

LST REVIEW

Volume 10 Issue 144 October 1999



EQUAL OPPORTUNITY LAW

EQUAL OPPORTUNITY BILL	01
<hr/>	
NGO COMMENTS ON THE EQUAL OPPORTUNITY BILL	34
<hr/>	
THE ACT THAT WASN'T: EQUAL OPPORTUNITY LEGISLATION IN SRI LANKA <i>AMBIKA SATKUNANATHAN</i>	42
<hr/>	
REPUBLIC OF SOUTH AFRICA - EMPLOYMENT EQUITY BILL	57
<hr/>	

LAW & SOCIETY TRUST

LST REVIEW

*(This is a continuation of the
Law & Society Trust Fortnightly Review)*

EDITOR

Dr Sumudu Atapattu

Law & Society Trust

3 Kynsey Terrace

Colombo 8 Sri Lanka

Tel: 94 1 691228/684845

Fax: 94 1 686843

e-mail: lst@slt.lk

Editor's note

In this issue we publish the Equal Opportunity Bill placed on the Order Paper of Parliament recently. Forty two petitions were filed against the Bill and one in favour of the Bill. Bowing down to widespread opposition to the Bill, the government gave an assurance in Court that the Bill would be withdrawn and removed from the Order Paper of Parliament.

It is a pity that a Bill of this nature - which sought to outlaw discrimination on the basis of, *inter alia*, ethnicity, religion, gender, disability and age - became so politicised. The majority viewed it with suspicion and felt that they were being deprived of the privileges that they were enjoying, while the minority, particularly, the Tamil community, felt that the Bill sought to look after individual rights which would only overshadow their group rights. Thus, the Bill was bound to be still-born without any support from either the majority or the minorities. It is also a pity that certain groups in society got school children involved in these protests.

Despite the fate of the Bill, the government must be commended for the consultative process it adopted in drafting the Bill, which was unprecedented. Numerous meetings were held with different stakeholders (the private sector, women's groups, religious bodies and NGOs in general) to revise and refine the Bill before it was placed on the Order Paper of Parliament. Despite these efforts, the government underestimated the opposition to the Bill, which finally was the deciding factor of its fate.

The Trust, together with several NGOs and activists, studied the Bill carefully and after several meetings prepared a lobby document on the Bill which was forwarded to the Minister of Justice and Constitutional Affairs. The lobby document with NGO comments is also published in this issue.

Ambika Satkunanathan discusses the draft Bill and compares it with the provisions in the earlier drafts. She discusses the merits of the Bill in relation to employment and education, sexual harassment, and access to goods and services. She also discusses the powers and functions of the proposed Equal Opportunity Commission and Tribunal and points out that the whole aim of the draft legislation - promoting an equal opportunity culture in Sri Lanka - has been nullified.

We also publish excerpts from a similar piece of legislation in South Africa called the Employment Equity Act and the process that was adopted in drafting that Bill.

An Act to make unlawful, discrimination on the grounds of ethnicity, gender, religious or political opinion, language, caste, age or disability, in employment, education, access to public places and means of transportation and in the provision of accommodation, goods and services; to provide for the formulation of equal opportunity programmes by employers; to provide for the establishment of an Equal Opportunity Commission and an Equal Opportunity Tribunal; and to provide for matters connected therewith or incidental thereto.

Short title.

1. This Act may be cited as the Equal Opportunity Act, No. of 1999 and shall come into operation on such date as the President may appoint by Order published in the Gazette. Different dates may be appointed in respect of different provisions of the Act.

Objectives of the Act.

2. The general objectives of this Act shall be:
- (a) the promotion of equality of opportunity, and of the recognition and acceptance within the community, of the equality of all persons regardless of their ethnicity, gender, religious or political opinion, language, caste, age or disability;
 - (b) the elimination of discrimination, either direct or indirect, against persons on the ground of ethnicity, gender, religious or political opinion, language, caste, age or disability and to take effective measures to protect and advance persons or categories of persons disadvantaged by discrimination on one or more of such grounds;

- (c) the elimination of sexual harassment in the workplace and in educational institutions and public places and the elimination of sexual harassment related to accommodation;
- (d) ensuring the realization of equality of opportunity in the work place, in relation to both ethnicity and gender.

PART I DISCRIMINATION AGAINST PERSONS

Sexual harassment

3. (1) It shall be unlawful for a person to sexually harass another person, or by use of word or actions, to cause sexual annoyance to such other person.

- (2) It shall be unlawful for a person to sexually harass -
 - (a) another person in the discharge of the first mentioned person's duties;
 - (b) any employer of that person;
 - (c) any employee of that person;
 - (d) a fellow employee of that person;
 - (e) any other person who is seeking employment by that person or a third person;
 - (f) another person who refuses to participate in, or desist from, any activity against that other person's will.
- (3) It shall be unlawful -
 - (a) for a person who is a member of the staff, or a student of, an educational institution to sexually harass a person who is a member of the staff, or a student, of that educational institution;

- (b) for a person who exercises control or purports to exercise control over accommodation or the letting or other allocation of accommodation, to sexually harass a person who occupies such accommodation or a person who is an applicant for such accommodation;
 - (c) for a person who exercises control, or purports to exercise control, over food, medicine or other goods and services to sexually harass a person who is an applicant for, or the recipient or consumer of, such food, medicine, goods or services;
 - (d) for a person to sexually harass another person in a public place or while using any means of transportation.
- (4) For the purposes of this Act, "sexual harassment" includes -
- (a) physical contact and physical advances;
 - (b) a demand or request for sexual favours;
 - (c) the making of sexually coloured jokes or comments;
 - (d) the showing of pornography;
 - (e) any other unwelcome conduct, physical or verbal, of a sexual nature.

Preventive steps.

4. (1) Every employer or person exercising control over an educational institution shall take steps to prevent sexual harassment in the workplace of such employer or in such educational institution, as the case may be, and shall in particular,

- (a) expressly prohibit sexual harassment in the workplace of such employer or in such educational institution, as the case may be, and give notification of such prohibition in such manner as is calculated to give it maximum publicity in such workplace or educational institution, as the case may be;

- (b) ensure that an environment free of hostility based on gender is created in such workplace or educational institution, as the case may be.

(2) Where an employer or person exercising control over an educational institution receives a complaint of sexual harassment committed in the work place of such employer or in such educational institution, as the case may be, it shall be duty of such employer or person to cause inquiries to be made into such complaint and where necessary, to refer the complaint for investigation by the police.

Discrimination in work.

5. (1) It shall be unlawful for an employer to discriminate against a person on the ground of that person's ethnicity, gender, religious or political opinion, language, caste, age or disability -

- (a) in the arrangements made for the purpose of determining who should be offered employment by that employer; or
- (b) in determining who should be offered employment by that employer; or
- (c) in the terms or conditions on which employment is offered to that person by that employer;
- (d) in the terms or conditions of employment that the employer accords to that person after the employment of that person by that employer;
- (e) by denying that person access, or limiting that person's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, after that person is employed by that employer;
- (f) by dismissing that person from the employment of that employer; or
- (g) by subjecting that person to any other detriment, during his or her employment by that employer.

(2) Nothing in this section shall apply to, or in relation to arrangements for recruitment, or recruitment, for -

- (a) employment as priests or ministers of any religion;
- (b) employment for the purposes of a private household;
- (c) employment as a teacher in an educational institution referred to in paragraphs (a) and (b) of subsection (2) of section 6;
- (d) employment where the essential nature of either the employment or the institution in which the employment is to be performed, requires that it be performed by a person having proficiency in a particular language, or by a person of a particular ethnicity or gender or a person of a certain age or a person without a disability or a person holding, or not holding, as the case may be, a particular religious belief or political opinion;
- (e) employment for the purposes of a family business, the majority of the employees in which are members of one family.

Discrimination in education.

6. (1) It shall be unlawful for a person exercising control over an educational institution to discriminate against a person on the ground of that person's ethnicity, gender, religious or political opinions, language, caste, age or disability -

- (a) in the arrangements made for the purpose of determining who should be offered admission as a student of such educational institution, subject to the availability of facilities in such institution for instruction in a particular medium;
- (b) in determining who should be offered admission as a student of such educational institution;

- (c) in the terms and conditions on which admission as a student of such educational institution is offered to that person;
- (d) by denying that person access, or limiting that person's access, to any benefit associated with studentship of such educational institution, after that persons's admission to that educational institution;
- (e) by expelling or suspending that person from that educational institution or subjecting him or her to disciplinary action, after that person's admission to that educational institution;
- (f) by subjecting that person to any other detriment, after his or her admission to that educational institution.

(2) Nothing in this section shall apply to, or in relation to, an application for admission as a student of an educational institution that -

- (a) is conducted by a religious body,
- (b) conducted by established practice, or declared to be conducted, solely or mainly for students professing a particular religion;
- (c) conducted solely for students of the opposite sex to the sex of the applicant.

(3) The Minister in charge of the subject of Education with the concurrence of the Cabinet of Ministers and in accordance with the declared government policy on admission to schools, may, from time to time, determine guidelines in regard to admission of students professing various religions to educational institutions referred to in sub-paragraphs (a) and (b), which are categorised as government or semi-governmental schools, and such determination shall be deemed not to be a contravention of subsection (1) of this section,

Discrimination in access to places and means of transportation.

7. It shall be unlawful for a person to discriminate against another on the ground of the other person's ethnicity, gender, religious or political

opinions, language, caste, age, or disability -

- (a) by refusing to allow the other person access to, or the use of, any place or means of transportation that the public or a section of the public is entitled or allowed to enter or use, whether for payment or otherwise;
- (b) in the terms on which the first mentioned person is prepared to allow the other person access to, or the use of, any such place or means of transportation;
- (c) by refusing to allow the other person the use of any facilities in any such place or means of transportation that the public or a section of the public is entitled or allowed to use, whether for payment or otherwise;
- (d) in the terms on which the first mentioned person is prepared to allow the other person the use of any such facilities; or
- (e) by requiring the other person to leave, or cease to use, any such place or means of transportation or any such facilities.

Discrimination in accommodation.

8. (1) It shall be unlawful for a person, whether as principal or agent to discriminate against another person on the ground of the other person's ethnicity, gender, religious or political opinions, language, caste, age, or disability -

- (a) in the arrangements made by the first mentioned person for the purpose of determining who should be offered accommodation over which that person has control;
- (b) by refusing the other person's application for such accommodation;
- (c) in the terms or conditions on which such accommodation is offered to the other person; or

- (d) by deferring the other person's application for such accommodation or according to the other person's application a lower priority in any list of applicants for that accommodation;
- (e) by denying the other person's access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person; or
- (f) by evicting the other person from accommodation occupied by the other person; or
- (g) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.

(2) Nothing in this section shall apply to or in relation to -

- (a) accommodation provided by a religious body; or
- (b) accommodation provided by a charitable or other voluntary body solely for persons of a particular sex or solely for persons of a particular marital status.

(3) In this section, "accommodation" means any residential facilities, offered to the public in the course of carrying on any business but does not include any facilities given out on the basis of a tenancy.

Discrimination in provision of goods and services.

9. It shall be unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's ethnicity, gender, religious or political opinions, language, caste, age, or disability -

- (a) by refusing to provide the other person with those goods or services, or to make those facilities available to the other person;
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or

makes those facilities available to the other person; or

- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Certain acts deemed not to be contraventions of this Act.

10. (1) The requirement by an employer, of any qualification, whether for recruitment for employment by such employer or for promotion or transfer or as a condition of employment by such employer, being in each case an essential occupational requirement shall be deemed not to be a contravention of the preceding provisions of this Act.

(2) The determination by an employer of an age of retirement for his or her employees and the employment by an employer of persons above the age so determined in circumstances in which the special skills or experience of those persons are required, shall be deemed not to be contraventions of the preceding provisions of this Act.

**PART II
EQUAL OPPORTUNITY PROGRAMMES**

Equal opportunity programmes.

11. (1) Every Institution employing one hundred or more persons shall formulate and implement equal opportunity programmes and where necessary, affirmative action programmes to ensure equality of opportunity in such Institution.

(2) The programmes formulated under subsection (1) in respect of an Institution shall -

- (a) be designed to identify, in a systemic way, and remove, any discriminatory barriers -
 - (i) based on ethnicity, sex, gender, religious or political opinion, language, caste, age or disability, and

- (ii) relating to recruitment, promotion, training and conditions of employment in such Institution; and
- (b) set out such policies and procedures as are designed to create an environment free from discrimination and harassment in such Institution.

Issues to be addressed in programme.

12. (1) Every programme formulated under section 11 in respect of an Institution shall address the following issues -

- (a) training programmes on equal opportunity for employees in that Institution;
- (b) pay equity for such employees;
- (c) elimination of sexual harassment in such Institution;
- (d) recruitment and promotion in such Institution;
- (e) occupational segregation in such Institution;

(2) In formulating a programme under section 11, an employer shall -

- (a) develop a policy statement;
- (b) collate and analyse employment statistics in such Institution;
- (c) review human resources policies and practices in such Institution;
- (d) establish a strategic plan that incorporates the employer's objectives and the strategies and time tables for achieving those objectives; and
- (e) monitor and evaluate the success of the implementation of that strategic plan.

Submission of preliminary and progress reports.

13. (1) Every employer in an Institution to which this Part of this Act applies shall furnish to the Equal Opportunity Commission established under section 18, within one year of the coming into operation of this Part of this Act, a preliminary report on the composition and diversity of that Institution.

(2) The Commission may, by notice in writing, require an employer to furnish a progress report providing for the matters referred to in subsection (3) and it shall be the duty of such employer to comply with such requirements.

(3) A progress report furnished under subsection (2) shall provide a review of the recruitment, training and promotion practices in the Institution to which the report relates, and the action taken to promote equality of opportunity in that Institution.

Sanctions for non-compliance,

14. (1) Where an employer fails to furnish a preliminary report or a progress report before the date on which the employer is required to furnish such report, the Equal Opportunity Commission shall issue a notice to the employer requiring him or her to furnish that report within twenty eight days of the receipt by the employer, of that notice.

(2) In the event of the employer failing to furnish the report within the twenty eight days referred to in the notice issued under subsection (1), the Equal Opportunity Commission shall issue a notice to that employer informing that employer that it intends to include the name of that employer in the list of non-complying employers to be furnished to the Minister in charge of the subject of Justice for placing before Parliament.

Defective report.

15. Where an employer furnishes a report that does not meet the requirements of this Act, the Equal Opportunity Commission shall return the report to the employer and give the employer an opportunity to revise the report and provide the requisite information, and it may offer to assist the employer in revising the report.

Penalty.

16. (1) The Equal Opportunity Commission may impose a penalty of not less than one hundred thousand rupees on an employer who fails after two or more warnings in writing, to formulate or implement an equal opportunity or affirmative action programme in respect of his Institution.

Interpretation.

17. In this Part of this Act -

"employer" -

- (i) in the case of a government department, means the head of that department;
- (ii) in the case of a public corporation, means the Chairman of the Board of Directors or other body, how so ever described, charged with the administration and management of the affairs of that public corporation;
- (iii) in the case of a company incorporated under the Companies Act, No.17 of 1982, means the Chairman of the Board of Directors of that company;

"Institution" means a government department, public corporation or a company incorporated under the Companies Act, No.17 of 1982.

PART III EQUAL OPPORTUNITY COMMISSION

Equal Opportunity Commission

18. (1) There shall be established an Equal Opportunity Commission (hereinafter referred to as "the Commission").

(2) The Commission shall, by the name assigned to it by subsection (1), be a body corporate with perpetual succession and a common seal and may sue and be sued in such name.

Members of the Commission.

19. (1) The Commission shall consist of -

- (a) the Chairman of the National Women's Commission;
- (b) four other members appointed by the President in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, of whom one shall be from the private sector and the other three shall be from among persons who have had proven experience in the field of human rights.

(2) The President shall in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, appoint one of the members of the Commission to be the Chairman of the Commission.

(3) The Commission shall, as far as is practicable, reflect the ethnic and gender composition of Sri Lanka.

Term of office of members of the Commission.

20. (1) A member of the Commission may resign from office by letter in that behalf addressed to the President and such resignation shall be effective from the date on which it is accepted by the President.

(2) The President may, in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, and for reasons assigned, remove a member of the Commission from office.

(3) Subject to the provisions of subsections (1) and (2), the term of office of a member of the Commission shall be three years:

Provided that a member of the Commission appointed in place of a member who dies, resigns, or is removed from office, shall hold office for the remainder of the term of office of the member who he succeeds.

(4) A member of the Commission who vacates office by effluxion of time shall be eligible for re-appointment.

Temporary vacancies.

21. Where the Chairman or a member of the Commission is by reason of illness, absence from Sri Lanka or other cause, temporarily unable to discharge his or her functions as a member or Chairman, as the case may be, the President may, in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, appoint another person to act, for a period not exceeding three months, in the place of such member or Chairman, as the case may be.

Remuneration.

22. The members of the Commission shall be paid remuneration of such amount as may be determined by the President in consultation with the Minister in charge of the subject of Finance.

The Chairman of the Commission.

23. (1) The Chairman of the Commission may resign from the office of Chairman by a letter in that behalf addressed to the President, and the resignation shall be effective from the date on which it is accepted by the President.

(2) The President may, in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, and for reasons assigned, remove the Chairman from the office of Chairman.

(3) Subject to the provisions of subsections (1) and (2), term of office of the Chairman shall be his period of membership of the Commission.

Meetings of the Commission.

24. Subject to the provisions of this Part of this Act, the Commission may determine the procedure for the conduct of its meetings and the transaction of business at such meetings.

Vacancies not to invalidate proceedings.

25. No act or proceeding of the Commission shall be held to be invalid by reason only of any vacancy in the Commission or any defect in the appointment of a member thereof.

Advisory Committee.

26. (1) There shall be an Advisory Committee to the Commission consisting of five persons appointed by the President from among persons who are actively engaged in the promotion and protection of human rights.

(2) The Advisory Committee appointed under subsection (1) shall, as far as practicable, be representative of non-government organisations, professional organisations, higher educational institutions and the private sector.

(3) The Commission may refer any matter relating to the implementation of the provisions of this Act to the Advisory Committee for its advice, and it shall be the duty of the Advisory Committee to consider such matter and tender its advice thereon to the Commission.

Functions of the Commission.

27. The functions of the Commission shall be -

- (a) conduct investigations into complaints made by persons who allege that they have been discriminated against in contravention of the provisions of Part I of this Act, and to endeavour to conciliate such complaints;
- (b) to impose penalties, under section 16 on employers who fail, after two or more warnings in writing, to either formulate or implement equal opportunity and affirmative action programmes;
- (c) to work with both the government and private sector to promote equal opportunities in the public and private sectors, and to evaluate the effectiveness of programmes

and processes developed and put in place to achieve that objective;

- (d) to collect and disseminate information and advice on all matters relating to the elimination of discrimination, on the grounds referred to in Part I of this Act;
- (e) to monitor preliminary and progress reports furnished by employers under Part II of this Act;
- (f) to monitor programmes, policies and legislation affecting individuals and groups disadvantaged by discrimination on the grounds referred to in Part I of this Act, and to ensure that their rights are protected; and
- (g) to develop and conduct information programmes to promote understanding of the provisions of this Act, by the public.

Reference by Minister to the Commission.

28. (1) Any Minister of the Cabinet of Ministers may request the Commission to examine and report to that Minister -

- (a) whether any law or proposed law contravenes, or is likely to contravene, any provision of this Act;
- (b) whether any practice, alleged practice or proposed practice of any person or class of persons contravenes, or will give rise to a contravention of, any provision of this Act.

(2) The Commission shall examine the matter it has been requested to examine under subsection (1) and shall report its findings to the Minister.

Making of complaints to the Commission.

29. (1) A complaint alleging that a person has been discriminated against in contravention of the provisions of Part I of this Act, may be made in writing to the Commission by -

- (a) the person alleged to have been discriminated against, on that person's own behalf or on behalf of other persons;
- (b) a person or a group of persons acting on behalf of the person alleged to have been discriminated against;
- (c) a member of the public stating that no significant attempts are being made to improve diversity in the workplace.

(2) A complaint may be made to the Commission, within twelve months of the last incident of discrimination complained against.

(3) Where a person makes a complaint to the Commission under subsection (1), the period commencing on the date of the complaint and ending on the date on which the complaint is dismissed by the Commission or the Tribunal, as the case may be, shall not be taken into account in computing the period of one month referred to in Article 126(2) of the Constitution.

Procedure

30. (1) (a) Upon receipt of a complaint under section 29, the Commission shall make such investigation into the complaint as may be necessary to ascertain the truth of the matters referred to in the complaint.

(b) The Commission shall refuse to investigate a complaint, if it is satisfied that an application in respect of the same matters, or substantially the same matters, as are referred to in the complaint, is pending before any court or tribunal.

(2) The Commission may refuse to investigate, or cease to investigate, any such complaint if it is satisfied that -

- (a) the complaint is patently without merit;
- (b) the complaint is frivolous, vexatious or not made in good faith, and shall inform the complainant of its decision, and the reasons therefor.

(3) A decision under subsection (2) shall be taken at a meeting of the Commission by a simple majority.

(4) Where the Commission has informed the complainant of its decision under subsection (2), the complainant may, within twenty one days of the receipt of that decision, request the Commission, in writing, to refer the complaint to the Tribunal established under section 43.

(5) On receipt of a request under subsection (4), the Commission shall refer the complaint to which the request relates, to the Tribunal together with a report relating to the investigation made by the Commission into the complaint.

Directions to attend compulsory conference.

31. (1) For the purpose of investigating a complaint, made to it under section 29 and endeavouring to resolve that complaint by conciliation, the Commission may, by notice in writing, direct the persons referred to in subsection (2) to attend a conference presided over by the Chairman or a person appointed by the Chairman, at a time and place specified in the notice.

(2) Directions under subsection (1) to attend a conference in relation to a complaint shall be given -

- (a) to the complainant, or all the complainants, as the case may require;
- (b) to the person who is alleged by the complainant to have contravened any provision of this Act; and
- (c) to any other person who, in the opinion of the Commission, is likely to be able to provide information relevant to the investigation or whose presence at the conference is, in the opinion of the Commission, likely to be conducive to the resolution of the complaint by conciliation.

Compulsory conference.

32. (1) A conference under section 31 shall be held in camera and shall be conducted in such manner as the person presiding at that conference thinks fit.

(2) Subject to subsection (3), a body of persons, whether corporate or unincorporate, directed under section 31 to attend the conference shall be deemed to have attended the conference if an officer or employee of that body attends on behalf of that body.

(3) Except with the consent of the person presiding at the conference -

- (a) a natural person shall not be entitled to be represented at the conference by another person; and
- (b) a body of persons, whether corporate or unincorporate, shall not be entitled to be represented at the conference by any person other than an officer or employee of that body.

(4) The Commission may, in its discretion, allow a person directed to attend the conference under section 31, to be represented by an attorney-at-law.

Power to obtain information and documents.

33. (1) Where the Commission has reason to believe that a person is capable of furnishing information or producing documents relevant to an investigation being made by it, the Commission may by notice in writing served on that person require that person, at such place and within such period or on such date and at such time, as are specified in the notice -

- (a) to furnish to the Commission, in writing signed by that person or in the case of a body corporate, by an officer of such body corporate, such relevant information as is specified in the notice; or
- (b) to produce to the Commission, such relevant documents as are specified in the notice.

(2) Where any documents are produced to the Commission by any person in compliance with a requirement imposed on him or her under subsection (1), the Commission -

- (a) may take copies of, or take extracts from, such documents;

- (b) may retain possession of such documents for such period as is necessary for the purposes of the investigation to which the documents relate; and
- (c) shall permit a person who would be entitled to inspect any one or more of those documents if they were not in the possession of the Commission to inspect, at all reasonable times during such period, such of the documents as that person would be so entitled to inspect.

Resolution of complaint by conciliation.

34. (1) Where the Commission is of the opinion that a complaint other than a complaint that the Commissioner has dismissed under section 30 may be resolved by conciliation, the Commission shall endeavour to resolve the complaint by conciliation.

(2) The Commission may, by notice in writing, require the complainant and the person against whom the complaint is made or either of them, to appear before the Commission, either separately or together, for the purpose of endeavouring to resolve the complaint by conciliation.

Commission may dismiss complaint.

35. (1) Where, at any stage of an investigation into a complaint made under section 29, the Commission is satisfied that the complaint is frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful under any provision of Part I of this Act, the Commission may, by notice in writing addressed to the complainant, dismiss the complaint, and may, having regard to the nature of the complaint, order the complainant to pay to the person against whom the complaint is made, compensation of such amount as may be determined by the Commission.

(2) The Commission shall, in the notice under subsection (1) advise the complainant of -

- (a) the reason for dismissing the complaint; and
- (b) the rights of the complainant to request the Commission to refer the complaint to the Tribunal.

Commission to refer complaint to Tribunal where conciliation is not possible.

36. (1) Where the Commission -
- (a) is of the opinion that a complaint cannot be resolved by conciliation;
 - (b) has endeavoured to resolve a complaint by conciliation but has not been successful in such endeavours; or
 - (c) is of the opinion that the nature of the complaint is such that it should be referred to the Tribunal,

The Commission shall refer the complaint to the Tribunal together with a report relating to the investigation made by the Commission into the complaint.

(2) Where the Commission refers a complaint to the Tribunal under subsection (1), the Commission -

- (a) shall, if the complainant requests the Commission to do so, assist the complainant in the presentation of the case of the complainant to the Tribunal or arrange for assistance to the complainant in the presentation of the case of the complainant to the Tribunal;
- (b) may, if the complainant requests the Commission to do so and the Commission considers it appropriate to do so in all the circumstances of the case, make such contribution towards the cost of witnesses and other expenses as is necessary to enable the complainant to present his or her case fully to the Tribunal.

Interim Orders.

37. The Commission may, at any time after a complaint is made to the Commission, and before the Commission dismisses the complaint under section 30, resolves the complaint by conciliation or refers the complaint to the Tribunal, as the case may be, apply to the Tribunal for the making of an

interim order under section 47 or for the variation or revocation of any such order.

Offences.

38. Every person who, without reasonable cause -
- (a) fails to attend before the Commission in compliance with a direction given under section 31; or
 - (b) fails to furnish any relevant information or to produce any relevant document in compliance with the requirements of a notice given under section 33,

shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding one hundred thousand rupees.

Staff

39. The Commission may appoint such officers as may be necessary for the discharge of the functions of the Commission and may -

- (a) dismiss, and exercise disciplinary control over, such officers;
- (b) determine the remuneration payable to, and the terms and conditions of service of, such officers; and
- (c) establish and regulate welfare schemes for the benefit of such officers and make contributions to such schemes.

Seal of the Commission.

40. The seal of the Commission may be determined and devised by the Commission, and may be altered in such manner as may be determined by the Commission.

Annual Report

41. (1) The Commission shall, at the end of every year, cause a

report to be prepared of the work and activities of the Commission during that year.

(2) Every such report shall include -

- (a) a list of the complaints received by the Commission during that year, and the manner in which those complaints have been disposed of;
- (b) the research undertaken by the Commission during that year;
- (c) the measures considered necessary by the Commission for the elimination of discrimination on any ground referred to in Part I of this Act including measures for the modification of any legislative provision which discriminates against any person or class of persons on any such ground.

(3) The Commission shall cause a copy of the report prepared by it under subsection (1) to be sent to the President within four months of the end of the year to which that report relates, and the President shall cause such report to be placed before Parliament.

Delegation by the Commission.

42. The Chairman of the Commission may, by instrument in writing, delegate to an officer of the Commission the exercise of any one or more of the powers of the Commission.

PART IV THE EQUAL OPPORTUNITY TRIBUNAL

Establishment and Constitution of the Equal Opportunity Tribunal.

43. (1) There shall be an Equal Opportunity Tribunal (hereinafter referred to as "the Tribunal") consisting of -

- (a) a retired judge of the Supreme Court or Court of Appeal; and
- (b) two attorneys-at-law with proven experience in the field of human rights,

appointed by the President in consultation with the Prime Minister, the Leader of the Opposition and the Speaker.

(2) The member of the Tribunal appointed under paragraph (a) of subsection (1) shall be the President of the Tribunal.

(3) The President and the members of the Tribunal shall hold office for a period of three years and shall, unless removed from office under subsection (4) be eligible for re-appointment.

(4) The President may, in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, remove the President or a member of the Tribunal from office -

- (a) if such President or member is permanently incapable of performing his or her duties;
- (b) for neglect of duty; or
- (c) for undesirable conduct.

(5) There shall be a Registrar of the Tribunal appointed by the Tribunal.

(6) The President and members of the Tribunal and Registrar of the Tribunal may be paid remuneration of such amount as may be determined by the President of the Republic in consultation with the Minister in charge of the subject of Finance.

(7) The President of the Tribunal shall preside at meetings of the Tribunal. In the absence of the President from any meeting of the Tribunal, the members present at such meeting shall elect a President from among themselves.

(8) A decision supported by a majority of the members present at a meeting of the Tribunal shall be deemed to be the decision of the Tribunal.

Function of the Tribunal.

44. (1) The Tribunal shall inquire into all complaints referred to by

the Commission under section 30 or section 36.

(2) The Tribunal shall determine the procedure to be followed in holding any such inquiry.

Discontinuance of inquiry.

45. The Tribunal shall not hold or continue, as the case may require, an inquiry into a complaint referred to it under section 30 or 36 if the complainant notifies the Tribunal that the complainant does not wish the inquiry to be held or to continue.

Joinder of parties.

46. Where the Tribunal is of the opinion that a person ought to be joined as a party to the inquiry, the Tribunal may, by notice in writing given to that person, join that person as a party to the inquiry.

Interim Orders.

47. The Tribunal may on an application made to it by the Commission under section 37 or on the application of a party to an investigation being held by the Commission, make such interim orders as it may deem appropriate to secure the rights of the parties to the investigation, pending the conclusion of the investigation.

Power to summon witnesses.

48. (1) The Tribunal shall have power to summon and examine witnesses at any inquiry held by the Tribunal. Every summons shall be under the hand of the President of the Tribunal.

(2) A summons issued by the Tribunal may be served by delivering it to the person named therein, or if that is not practicable, by leaving it at the last known place of abode of that person.

(3) Every person on whom a summons is served shall attend before the Tribunal at the time and place mentioned therein, and shall give such evidence and produce such documents as are required of that person or as are in that person's possession or power, according to the tenor of the summons.

Evidence

49. (1) The Tribunal shall have power for the purposes of any inquiry held under this Act -

- (a) to procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as it may think necessary or desirable to procure, receive or examine;
- (b) to require the evidence, whether written or oral of any witness to be given on oath or affirmation, such oath or affirmation to be that which could be required of that witness if he were giving evidence in a court of law and to administer, or cause to be administered by an officer authorised by the Tribunal, an oath or affirmation to every such witness;
- (c) to summon any person to attend before the Tribunal to give evidence or to produce any document or other thing in his or her possession or power, and to examine him or her as a witness or require him or her to produce any document or other thing in his or her possession or power;
- (d) notwithstanding anything in the Evidence Ordinance, to admit any evidence, whether written or oral which might be inadmissible in civil or criminal proceedings.

Orders of the Tribunal.

50. (1) At the conclusion of an inquiry by the Tribunal into a complaint referred to it under section 30 or section 36, the Tribunal may

- (a) if it finds that there has not been a contravention of any provision of Part I of this Act as alleged in the complaint, dismiss the complaint;
- (b) if it finds that there has been contravention of a provision of Part I of this Act by any person as alleged in the complaint -
 - (i) order that person to pay compensation in a sum not less than fifty thousand rupees to the complainant for any

loss or damage suffered by the complainant as a result of such contravention;

- (ii) make order enjoining that person from continuing or repeating such contravention; or
- (iii) order that person to do any act to redress any loss or damage suffered by the complainant as a result of such contravention; or
- (iv) make order declaring void, in whole or any part or modifying, any contract or agreement made, or practice followed, in contravention of any provision of Part I of this Act.

(2) In assessing the sum to be paid as compensation by any person under subsection (1), in respect of a contravention, the Tribunal shall have regard -

- (a) to the nature, extent and gravity of the contravention
- (b) the wilfulness and intent with which that person has committed the contravention;
- (c) the fact that such person has been regularly contravening provisions of this Act.

(3) Every decision of the Tribunal shall be accompanied by reasons for the decision. The Tribunal shall, not later than one month after it makes a decision, cause notice of its decision to be served on every person affected by the decision.

Appeals.

51. (1) Any person dissatisfied with a decision or order of the Tribunal, may appeal therefrom to the Supreme Court, on a question of law, with the leave of the Supreme Court first had and obtained.

(2) The Supreme Court may, on an appeal preferred to it under subsection (1), affirm, reverse or vary the decision or order against which the appeal is preferred.

(3) The Tribunal and any member of the Tribunal shall not be liable to any costs in any proceedings instituted against it in the Supreme Court.

Contempt.

52. Every offence of contempt committed against, or in disrespect of, the authority the Tribunal shall be punishable by the Supreme Court as though it were an offence of contempt committed against, or in disrespect of, the authority of such Court.

Acts of contempt.

53. (1) If any person upon whom a summons is served under section 48 -

- (a) fails without cause, which in the opinion of the Tribunal is reasonable, to appear before the Tribunal at the time and place mentioned in the summons; or
- (b) refuses to be sworn or affirmed, or having been duly sworn or affirmed, refuses or fails without cause, which in the opinion of the Tribunal is reasonable, to answer any question put to him relating to the matters being inquired into by the Tribunal; or
- (c) refuses or fails without cause, which in the opinion of the Tribunal is reasonable, to produce to the Tribunal any document or thing which is in his or her possession or power and which is in the opinion of the Tribunal necessary for arriving at the truth of the matters to be inquired into;
- (d) refuses or fails for any reason to comply with an order made by the Tribunal under this Part of this Act,

such person shall be guilty of the offence of contempt against, or in disrespect of the Tribunal.

(2) Where the Tribunal determines that a person or groups of persons has committed an offence of contempt against or, in disrespect of, its authority, the Commission may transmit to the Supreme Court, a certificate

setting out such determination, signed by the President of the Tribunal.

(3) In any proceedings for the punishment of an offence of contempt which the Supreme Court may think fit to take cognizance of as provided in section 52 any document purporting to be a certificate signed and transmitted to that Court under subsection (2) shall -

- (a) be received in evidence and be deemed to be such a certificate without further proof unless the contrary is proved; and
- (b) be conclusive evidence that the determination set out in the certificate was made by the Tribunal and of the facts stated in the determination.

(4) In any proceedings in the Supreme Court for the punishment of any alleged offence of contempt against, or in disrespect of, the Authority of the Tribunal no member of the Tribunal shall, except with his or her consent, be summoned or examined as a witness.

Finance.

54. The State shall provide the Tribunal with adequate funds to enable the Tribunal to discharge the functions assigned to it by this Act.

PART V THE FUND OF THE COMMISSION

Fund of the Commission.

55. (1) The Commission shall have its own Fund.

(2) There shall be paid into the Fund of the Commission -

- (a) all such sums as may be voted from time to time by Parliament for the use of the Commission; and
- (b) all such sums of money as may be received by the Commission in the exercise, discharge and performance of its powers, duties and functions;

- (c) or such sums of money as may be received by the Commission as grants or gifts, from local and foreign sources.

(3) There shall be paid out of the Fund the remuneration payable to the members and officers of the Commission, and all such sums of money as may be required to defray the expenses incurred by the Commission in exercise, discharge and performance of its powers, functions and duties under this Act, and all such sums of money as are required to be paid by the Commission by or under this Act.

Financial year and the audit of accounts.

56. (1) The financial year of the Commission shall be the calendar year.

(2) The Commission shall cause proper accounts to be kept of the income and expenditure, assets and liabilities and all other transactions of the Commission.

(3) The provisions of Article 154 of the Constitution relating to the audit of the accounts of public corporations shall apply to the audit of the accounts of the Commission.

PART VI GENERAL

Victimisation.

57. (1) Every person who subjects, or threatens to subject, another person to any detriment on the ground that the other person.

- (a) has made, or proposes to make, a complaint under this Act;
- (b) has furnished, or proposes to furnish, any information, or has produced or proposes to produce, any documents to a person exercising or discharging any power or function under this Act;
- (c) has appeared, or proposes to appear, as a witness at an inquiry held by the Tribunal;

- (d) has asserted, or proposes to assert, any rights of that other person or the rights of any other person, under this Act,

shall be guilty of an offence under this Act, and shall on conviction after summary trial before a Magistrate be liable to a fine not less than fifty thousand rupees and not exceeding one hundred thousand rupees.

Resistance and obstruction.

58. Every person who, without lawful excuse, resists or obstructs, the Chairman or any member or officer of the Commission, or the President member, Registrar or officer of the Tribunal, in the exercise by such Chairman, President, Registrar, member or officer, of any power conferred on him or her by or under this Act, shall be guilty of an offence under this Act, and shall on conviction after summary trial before a Magistrate be liable to a fine not less than twenty five thousand rupees and not exceeding fifty thousand rupees.

Members &c. of the Commission and Tribunal deemed to be public servants.

59. The members and officers of the Commission and the members and officers of the Tribunal shall be deemed to be public servants within the meaning, and for the purposes, of the Penal Code and every investigation or inquiry held by the Commission or the Tribunal shall be deemed to be a judicial proceeding within the meaning of that Code.

Commission and Tribunal deemed to be scheduled institutions within the meaning of the Bribery Act.

60. The Commission and the Tribunal shall be deemed to be scheduled institutions within the meaning of the Bribery Act, and the provisions of that Act shall be construed accordingly.

Protection of action

61. No proceedings, civil or criminal, shall be instituted against a member or officer of the Commission or a member or officer of the Tribunal for any act which in good faith is done or omitted to be done, by such member or officer, under this Act.

Review of the implementation of this Act.

62. The Commission shall, from time to time, review the implementation of the provisions of this Act and examine their effectiveness, and shall recommend to the Government such legislative and other measures as may be necessary to make them effective.

Provisions of this Act not to derogate from rights under other Acts.

63. The provisions of this Act shall be in addition to, and not in derogation of, any rights accruing to any person under any other law.

Sinhala text to prevail in case of inconsistency.

64. In the event of any inconsistency between the Sinhala and Tamil Texts of this Act, the Sinhala text shall prevail.

Interpretation.

65. In this Act, unless the context otherwise requires -

"complainant" in relation to a complaint, means the person or each of the persons by whom, or on behalf of whom, that complaint is made;

"disability" in relation to a person means such deficiency in that person's physical or mental capabilities, whether congenital or not, as renders that person unable by himself or herself, to ensure for himself or herself, in whole or part, the necessities of life;

"document" includes any book, register or other record of information, however compiled, recorded or stored, and includes computer records;

"educational institution" includes -

- (a) a Higher Educational Institution within the meaning of the Universities Act No.16 of 1978;

- (b) any other Institution recognized under Chapter IV of the Universities Act, No.16 of 1978;
- (c) any Institute registered under section 14 of the Tertiary and Vocational Education Act, No.20 of 1990;
- (d) any Advanced Technical Institute established under the Sri Lanka Institute of Technical Education Act, No.29 of 1996;
- (e) the Sri Lanka Law College;
- (f) the National Institute of Education established by the National Institute of Education Act, No.28 of 1985;
- (g) a College of Education established by the Colleges of Education Act, No. 30 of 1986, or a Government Training College;
- (h) a Government school or an assisted school or an unaided school, within the meaning of the Education Ordinance (Chapter 185).

"services" includes -

- (a) services relating to banking, insurance and the provision of grants, loans, credit or finance;
- (b) services relating to entertainment, recreation or refreshment;
- (c) services relating to transport or travel;
- (d) services of the kind provided by members of any legally recognized profession or the members of any trade; and
- (e) services of the kind provided by a government department, public corporation or a Provincial or local authority.

NGO Comments on the Equal Opportunity Bill

1. INTRODUCTION

The Law & Society Trust has held a series of consultations on the proposed equal opportunity legislation with several non-governmental organisations. This memorandum sets out the concerns expressed and proposed amendments to certain sections of the Bill.

2. ISSUES TO CONSIDER & RECOMMENDATIONS

(Please note that changes and inclusions are in bold)

The Act should contain a provision to the effect that reference to one gender includes the other and the neuter.

Section 2 - Grounds of discrimination

- * It is recommended that the grounds of discrimination be open-ended in line with Article 2 of the International Covenant on Civil and Political Rights.
- * We recommend that Section 2 and other sections containing the grounds of discrimination be brought in line with the Constitution, the Draft Constitution and section 11(2) (a) (ii) of the Equal Opportunity Act to include "sex" as one of the grounds of discrimination.

2. The general objectives of this Act shall be:-

- (a) the promotion of equality of opportunity, and of the recognition and acceptance within the community, of the equality of all persons, **without distinction of any kind, such as ethnicity, gender, religious or political opinion, language, caste, age, or disability or other status.**

- (b) the elimination of discrimination, either direct or indirect, against persons on grounds such as ethnicity, gender, religious or political opinion, language, caste, age or disability or other status, and to take effective measures to protect and advance persons or categories of persons disadvantaged by discrimination on any other grounds.

Section 3 (1) - Definition of sexual harassment.

- * The definition is not sufficiently precise. The meaning of sexual annoyance is unclear, it is therefore recommended that it be omitted.
- * As sexual harassment most often takes place in relationships where one party has more authority and power than the other, it is recommended that a subsection which states that it is unlawful to harass "any person under his or her authority" be included.
- * Please note that "fellow employee" has been changed to "co-employee".
- * As section 3(1)(f) is unclear, it is suggested that it be deleted.

3 (1) It shall be unlawful for a person to sexually harass another person, by use of words or action.

(2) It shall be unlawful for a person to sexually harass.

(a) any person under his or her authority

(b) another person in the discharge of the first mentioned person's duties;

(c) any employer of that person;

(d) a co-employee of that person;

(e) any other person who is seeking employment by that person or a third person;

Section 5 - Discrimination in employment.

- * **5(1)** - Please note that the words "by that employer" have been omitted.
- * **5 (2) (e)** - It is felt that this subsection is too broad, and will result in small family businesses being subject to unnecessary harassment.

5 (1) It shall be unlawful for an employee to discriminate against a person on the ground of that person's ethnicity, sex, gender, religious or political opinion, language, caste, age or disability -

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

(b) in determining who should be offered employment;

(c) in the terms or conditions on which employment is offered to that person;

(d) in the terms or conditions of employment that the employer accords to that person after the employment of that person;

(e) by denying that person access, or limiting that person's access to opportunities for promotion, transfer or training , or to any other benefits associated with employment, after that person is employed;

(f) by dismissing that person from employment; or

(g) by subjecting that person to any other detriment, during his or her employment.

(2) Nothing in this section shall apply to, or in relation to arrangements for recruitment for -

(e) employment for the purposes of a family business with less than 50 employees.

Section 6 - Discrimination in education.

- * It is felt that the exemptions to this provision will undermine the spirit and objectives of this act. The aim of the proposed act is to eliminate discrimination through the creation of a culture of equal opportunity, and, as the education system plays a pivotal role in the shaping of the values of young people is it imperative that the existing segregation in society is not reproduced in the education system. It is therefore proposed that the exemptions to this particular provision be removed.

- * There is also concern about subsection 3 which enables the Minister in charge of education to determine guidelines with regard to admission to educational institutions referred to in sub-paragraphs (a) and (b) which are categorised as government or semi-government schools. We strongly recommend the omission of this provision as it will result in the politicisation of the education system.

Section 8 (3) - Discrimination in accommodation.

- * Exemptions to the provision - section 8(3) - note that tenancy in private housing has been included.

8 (3) in this section accommodation includes any residential facilities offered to the public in the course of carrying on any business, but does not include any facilities given out on the basis on a tenancy in private housing.

Section 10 - Acts not deemed to be in contravention of the Act

- * It is recommended that the following subsection be included.

Section 10

(3) Nothing in this section shall detract from the obligations to promote the principles of diversity and pluralism enshrined in this Act.

Section 11 - Equal Opportunity Programmes.

- * Please note that additional subsections which impose obligations on employers to take steps to prevent sexual harassment in the workplace have been included.

(c) an appropriate complaint mechanism should be created by the employer's organisation for redress of the complaint of sexual harassment made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

(d) The complaint mechanism should be adequate to provide where necessary a complaints committee, a special counsellor or other support services, including the maintenance of confidentiality.

(e) The composition of the complaints committee should include a proportion of women which is reasonable in the circumstances of the institutions.

Section 17 - Definition of employer.

- * This definition is too narrow. It is there fore suggested that:
- * a "company incorporated under the Companies Act, No 17 of 1982, be replaced with a "company incorporated under the laws of Sri Lanka;
- * the word "means" be replaced with "includes";
- * it is also recommended that "government ministry" be included.

Institution includes a government ministry, department, public corporation or a company incorporated under the laws of Sri Lanka.

It shall not include:

- (a) institutions with less than 100 employees;**

(b) a family business with less than 50 employees.

Section 19 - Composition of the Equal Opportunity Commission

- * As the office of Commissioner is very demanding, we envisage the Commissioners to work full time. This would mean that the Chairperson of the National Women's Commission would not be able to be a part of both institutions, as it would only result in an increase in her workload, and reduce the time and energy she will be able to devote to both institutions.
- * Please note that "diversity" has been inserted in place of "composition" in section 19 (3).

19(1) The Commission shall consist of

(a) five members appointed by the President in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, of which three members including the Chair shall be full time, and shall include a representative from the private sector and a minimum of two women.

(b) They shall all be persons drawn from a variety of different backgrounds, with proven experience in the promotion and protection of human rights, and shall be known for their integrity, objectivity and impartiality of judgment.

(3) The Commission shall, as far as practicable, reflect the ethnic and gender diversity of Sri Lanka.

Section 20(2) - Term of office of members of Commission

- * It is recommended that the President remove a member only after proper inquiry.

The President may, in consultation with the Prime Minister, the Leader of Opposition and the Speaker, after proper inquiry, and for reasons assigned, remove a member of the Commission from office.

Section 27 - Functions of the Commission.

- * It is recommended that a subsection giving the Commission the power to take all steps to ensure effective implementation of the Act be included.

(h) to take all steps to ensure the effective implementation of the provisions of this Act.

The time frame for dealing with complaints to the Commission.

- * We strongly recommend including a time frame within which the Commission is to investigate and arrive at a decision. We are also of the view that the time for the filing of any other action should be computed only after the finalisation of the matter at the Commission.

Section 30(1)(b) - Refusal by the Commission to investigate complaints.

- * This section has been reformulated to extend a discretion to the Commission.

30(1)(b) The Commission may refuse to investigate a complaint for reasons specifically stated, if it is satisfied that an application in respect of the same matters, or substantially the same matters, as are referred to in the complaint, is pending before any court or tribunal.

Section 35 - Dismissal of complaints by the Commission.

- * It is suggested that the compensation component be omitted from subsection (1) as this would also penalise those who submit complaints due to lack of awareness or unfamiliarity with the provisions of the Act. It would instead be prudent to include a separate subsection (3) extending compensation for only vexatious, frivolous or malicious complaints.

(3) In instances of malicious or vexatious complaints the Commission may having regard to the nature of the complaint, order the complainant to pay the person against whom the complaint is made, compensation of such amount as may be

determined by the Commission.

Section 38 - Offences.

- * A subsection which makes the non-payment of fines an offence has been included.

Every person who without reasonable cause

(c) does not pay a fine imposed by the Commission

shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding one hundred thousand rupees.

Section 43 - Composition of the Equal Opportunity Tribunal.

- * It is recommended that this provision be broadened to enable persons from different backgrounds and fields to be members of the Tribunal.

43 (1) There shall be an Equal Opportunity Tribunal consisting of persons from a variety of different fields, backgrounds and experiences, appointed by the President in consultation with the Prime Minister, the Leader of the Opposition and the Speaker.

Incentives for compliance with the Act

- * In order to achieve voluntary compliance, it would be wise to offer incentives to organisations.

"If the diversity profile of the institution is satisfactory it shall be entitled to:

- (1) be a nominee for the "best employer" award**
- (2) use the logo " we are an equal opportunity employer"**
- (3) government benefits.**

The Act That Wasn't: Equal Opportunity Legislation in Sri Lanka

*Ambika Satkunanathan**

"All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom, dignity, of economic security and equal opportunity"

**Declaration of the Aims and Purpose of the International
Labour Organisation (Declaration of Philadelphia 1944)**

Introduction

In October the government placed the Equal Opportunity Bill on the order paper of Parliament but, the government postponed the presentation of the Bill, hours before it was due to be presented. Within seven days of it being placed on the order paper 42 parties petitioned against the Bill on its constitutionality in the Supreme Court. In response the government through the Attorney-General gave an undertaking to the Supreme Court that it would not proceed with the Bill and that the Bill would be removed from the Order Paper of Parliament. The court consequently announced that in view of the government undertaking that there was no need to proceed with the petitions.

Why did the government fail in its attempt to introduce which on the face of it appears to be a forward thinking piece of legislation? Why would people, i.e. those who were supposed to benefit from it oppose the legislation?. Has the Bill roused feelings buried deep in the psyche of people?

Equal opportunity aims to ensure that everyone has the opportunity to access resources and compete on fair terms. It strives to create a level playing field.

* Researcher, Law & Society Trust.

Equal access does not mean equal results. Non-discrimination therefore is an important element of equal opportunity, as only non-discriminatory principles and practices will lead to the removal of fetters on a person's right to access resources and opportunities. The essence of equal opportunity is that each person has the right to develop his or her capabilities to the utmost, free of restrictions which are based on the person's attributes or qualities which are irrelevant to the person's capabilities.

What is discrimination? Discrimination has been interpreted to imply "any distinction, exclusion, restriction or preference which is based on any ground such as race, gender or other status, and, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. The prevention of discrimination has been defined as the... prevention of any action which denies to individuals or groups of people equality of treatment which they may wish."¹

Discrimination has been prohibited in a number of international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UNESCO Declaration against Discrimination in Education. In addition, regional instruments such as the Inter- American Convention on Human Rights have outlawed discrimination.

Is there a need for Equal Opportunity Legislation?

The Constitution of Sri Lanka contains an equality provision² in addition to a non-discrimination provision.³ The Directive Principles of State Policy also say that the "State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation".⁴ Since these constitutional

¹ Convention Against Discrimination in Education; Convention Concerning Discrimination in respect of Employment and Occupation.

² Article 12 (1)

³ Article 12 (2)

⁴ Article 27 (6)

provisions exist should the government have attempted to introduce additional legislation?

Although there is no restriction on the constitutional provisions which state that they are applicable only to public sector institutions, the mechanisms provided by the Constitution are directed towards providing relief for violations by "executive or administrative action."⁵ Therefore, those in the private sector are left high and dry with no avenue to seek redress. One of the primary objectives of the government in enacting this legislation was to make the private sector accountable for rights violations. In this day and age where the profits of large corporations exceed the annual budgets of many countries, and, where corporations have been found to be guilty of rights violations, as in the case of mining and logging companies in South America, and manufacturing companies in South and South East Asia, countries would be well advised to hold the corporate sector accountable for their actions.

In Sri Lanka the concerns of the private sector with regard to the proposed legislation have been with regard to the stifling of their power to hire and fire persons. They have viewed it as an interference with their private dealings. It has to be stated at the outset that no one is above the law. Even those functioning in the free market have to take laws and regulations into consideration, and be held accountable for their actions. This legislation in no way aims to impose fetters on employers or companies. Instead, the purpose is to ensure that discriminatory practices are eliminated and all persons have equal opportunity to access resources and opportunities. The Bill does not render any "selection or non-selection" questionable. The fact that merit alone should be the basis for employment is not disputed; what the legislation seeks to do is to ensure that a qualified person, is not discriminated against due to that person's gender or disability, or any other ascriptive status.

The opponents of the legislation have also stated that discrimination does not exist in Sri Lanka and, therefore there is absolutely no need for such legislation that only portrays the wrong image to the outside world. To quote one particular news report "it is relevant to ask whether the whole tone of the proposed legislation contains an element of "overkill" which could create an undeserved negative image of this country in international eyes".⁶ At this

⁵ Article 126 (2)

⁶ "Legal Watch", *The Island*, 3rd October 1999.

point in time, when Sri Lanka is embroiled in a civil war, when thousands have been rendered homeless, when children are being used as soldiers, when crime and corruption are on the increase and when particular groups in society are trying to incite communal violence, the introduction of equal opportunity legislation which only aims to create a just and equitable society will in no way tarnish the current image of our country, if at all, it will only enhance the image of the country as one that acknowledges existing problems, and is willing and able to tackle them in a mature and forward thinking manner.

Another argument which should be examined is that certain areas which have been brought under the purview of the legislation, such as the provisions outlawing discrimination in access to public places and means of transportation and the provision of goods and services “ are ... redundant in today’s context and make Sri Lanka sound like an apartheid state in need of reform”.⁷ In all fairness to the author of the article it has to be accepted that the provision in relation to access to public places and means of transportation is superfluous, but the section on provision of goods and services seems relevant even in today’s context when one realises that the Indian Tamils in the hill country still face such discrimination. It must also be noted that Sri Lanka is in need of urgent reform today, not only in the sectors mentioned in the proposed legislation but also in practically every sphere.

Another common complaint about the Bill has been that the grounds of discrimination are too broad, and that this would in effect jeopardize the effective implementation of the legislation. Still others have argued that this Bill targets too many areas where discrimination is not present, such as access to places and means of transportation, and ignores areas which should have been taken to task, such as personal land laws.

When legislating to eliminate discrimination it is only natural that the framers would wish to cover as many grounds of discrimination as possible. Sometimes this may not be feasible or practical, in that case separate pieces of legislation should be framed for different grounds. On the other hand this could result in a plethora of laws being in place and might lead to confusion.

⁷ Ibid

The Equal Opportunity Bill

Despite the existence of international norms and standards outlawing discrimination, many people around the world do experience some form of discrimination. Many countries have reacted to this by enacting legislation ensuring equal opportunity to all. The Sri Lankan government attempted to introduce similar legislation but encountered many problems that resulted in the abandonment of the Equal Opportunity Bill.

The Equal Opportunity Bill was drafted along similar legislation in other countries such as Australia, Canada, United States of America and South Africa. At first glance one is struck by the fact that all but one of these countries are "developed western countries", and one may wonder how compatible their systems would be with the needs of a developing South Asian country such as Sri Lanka. This issue will be discussed in the following sections of the paper, but first an examination of the relevant provisions of the legislation is in order.

The Bill contains four objectives:

(a) the promotion of equality of opportunity, and of the recognition and acceptance within the community, of the equality of all persons regardless of their ethnicity, gender, religious or political opinion, language, caste, age or disability;

(b) the elimination of discrimination, either direct or indirect, against persons on the ground of ethnicity, gender, religious or political opinion, language, caste, age or disability and to take effective measures to protect and advance persons or categories of persons disadvantaged by discrimination on one or more such grounds;

(c) the elimination of sexual harassment in the workplace and in educational institutions and public places and the elimination of sexual harassment related to accommodation;

(d) ensuring the realisation of equality of opportunity in the workplace, in relation to both ethnicity and gender;

Subsection (c) is aimed at the elimination of sexual harassment, but one could query whether this provision is really necessary since the Penal Code contains

a provision that outlaws sexual harassment. The provision in the Penal Code imposes a fine and or imprisonment for five years, while the Equal Opportunity.

Bill contains no such sanctions, it merely states that the complaint should be referred to the police. In the absence of sanctions and compensation for the victim is there any necessity to tamper with an area which is already part of the Penal Code?

It could be argued that the definition in the Penal Code is unclear, and that what this Bill attempted to do is to reiterate the Penal provision in order to ensure effective compliance. This Bill does contain provisions that impose positive obligations on the employer to take preventive steps to ensure that a conducive work environment that is free of sexual harassment is created. Although it seems as if the framers of the Bill began with the intention of providing a civil remedy the absence of compensation for the victim leaves the public confused.

The Bill outlaws discrimination in five different areas; employment, education, access to places and means of transportation, accommodation and provision of goods and services.

Discrimination in employment

In comparison to the provision on education this is a relatively non-controversial provision. This makes it unlawful to discriminate against anyone on an outlawed ground of discrimination in hiring a person, in determining the terms and conditions of employment, by dismissing that person, or by subjecting that person to any other detriment.

There are of course exceptions to this provision. The section shall not apply to:

- * recruitment for employment as priests or ministers of a religion;
- * employment for purposes of a private household;
- * employment as a teacher in an educational institution referred to in paragraphs (a) and (b) and subsection (2) of section 6;

- * employment for the purposes of a family business, the majority of which are members of one family; and
- * employment where the essential nature of either the employment or the institution in which the employment be performed requires that it be performed by a person having proficiency in a particular language, by a person of a particular ethnicity or gender, or a person of a certain age or a person without a disability or a person holding or not holding a particular religious belief.

The final two exceptions seem to nullify the objectives of this particular provision. This exempts family businesses which employ members of one family, but what constitutes family is not defined in the Bill. In South and South East Asia extended members such as second cousins and even relatives by marriage are deemed to be members of one family. What then of a business that employs 150 people who happen to be part of one family? Are such businesses free to discriminate against persons at their will?

It has to be conceded that certain occupations require that a person be of a certain gender, but it is hard to imagine a job which would require a person to be a Sinhalese or a Tamil. It is reasonable to require proficiency in a particular language, but as long as the person is proficient in the language the question of ethnicity is not relevant. As most organisations are reluctant to hire persons with disabilities either because they are of the misguided belief that they do not possess the capability to do the job, or because they do not wish to make their organisations "user-friendly" to those with a disability, exempting hiring on the ground of disability does not further the cause of persons with disabilities. Instead, this Bill should have followed the Australian Disability Discrimination Act 1992 which requires workplaces and other environments to provide facilities of access and use to the extent that these are economically and practically feasible.

In the light of these problems it would have been prudent to design a test to determine an essential occupational requirement. In the absence of such a test, this particular provision undermines the objectives of the legislation.

Another question that continuously kept cropping up, was how would one "prove" discrimination? Especially with regard to employment it can be quite hard to prove that one has been discriminated against purely because of any

ascriptive status. How would one gather proof to substantiate a claim of discrimination? With regard to promotions the task will be much easier as one could pinpoint to the other person's lack of requisite qualifications or experience as one would be familiar with the other applicant's capabilities, but in the case of recruitment, where one is quite unaware of the other applicants qualifications and capabilities, the task becomes more difficult.

Discrimination in education

This is the most controversial provision which raised a hornets nest that ultimately resulted in the demise of the Bill. This provision also brings into focus existing conflicts between a secularist state and a religious state, between individual rights and group rights, between ensuring the enjoyment of rights by all and the protection of minority rights, and, between constitutional guarantees to all people and constitutional limitations on the exercise of rights guaranteed to all people.

It is important to tackle the issue of education, as past discriminatory practices outside the labour market notably in the provision of education contribute to the lack of equity in employment. Such disadvantage also tends to be self-producing, as those with a poor education are often unable to secure sufficient income to provide for the education of their children, who in turn are unable to access the labour market.⁸

On the face of it, this provision appears to eliminate discrimination in all schools, but subsection (2) exempts certain schools from the ambit of this legislation. In order to analyse the issues arising from this provision an examination of the educational system in Sri Lanka is essential.

The Sri Lankan educational system is "fraught with inequities which only deepen existing ethnic, economic and regional disparities".⁹ These inequities are exacerbated by the complexity of the system in place. The schools are categorised according to the number of grades taught in each school.

⁸ Employment Equity, <http://www.polity.org.za/govdocs/commissions/fin8.html>.

⁹ Ratnam.P. "Right to Education," *Sri Lanka; State of Human Rights 1998*, Law & Society Trust, Colombo, 1998, p. 263.

Accordingly, there are type 1AB, 1C, Status 2 and Status 3 schools.¹⁰ These are further categorised as government schools, international schools, private fee levying schools that are run by religious bodies and receive no financial assistance from the government, and non-fee levying private denominational schools which receive government assistance in the form of teacher's salaries, and are thereby bound to a certain extent by government regulations. Of these categories, entry to certain government schools and to the private fee levying and non-fee levying schools is very competitive. Although the government schools are meant to be secular, certain schools on the basis of an agreement formed with the government when these schools were taken over follow a policy of admitting children of a particular ethnicity or religious faith. Due to the standard of education in the above said schools parents clamour to gain entry for their children to these schools. Since the quality of education in most government schools with a few exceptions, leaves a lot to be desired, gaining admission to these prestigious schools has become extremely competitive. In addition these schools are very particular about the "type" of students they admit.¹¹

This legislation, therefore, endeavoured to address this anomaly to a certain extent by decreeing that all educational institutions should admit all students if they are suitably qualified. Yet, if this were the intention of the legislation, it does not appear to be so, since the exceptions to the provision would in effect result in maintaining the status quo.

Subsection (3) vests power in the Minister of Education to determine guidelines in regard to admission of students professing various religions to educational institutions referred to in subsections (a) and (b), which are categorised as government or semi-government schools. This, in effect, would include all schools except those that are fully private and run by religious bodies. This allows the very schools which employ selective admission policies and thereby discriminate against students not of the "correct" faith, ethnicity or social standing to continue to do so, but tampers with the semi-government and government schools which to a certain extent

¹⁰ Ibid at p. 274.

¹¹ One has to be of a particular faith, or needs to be the child of a past pupil of the institution to gain entry. There is also a rule which states that a student should live within a two mile radius of the school. This has resulted in parents forging documents and letters to obtain admission in these "prestigious" schools.

admit children of different ethnicities and religious faiths. What then is the aim of this provision?

It appears that the government began with the intention of eliminating discrimination in all schools and later in order to appease certain sections in society inserted the exceptions that have not been formulated with the realities of the educational system and the social structure in mind.

This provision also raises many other contentious issues. It is indeed important that minorities have the freedom to attend a school where minority language, minority values of history and culture can be cultivated and preserved. International instruments such as the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, states that minorities shall not be denied the right in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The Convention on the Prevention of Discrimination in Education contains provisions that give minorities the right to have influence over educational institutions. This then is an internationally acknowledged right, but the strict exercise of this right could also lead to marginalisation and alienation and deepen the existing divides between the different communities in the country.

One of the petitioners challenging the Bill on its constitutionality claimed that the Bill was discriminatory because section 6 (1) (f) of the Bill was in violation of Article 14 (1) (e) of the Constitution.¹² Section 6(1) (f) decrees that a student should not be subjected to any detriment, after his or her admission to a particular educational institution. The petitioner claimed that this provision prevented a person exercising control over an educational institution, of a particular religion, from restricting the enjoyment of rituals of another religion within the institution. The petitioner claimed that this would force the principal of a Buddhist school to provide facilities to perform other rituals that may be in "conflict" with the Buddhist religion.

Article 14 (1) (e) of the Constitution states as follows:

Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private to manifest

¹² *The Island*, 15th October 1999.

his religion or belief in worship, observance, practice and teaching.

Section 6 (1) (f) in no way restricts the above right enshrined in the Constitution. On the other hand it attempts to enhance this right by ensuring that each and every student in a school has the right to profess and practice his or her religion.

This provision also brings forth the tension between freedom of religion and the limitations imposed upon that freedom by the Constitution. Although it is the responsibility of the State to ameliorate socio-economic inequality, in the course of doing so it should not illegitimately infringe constitutional rights.¹³ It is generally acknowledged that any limitation of a constitutionally protected right must be justified not merely in terms of reasons but in terms of reasons of a certain kind.¹⁴ The Constitution of Sri Lanka does impose limitations on Article 14 (1) (e).

Article 15 (7) states that:

“the exercise and operation of all the fundamental rights declared and recognised by articles 12,13 (1), 13 (2) and 14 shall be subject to such restrictions as may be prescribed by law for the purpose of securing due recognition and respect for the rights and freedoms of others....”

It is evident that this section restricts the rights of persons to profess and practice their religion if it results in the infringement of the rights of others to do the same. The only goal of section 6 (1) (f) was to guarantee the rights of all students to benefit not only from formal education but also from being able to practice their religion, speak their language and culture, and at the same time be exposed to the cultures and religions of other communities.

The most vehement, vociferous opposition to the Bill in general and this provision in particular was from religious groups both majority and minority which felt that this would in some way erode their way of life and heritage.

¹³ Myerson.D. *Rights Limited: Freedom of Expression, Religion and the South African Constitution*, Juta & Co, 1997. P.5.

¹⁴ *Ibid* at p.1

The general opinion is that the government meekly withdrew the Bill in response to this lobby. It is easy to perceive the cross roads the government is at, they sought to protect the rights of the minority in some way, which while threatening the majority also to some extent undermined the rights of those it sought to protect, the minorities. As Juregensmyer states "rulers in Sri Lanka face the same dilemma their predecessors did; they need Sinhalese support, but they feel that they cannot go so far as to alienate the Tamils and other minority groups. They would like to achieve what might be an impossibility; a national entity that is both religious and secular."¹⁵

As in other ex-colonies and ex-members of the Soviet Union or States brought into being or separated by war, Sri Lankans too, both the majority and minority yearn to revive their cultures, religions, languages and heritage. This will inevitably lead to conflicts between the different national groups within States, as in the case of Sri Lanka. Jurgensmyer's words in his article written 6 years ago sound almost prophetic. He says that "many observers of the Sri Lankan scene speculate that a revived movement of Sinhalese nationalists will appear again....If and when the Sinhalese nationalist movement is revived, most likely it will again target the secular government".¹⁶

The minorities too viewed the legislation with skepticism. At the moment the LTTE which claims to be the representative of the largest minority in Sri Lanka, the Tamils, is demanding autonomy, i.e. they are demanding their right as a peoples to a separate nation state. Most of the minority political parties too are demanding recognition of their rights as a group, i.e. they are demanding some form of power sharing with the majority government. Therefore the opposition of the minorities striving for recognition as groups, to the Equal Opportunity Legislation which is directed at protecting individual rights should not come as a surprise.

Equal Opportunity Programmes

Sections 11 and 12 impose obligations on institutions employing 100 or more persons to formulate equal opportunity programmes, and, where necessary affirmative action programmes. These programmes should be designed to identify in a systemic way and remove any discriminatory barriers based on

¹⁵ Ibid, at p.38.

¹⁶ Ibid, at p. 109.

any of the proscribed grounds of discrimination. Concern has been expressed about the ambiguity of the words "affirmative action programmes where necessary". Many interpretations have been put forward about this provision, the most common being that quotas will be imposed to ensure numerical representation in the employment sector to be reflective of the general population. There is no mention of quotas in the legislation, and on the face of it, it appears to be about targets rather than quotas. Once again the peculiarities of Sri Lankan society throw a spanner in the works. The Sri Lankan population is segregated according to ethnicity in certain provinces. The North is largely populated by Tamils and the East mainly by Muslims whereas the Sabaragamuwa and Southern provinces consist mainly of Sinhalese. The Central province and the Western province are multi-ethnic in nature.

This, therefore, makes it difficult to assess the necessity for affirmative action programmes. The difficulty does not immediately nullify the possible benefits of this provision. The rationale of the provision is to ensure that under-represented segments of the population are given the opportunity to access resources and opportunities in society. In assessing the necessity of affirmative action programmes the demography of the particular province should be taken into account, rather than the population of the whole country. Therefore the employment of 90% Sinhalese in the public sector in the Southern province would not be contradictory to the objectives and principles of the legislation.

The objective of the legislation is not to change the population distribution of the country but to ensure a person is guaranteed equal opportunity regardless of the place of residence.

Section 13 of the Bill states that every employer in an institution shall furnish to the Equal Opportunity Commission ...within one year of the coming into operation of this Part of the Act, a preliminary report on the composition and diversity of that Institution.

In order to furnish a report on the diversity and composition of the institution the employer will have to gather information on, amongst others, the caste of the employee. Although the aim of this Bill and this particular provision is to eliminate discrimination, fears have been expressed that compelling persons to disclose their caste will institutionalise the very system which the state is attempting to eliminate. What then are the options? As public opinion seems

to indicate that discrimination on the basis of caste has been all but eradicated, maybe it should not have been included in the Bill. Or, only those who wish to disclose their caste should do so and the company in its report should be free to state that a certain percentage of employees did not wish to disclose their caste.

The Equal Opportunity Commission and Tribunal

In Sri Lanka there is a plethora of Commissions, most of which have failed miserably in fulfilling their mandate. At this point in time should the government have attempted to create two more institutions to be a burden on the already overburdened coffers of the State?

Since the only means available to persons to seek redress in the case of infringement of fundamental rights is the Supreme Court, the Equal Opportunity legislation sought to create a less expensive, more expedient method of obtaining relief. The aim of creating these two institutions was to enable people to go to a less formal, easily accessible forum rather than expend an enormous amount of money to obtain justice. As with the other human rights institutions created by the state, the stated objectives are laudable but, effective functioning would have depended largely on the individuals manning these institutions.

The Equal Opportunity Commission's function was to receive complaints of discrimination, investigate them and attempt to resolve them through conciliation. In the event of a failure the Commission could refer the matter to the Tribunal which is a quasi-judicial body. In addition, the Commission also had to engage in public education and assist institutions set up in-house mechanisms to promote equal opportunity and resolve complaints of discrimination.

The Tribunal, a quasi-judicial body, would give decisions on matters referred to it by the Commission, or hear appeals of complainants dissatisfied with the decision of the Commission not to investigate the complaint. The mandates of the Commission and Tribunal are ambitious, but as stated above their effective functioning would depend on the members, the resources available to the bodies and well-trained staff.

Since governments often tend to stifle human rights institutions through the denial of funding, it is refreshing to note that the bodies envisaged by this

legislation were given the right to accept funds, grants or gifts from local and foreign sources. On the other hand, judging by the reaction to the Bill, this might be construed to be international interference in national affairs. It has to be pointed out at this juncture that as the government of Sri Lanka freely accepts aid from foreign nations, to prevent these institutions from accepting foreign aid sounds hypocritical.

Conclusion

Similar legislation has been enacted in other countries and the institutions created are functioning in an effective manner. This leads to the question as to why equal opportunity legislation met with such strong opposition. It has to be conceded that it is not always possible to bring about change through the enactment of legal provisions but since we live in a "democratic system" which is governed by laws, rules and regulations one has to resort to lawmaking to nudge change in the correct direction.

Many arguments have been put forward to the effect that economic and social rights have to be realised, and the country has to join the ranks of the developed nations before such legislation can be enacted. This legislation attempts to nudge development in the correct direction by introducing a culture of equal opportunity within which the realisation of socio-economic rights would become a reality. Development cannot take place in a society where discrimination thrives, it cannot take place in an environment where equal opportunity is denied to all persons.

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY BILL

To provide for employment equity; and to provide for matters incidental thereto.

PREAMBLE

Recognising-

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

Therefore, in order to -

promote the constitutional right of equality and the exercise of true democracy;

eliminate unfair discrimination in employment;

ensure the implementation of employment equity to redress the effects of discrimination;

achieve a diverse workforce broadly representative of our people;

promote economic development and efficiency in the workforce; and give effect to the obligation of the Republic as a member of the International Labour Organisation.

CHAPTER I

DEFINITIONS, PURPOSE, INTERPRETATION AND APPLICATION

Definitions

1. In this Act, unless the context otherwise indicates -

"black people" is a generic term which means, Africans, coloureds and Indians;

"designated groups" means black people, women and people with disabilities;

"family responsibility" means the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support;

"HIV" means the Human Immunodeficiency Virus;

"people with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment;

"pregnancy" includes intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy;

Purpose of this Act

2. The purpose of this Act is to achieve equity in the workplace by -

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Interpretation of this Act

3. This Act must be interpreted -

- (a) in compliance with the Constitution;
- (b) so as to give effect to its purpose;
- (c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and
- (d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.

Elimination of unfair discrimination

5. Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Prohibition of unfair discrimination

6. (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to -

- (a) take affirmative action measures consistent with the purpose of this Act; or
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination or grounds of unfair discrimination

listed in subsection (1).

Burden of proof

1. Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.

Duties of designated employers

13. (1) Every designated employer¹⁷ must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.

(2) A designated employer must -

- (a) consult with its employees as required by section 16;
- (b) conduct an analysis as required by section 19;
- (c) prepare an employment equity plan as required by section 20;
and
- (d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.

Affirmative action measures

15. (1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include -

- (a) measures to identify and eliminate employment barriers,

¹⁷ This includes an employer who employs 50 or more employees.

including unfair discrimination, which adversely affect people from designated groups;

- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- (d) subject to subsection (3), measures to -
 - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
 - (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

Employment equity plan

20. (1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

(2) An employment equity plan prepared in terms of subsection (1) must state -

- (a) the objectives to be achieved for each year of the plan;
- (b) the affirmative action measures to be implemented as required by section 15(2);
- (c) where under representation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and

level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve these goals;

- (d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
- (e) the duration of the plan, which may not be shorter than one year or longer than five years;
- (f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
- (g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
- (h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
- (i) any other prescribed matter.

(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's -

- (a) formal qualifications;
- (b) prior learning;
- (c) relevant experience, or
- (d) capacity to acquire, within a reasonable time, the ability to do the job.

OBJECTIVES OF THE BILL

The principal object of the Employment Equity Bill, 1998, is to achieve equity in employment through promoting equal opportunities and implementing affirmative action to redress disadvantages experienced by people from designated groups.

The most important proposals contained in the Bill are that:-

- * all employers take steps to end unfair discrimination in their employment policies and practices;
- * unfair discrimination on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth against employees or job applicants be prohibited;
- * medical testing of employees be prohibited unless justified;
- * psychometric testing be prohibited unless justified;
- * designated employers prepare and implement employment equity plans subsequent to conducting a workforce analysis and consulting with unions and employees;
- * employment equity plans contain specific affirmative action measures to achieve the equitable representation of people from designated groups in all occupational categories and levels in the workforce of designated employers;
- * all designated employers report to the Department of Labour on their implementation of employment equity;
- * a Commission for Employment Equity be established;
- * enforcement of employment equity obligations on designated employers takes place by the Labour Inspectorate and the Director-General of the Department of Labour;
- * any employer that intends to contract with the State complies with its employment equity obligations; and
- * an employee be protected from victimisation for exercising rights conferred by the Bill.

THE DRAFTING PROCESS

This Bill emerged out of an extensive consultation process. This process began with the establishment of the Affirmative Action Policy Development Forum by the Minister of labour in 1995. This Forum represented the major stakeholders in the area of affirmative action and employment equity, viz. the unions, business, community organisations, disabled people's organisations, women's organisations and non-governmental organisations. When it completed its work, a team of experts was appointed to draft the green paper. This team's efforts led to the publication of the Green paper on Employment and Occupational Equity on 1 July 1996.

The Minister then appointed a team of legal experts to draft the Employment Equity Bill. This team began its work in February 1997. Its members were Ms Amanda Armstrong (CTH), Ms Urmila Bhoola (CTH), Mr Siphon Madlhophu (Madlhophu Attorneys) and Mr Mzi Yawa (formerly, Department of Labour). Professor Julio Faundez of Warwick University (UK) was seconded to the drafting team by the International Labour Organisation (ILO). The drafters made extensive use of his expertise. Mr. Phil Knight advised the drafters on the use of plain language. To assist the Legal Drafting Team in its work, a policy reference group was formed to advise the legal drafters on equity policy matters. The group under the leadership of the Director Equal Opportunities, Mr Loyiso Mbabane, consisted of Mr Les Kertledas, Mr Jeremy Baskin, Dr Guy Mhone, Ms Lucia Rayner, Ms Tanya Golden, Ms Nokhanya Moerane, Mr Jesse Malulke, Mr Terence Chauke and Ms Thuli Madonsela. The team completed its work at the end of August 1997.

During September to November 1997 the USAID sponsored inputs from several international experts including Mr Deval Parnck, Mr Kenneth Gage, Ms Ellen Vargas, Mr Joseph Kennedy and Ms Shirley Wilcher. Professor Harish Jain of Canada also provided extensive input through financial assistance of USAID.

The first version of the Bill was released on 1 December 1997. A summit was later held to establish areas of agreement and disagreement and to endeavour to reach agreement as far as the objectives and formulation of the Bill were concerned. The Bill was then tabled at NEDLAC for negotiations. Negotiations took place in March and April 1998 and, as a result, a number of changes were made to the Bill. The subsequent draft was approved by Cabinet in May 1998.

SUBSCRIPTIONS

The annual subscription rates of the LST Review have been revised due to rising costs of production as follows:

Local:	Rs. 600/=
Overseas:	
South Asia/Middle East	US\$ 30
S.E. Asia/Far East/Australia	US\$ 35
Europe/Africa	US\$ 40
America/Canada/Pacific countries	US\$ 45

Individual copies at Rs. 50/= may be obtained from the Trust at No. 3, Kynsey Terrace, Colombo 8, and BASL Bookshop, 129, Hulftsdorp Street, Colombo 12.

Spiral bound and indexed copies from Volume I - VII are also available.

Enquiries: *Librarian*
Law & Society Trust
No.3, Kynsey Terrace
Colombo 8
Tel. 686845/691228
Fax: 94 1 686843

Recent Publications

SRI LANKA: STATE OF HUMAN RIGHTS 1998

Rs. 400/=

**SRI LANKA: POLITICS, NATIONAL SECURITY AND
THE VIBRANCY OF NGOs
A Region-wide Research and Advocacy Project
to promote
the Freedoms of Association, Assembly and Expression in Asia**

Rs. 75/=

THE DRAFT CONSTITUTION OF SRI LANKA:

Critical Aspects

**Edited by
Dinusha Panditaratne & Pradeep Ratnam**

Rs. 300/-

*Enquiries: Law & Society Trust
3, Kynsey Terrace, Colombo 8
Tel. 691228/684845*