the new Equality Bill there should be a Public Sector Equality Duty, with a clear statement of purpose for the duty based on four “dimensions of equality”: addressing disadvantage; promoting respect and fostering good relations; meeting different needs while promoting shared values; promoting equal participation.¹⁰
15. Under a public sector duty, public authorities would have to take account of equality considerations in carrying out their functions including:
- policy-making,
 - decision-making,
 - service provision,
 - procurement, and
 - employment matters.
16. The Commission invites policy-makers to reflect on the pertinence of introducing in the law such a duty.

¹⁰ Ibid., at pp. 18 seq.