

COOK ISLANDS SEX DISCRIMINATION ACT 2005
2005
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BE IT ENACTED by the Parliament of the Cook Islands as follows:

Short title

- 1. This Act may be cited as the Sex Discrimination Act 2005.

Coming into Force

- 2. This Act comes into force on [a date to be assented to by the Queen’s Representative by Order in Executive Council].

Objective

- 3. The objective of this Act is the amelioration of discrimination in employment on the ground of sex by:
 - (a) Providing information and education on sex discrimination in employment.
 - (b) Facilitating the ability of Cook Islands' employers to provide work places free from discrimination on the ground of sex
 - (c) Prohibiting sex discrimination in employment.
 - (d) Providing a means of redress for sex discrimination in employment.

Interpretation

- 4. In this Act:

“Court” means the Cook Islands High Court whether constituted by a Judge or one or more Justices of the Peace

“Employee” includes contract workers and unpaid workers

“Employer” includes an agent of the employer

“Minister” means the Minister of Internal Affairs

Application

- 5. This Act applies to public and private sector employers.

Part 1 – Discriminatory Practices Prohibited

Discrimination in Benefits or Conditions

6 (1) Subject to section 7, an employer may not:

- (a) Publish or cause to be published, a job advertisement that states a preference as to sex.
 - (b) Employ or refuse to employ a person because of the sex of that person.
 - (c) Dismiss an employee from employment because of the sex of that employee.
 - (d) Dismiss an employee from employment because that employee is pregnant.
 - (e) Dismiss an employee because that employee takes or intends to take maternity or paternity leave authorized by the employee's employment contract or by government legislation.
 - (f) Apply unequal conditions of employment to an employee because of the sex of that employee.
 - (g) Pay different wages, or provide different benefits, to an employee because of the sex of that employee.
 - (h) Apply different criteria to an employee in opportunity for training because of the sex of that employee.
 - (I) Apply different criteria to an employee in opportunity for promotion because of the sex of that employee.
- (2) An employer may not reduce the rate of pay or the benefits of an employee in order to comply with subsection (1).

Exceptions to Discrimination

7. The prohibitions in section 6 do not apply in the following situations:

- (a) Domestic employment in a private household.
- (b) Employment as a counselor on highly personal matters such as sexual matters.
- (c) Employment that is limited to one sex to preserve reasonable standards of privacy.
- (d) Employment with a religious organization where the position is limited to one sex so as to comply with the doctrines of that religious organization.
- (e) Employment that is part of an affirmative action plan that is authorized by government and designed to ameliorate the effects of sex discrimination.
- (f) Deferential treatment on the ground of sex that is a genuine occupational qualification for the employment.

Onus on Employer to Prove Exception

8. The employer shall bear the onus of proving, on a balance of probabilities, that the deferential policy or treatment that is the subject of a complaint falls within one of the exceptions in section 7.

Sexual Harassment

9(1) In the course of applying for employment, or in the course of an actual employment relationship, a person may not make a request to another person for sexual contact or other form of sexual activity which contains an implied or overt suggestion of preferential treatment, or an implied or overt suggestion of deferential treatment.

(2) During the course of an employment relationship, a person may not use language, visual illustrations, physical behaviour or any other thing to subject another person to behaviour of a sexual nature that is:

- (a) Unwelcome or offensive, and
- (b) Either repeated or of such a significant nature that it has a detrimental effect on that person.

Complaint Upheld When Discrimination is one of the Reasons

10. If a Court determines that the behaviour that is the subject of a complaint is based partly on a reason that constitutes discriminatory behaviour under this Act, and partly on one or more other reasons that do not constitute discriminatory behaviour under this Act, the Court shall uphold the complaint.

Discrimination Does Not Require Proof of Intention

11. Discrimination under this Act does not require proof of intention to discriminate.

Retaliation in Response to a Complainant

12 (1) A person may not retaliate against another person because that other person complains of discrimination under this Act or assists a complaint of discrimination under this Act.

(2) For the purpose of this section retaliate means intimidation, coercion, or any of the behaviours described in sections 6 or 9 on the ground that the other person:

- (a) Has brought or proposes to bring a complaint under this Act.
- (b) Has provided or proposes to provide information or evidence to a Conciliator or a Court.
- (c) Has made an allegation that a person has violated a provision of this Act.

(3) If in the judgment of the Court, a person has retaliated against another person, the Court shall hold liable the person responsible for the retaliation, whether or not the original complaint is proven.

Employer Liability for Acts of Discrimination in the Workplace

13 (1) An employer shall maintain a workplace free from the behaviours prohibited by sections 6, 9 and 12.

(2) A complainant may name an employer as a respondent in a complaint under sections 6, 9 and 12 whether or not the behaviour complained of relates directly to the employer.

Exception to Employer liability

14 (1) A Court shall not hold an employer liable for the actions of an employee under section 13 of this Act if the employer took reasonable care to provide a workplace free from the kind of discrimination that is the subject of the complaint.

(2) In determining whether an employer has taken reasonable care in accordance with subsection (1) a Court shall have regard to all of the evidence including:

- (a) Whether the employer had in place, at the time of the discriminatory act, a formal anti discrimination policy that complies with this Act.
- (b) Whether the employer took practical steps to bring the anti discrimination policy to the attention of the employees.
- (c) Whether the employer took practical steps to prevent the behaviour that is the subject of the complainant.

Part 2 – Sex Discrimination Officer**Appointment of Sex Discrimination Officer**

15 (1) The Minister shall appoint a Sex Discrimination Officer.

(2) The term of office of the Sex Discrimination Officer is three years.

(3) In recommending a person for appointment to the position of Sex Discrimination Officer, the Minister shall have regard to the person's ability to properly carry out the duties of the Sex Discrimination Officer in section 16 including regard for the following criteria:

- (a) The person's knowledge of sex discrimination and human rights law in the Cook Islands or another country.
- (b) The person's experience as an educator in the area of sex discrimination or human rights.

Duties of the Sex Discrimination Officer

16 (1) The Sex Discrimination Officer shall provide education, information and assistance to employers, employees, and the general public necessary to achieve the purposes of this Act.

(2) In furtherance of subsection (1) the Sex Discrimination Officer shall:

- (a) Conduct workshops on workplace discrimination.
- (b) Provide information to employers and employers' associations on discrimination free workplaces.
- (c) Assist employers to develop appropriate non discriminatory employment policies.

- (d) Provide information to employees, trade unions, professional associations, workers' collectives, and women's organizations on discrimination free workplaces.
- (e) Respond to public inquiries by providing information about rights and responsibilities under this Act.
- (f) Issue non binding guidelines on the meaning of "genuine occupational qualification".

Annual Report by Sex Discrimination Officer

17 (1) The Sex Discrimination Officer shall submit an annual report to the Minister within 60 days of the end of the fiscal year that contains a summary of the work of the Sex Discrimination Officer and includes:

- (a) The educational work undertaken by the Sex Discrimination Officer.
- (b) The number of complaints filed under this Act.
- (c) The number of complaints investigated and conciliated under this Act.
- (d) The disposition of complaints under this Act including a summary of the statement of facts, issue, application of the law, and resolution.
- (e) Any other issue that, in the opinion of the Sex Discrimination Officer, should be brought to the attention of the Minister with respect to the application of this Act or other sex discrimination issues in the Cook Islands not covered by this Act.

(2) After the Minister receives the annual report from the Sex Discrimination Officer, the Minister shall, as soon as reasonable practicable, provide a copy of the annual report to each Member of Parliament.

(3) The Minister shall make additional copies of the annual report available for public distribution at a cost, if any, determined by the Minister.

Removal of Sex Discrimination Officer

18 The Minister shall remove the Sex Discrimination Officer in the following situations:

- (a) Incapacity affecting performance of duty.
- (b) Neglect of duty.
- (c) Misconduct proved to the satisfaction of the Public Service Commissioner.

Appointment of New Sex Discrimination Officer

19 If a person appointed to the position of Sex Discrimination Officer, dies, resigns, or is removed from office by the Minister in accordance with section 17, the Minister shall appoint a new Sex Discrimination Officer in accordance with section 14.

Part 3 - Dispute Resolution

Complaints of Discrimination under this Act and the Race Relations Act

20. If a person alleges a contravention of this Act and a contravention of the Race Relations Act relating to the same matter, the procedures provided by this Act govern the

complaint, and the conciliator or the Court, as the case may be, shall inquire into both grounds of complaint.

Choice of Procedure

21. Subject to the provisions of this Part a person who alleges a contravention of this Act may:

- (a) File a complaint with the Sex Discrimination Officer, or
- (b) Bring an action in Court.

Filing a Complainant with the Sex Discrimination Officer

22 (1) A person who alleges a contravention of this Act may file a complaint with the Sex Discrimination Officer in a form satisfactory to the Sex Discrimination Officer.

(2) A person who wishes to file a complaint in accordance with subsection (1) shall file the complaint within the following time frame:

- (a) Within 1 year of the date that is the subject of the complaint, or
- (b) Within 1 year of the date the subject of the complaint first became known to the person, or
- (c) Within 1 year of the date of the last alleged occurrence of the behaviour that is the subject of the complaint if the person is alleging ongoing discriminatory behaviour.

(3) Subject to subsection (4), upon receiving a complaint, the Sex Discrimination Officer shall, within 5 working days:

- (a) Refer the complaint to a conciliator from the list provided by the Minister.
- (b) Advise the complainant of the name and contact information of the Conciliator.

(4) The Sex Discrimination Officer may not refer a complaint to a conciliator if the Sex Discrimination Officer determines that:

- (a) The complaint is not within the jurisdiction of this Act, or
- (b) The complaint is not made in accordance within the time limits specified in subsection (2), or
- (c) The same complaint is currently before the Court, or
- (d) The same complaint has been adjudicated by the Court.

(5) If the Sex Discrimination Officer does not refer the complaint to a conciliator in accordance with section 4, the Sex Discrimination Officer shall advise the person in writing of the reason, and also advise the person that the Court has jurisdiction to extend the time limit for filing a complaint if this was a reason for not referring the complaint to a conciliator.

Procedure Following Referral of Complaint to a Conciliator

23(1) Upon receiving a referral from the Sex Discrimination Officer the conciliator shall:

- (a) Advise the parties to the complaint that a conciliator has been assigned to investigate the complaint.

(b) Advise the parties to the complaint of the conciliator's powers of investigation and conciliation under this Act.

(c) Advise the parties of the availability of a Conciliation Conference to clarify and resolve matters at issue between the parties.

(2) Where both the parties are willing to attend a Conciliation Conference, the conciliator shall arrange a Conciliation Conference at a time and place satisfactory to the parties.

Power to Compel a Conciliation Conference

24 (1) The conciliator may, at any time before a final report is provided to the parties, provide written notice to the parties to attend a Conciliation Conference.

(2) The conciliator shall hold the Conciliation Conference at a reasonable place and time.

(3) The conciliator may provide written notice to a person to attend a Conciliation Conference other than the parties to whom the complaint relates if, in the opinion of the conciliator, the person is likely to provide information conducive to the settlement of the complaint.

(4) Where any person is required to attend a Conciliation Conference the person is entitled to the same fees, allowances and expenses as a witness in civil proceedings in High Court.

General Conduct of Conciliation Conference

25 (1) The conciliator shall ensure that none of the parties are disadvantaged by attending a Conciliation Conference.

(2) Except with the consent of the parties the conciliator shall keep confidential the information disclosed in a Conciliation Conference.

Power to Investigate

26 (1) The conciliator shall make best efforts to obtain information that in the opinion of the conciliator will assist the parties in reaching a settlement.

(2) If in the opinion of the conciliator, a person is capable of providing information relevant to the complaint the conciliator may serve written notice on that person to provide that information within the time specified in the notice.

(3) The person to whom notice is given under subsection (2) shall:

(a) Provide a signed document to the conciliator which provides the conciliator with the information requested in the notice including a declaration of the truth of its contents.

(b) Produce for the inspection of the conciliator the documents or things specified in the notice.

(4) A person who knowingly provides false or misleading information to a conciliator under this section commits an offence under section 122 of the Crimes Act 1969. (Making a false statement or declaration to a person authorized by law to receive the statement or declaration).

Report by Conciliator

27 (1) At the conclusion of the investigation the conciliator shall provide a written report to the parties and the Sex Discrimination Officer.

(2) The conciliator's report shall outline the nature of the complaint, the response to the complaint, the findings of the conciliator, and whether the parties were able to reach an agreement.

(3) If the parties were able to reach an agreement the conciliator shall:

- (a) Reduce the agreement to writing.
- (b) Have the parties sign the agreement.
- (c) Provide a signed copy to each party.
- (d) Provide a copy to the Sex Discrimination Officer.

(4) The agreement may be filed by a party with the Registry of the Court.

(5) After an agreement is filed with the Registry of the Court it may be enforced in the same manner as if it were an Order of the Court.

(6) If the parties are unable to reach an agreement the conciliator shall advise the parties of the complainant's right to begin an action in Court to resolve the complaint.

Persons Who May Act as Conciliators

28 (1) The Minister shall compile a list of persons willing to be appointed as conciliators under this Act having regard to the following criteria:

- (a) The person's knowledge of sex discrimination and human rights law in the Cook Islands or another country.
- (b) The person's experience as a conciliator.
- (c) The person's formal legal training and experience.
- (d) The person's reputation in the community.

(2) After compiling a list in accordance with subsection (1) the Minister shall provide the list to the Sex Discrimination Officer.

Prerequisites for Filing a Complaint with the Court

29(1) A person alleging a contravention of this Act may begin an action in Court for damages unless the same complaint is being investigated by a conciliator at the time the complaint is filed, or the complaint has previously been conciliated by a conciliator and a settlement has been reached.

(2) Subject to subsection (1) a person who wishes to begin an action in Court shall begin the action within the following time frame:

- (a) Within 1 year of the date that is the subject of the complaint, or
- (b) Within 1 year of the date the subject of the complaint first became known to the person or
- (c) Within 1 year of the date of the last alleged occurrence of the behaviour that is the subject of the complaint if the person is alleging ongoing discriminatory behaviour

(3) In calculating the time limit for beginning an action in Court the Court may not consider the time between filing a complaint with the Sex Discrimination Officer and the date the conciliator's report is completed.

(4) The Court may extend the time for beginning an action in Court if the Court determines that:

- (a) The delay in bringing the action was incurred in good faith.
- (b) No substantial prejudice will result to any party because of the delay.

Court to Provide Written Reasons

30 The Court shall provide written reasons for a decision made under this Act.

Remedies

31 If a Court finds, on a balance of probabilities, that the defendant has engaged in a prohibited behaviour under this Act the Court may grant one or more of the following remedies:

- (a) A declaration that the Defendant has engaged in a prohibited behaviour under this Act.
- (b) An order restraining the Defendant from continuing or repeating the prohibited behaviour.
- (c) An order compensating the aggrieved person for lost wages and the loss of any benefit which the aggrieved person might reasonably have expected to receive but for the prohibited behaviour.
- (d) An order compensating the aggrieved person for humiliation, loss of dignity, and injury to feelings.
- (e) An order making available to the aggrieved person the benefit that the aggrieved person was denied by the prohibited behaviour.
- (f) Punitive damages.
- (g) Costs.
- (h) Other relief the court deems just.

Appeals

32 (1) A party may appeal a decision of the Court, whether constituted by a Judge or one or more Justices of the Peace, to the Court of Appeal on the following grounds:

- (a) The judgment should be set aside because it is unreasonable or cannot be supported by the evidence, or
- (b) The judgment should be set aside because of a wrong decision on a question of law.

(2) The Court of Appeal shall provide written reasons for its decision.

Part 4 – Miscellaneous

Evaluation of this Act

33 (1) The Minister shall, after the expiration of three years, and not longer than four years, following the proclamation of this Act, appoint an independent committee to evaluate the implementation of this Act.

(2) The independent committee appointed pursuant to subsection (1) shall:

- (a) Assess the degree to which this Act has been successful in ameliorating discrimination in employment on the ground of sex.
- (b) Suggest amendments to this Act and other legislation that, in the opinion of the independent committee, will further the objectives of section 2 of this Act.

(3) The independent committee shall, within 4 months of its formation, report its findings in writing to the Minister.

(4) After the Minister receives the report from the independent committee, the Minister shall, as soon as reasonable practicable, provide a copy of the report to each Member of Parliament.

(5) The Minister shall make additional copies of the report available for public distribution at a cost, if any, determined by the Minister.

Fees and Expenses for Conciliator

34 The Minister shall make regulations establishing a tariff of reasonable fees and expenses paid to a conciliator under this Act.

Conflict of Laws

35 If there is a conflict between this Act and any other enactment, this Act prevails.