

Definition

The **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**, which has been ratified by Mongolia, defines discrimination in the workplace as involving unfair treatment based on a protected characteristic, such that the person discriminated against suffers from a loss or reduction of equality of opportunity or treatment. Protected characteristics include, for example, race, colour, sex, religion, political opinion, national extraction and social origin.

Forms of discrimination

Unfair treatment can involve *direct or indirect discrimination*. Direct discrimination involves someone being treated differently and worse than others. This can involve discriminatory acts that are more obvious, such as racial abuse or harassment in the workplace, or less obvious, such as only assigning non-customer facing duties to a shop salesperson because he or she is old. Indirect discrimination involves someone being disadvantaged by a practice, policy or rule that applies to everyone in the same way, but has a worse effect on certain people than others. For example, an employer might require workers to travel around the country at short notice for meetings, despite the availability of video conferencing facilities. This could particularly disadvantage women with young children, as they are more likely to be responsible for childcare. It could therefore be considered indirect discrimination.

Drawing distinctions based on the inherent requirements of a job, however, does not constitute discrimination under Convention No. 111. For example, in selecting applicants for an English teaching job, favouring a person with strong English language skills over another person with weak English language skills does not amount to discrimination because this is an integral part of the job. Favouring a teacher who belongs to a particular religion, however, could amount to discrimination, particularly if teaching that religion is not an inherent requirement of the job.

Sexual harassment is a particular form of discrimination. It can involve physical, verbal or non-verbal conduct of a sexual nature or other conduct based on sex affecting the dignity of women or men, if it is unwelcome, unreasonable and offensive to the recipient, and the conduct is used explicitly or implicitly as the basis for a decision that affects the recipient's job. It can also involve conduct that creates an intimidating, hostile or humiliating work environment for the recipient. Sexual harassment can therefore cover a wide range of behaviours, from touching and sexual assault to making sexual jokes or comments and sending emails containing sexual content.

It is therefore clear that discrimination can take various different forms, ranging from hiring policies and comments made to another person, on the one hand, to racial abuse and sexual violence, on the other.

Effective prevention of discrimination

Discrimination of any type can be detrimental to both employers and workers. It can impair the productivity of workers and businesses, and negatively affect the performance of the economy as a whole. The question therefore remains as to the best means of preventing workplace discrimination, encouraging employers and workers to follow effective procedures and implement necessary safeguards.

Convention No. 111 places a number of duties on signatories, including cooperating with employers' and workers' organizations to promote non-discrimination, enacting relevant legislation, promoting relevant educational programmes and vocational training, and repealing laws and practices that are inconsistent with Convention No. 111.

Legal framework in Mongolia

There are currently several pieces of legislation concerned with non-discrimination, largely in respect of gender discrimination, including the **Constitution of Mongolia (1992)**, the **Labour Law (1999)**, the **Civil Code (2002)** and the **Law on the**



Promotion of Gender Equality (2011). Furthermore, the most recent draft of the **Criminal Code**, which will come into force on 1 September 2016, prohibits any discrimination based on a wide range of characteristics:

If discriminated, or freedom limited, or requested to do certain act or inaction, threatened, based on nationality, ethnicity, language, skin colour, age, gender, social origin, status, wealth, the duties performed, work position, religion, opinion, education, sexual and gender orientation, and health condition, it will be punished to 400–4670 transactional units, or one month to one year house arrest, or one month to one year imprisonment.

Including such a broad definition of discrimination in the Criminal Code is problematic for a number of reasons. Because it can take many different forms and levels of severity, as highlighted above, criminalizing discrimination may be both impractical and disproportionate. It could result in a significant number of parties being liable to prosecution for acts of discrimination that are towards the lower end of the scale of seriousness. For example, if one party makes a discriminatory comment to another party about his or her level of education, the former could technically face a financial penalty, house arrest or even imprisonment. Even though such discrimination should be prevented, the onus should be on employers and workers to foster an environment of non-discrimination rather than on the criminal justice system to impose punishment in all cases.

Resorting to the criminal courts to deal with all acts of discrimination provides for a relatively inflexible approach that is likely to have a limited effect on stimulating processes of change in the workplace. For instance, although a prosecution may encourage an employer to alter his or her workplace policies and procedures after a discriminatory act has taken place, and may have a deterrent effect in respect of carrying out further acts of discrimination, it does not offer guidance as to how to prevent discrimination in the first place or how to deal with complaints when they arise. In fact, the negative publicity that can accompany the prosecution of an employer can urge other employers to adopt a defensive approach instead of one that is conducive to promoting equality in the workplace. The net

effect may be that employers are encouraged to take the minimum action necessary to avoid contravening criminal legislation, as opposed to fulfilling positive obligations that could be imposed on them through civil legislation to advance the elimination of discrimination.

In contrast, dealing with most forms of workplace discrimination in the Labour Law would allow for a broader approach to be taken. Detailed provisions could be included in furtherance of Convention No. 111, assigning rights and responsibilities to employers and workers, and promoting non-discriminatory practices through education and vocational training. Such a system could address a wide range of issues, from prevention to disciplinary and remedial procedures, to monitoring and enforcement. Protection of workers could be reinforced by the support of civil society organizations, offering a variety of services to both employers and workers to combat discrimination. If employers were taken to court for contravening non-discrimination provisions of the Labour Law, they would be subject to the lower standard of proof that applies in civil cases as compared to criminal cases, potentially holding them more accountable for their actions. Moreover, the lower standard of proof would enable victims of workplace discrimination to access dispute settlement services at a relatively low evidential threshold and with less public exposure.

It should be noted that, in respect of non-discrimination on the basis of gender, the Law on the Promotion of Gender Equality already provides guidance covering aspects of political, economic, social and cultural spheres, as well as requirements in relation to family relations and the provision of public services.

In conclusion, it is recommended that only serious forms of racial discrimination should be included in the Criminal Code. Other serious acts such as sexual assaults, which can be a form of sexual harassment, are already provided for in the Criminal Code. Instead of criminalizing all forms of discrimination, workplace discrimination should be predominantly tackled through a comprehensive system of rights and responsibilities contained in the Labour Law, and supported by civil society organizations.