



International
Labour
Organization

**Analysis of Legislation Promoting and Protecting the Rights of Persons
with Disabilities in Employment in Vanuatu**

ILO Office of Pacific Island Countries

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Executive Summary

This report has been prepared by the International Labour Organisation (ILO) Office for Pacific Island Countries and is intended to assist the Government of Vanuatu, representative organisations of employers and workers, as well as wider stakeholders in Vanuatu consider the extent to which the CRPD is implemented in legislation with respect to the employment of persons with disabilities. This paper also makes reference to relevant ILO standards.

This report concludes that existing legislative framework relating to the protection and promotion of the rights of persons with disabilities in employment in Vanuatu is limited for the following reasons:

- The primary legislation regulating employment relationships (i.e. the Employment Act 1983) does not prohibit discrimination in employment (other than sex discrimination with respect to remuneration). Further, certain categories of workers are excluded from its protections, or can be excluded by the Minister by Order in Council.
- There are a small number of examples of legislation promoting equal employment opportunities. The Public Service Act 1998 appears to implicitly require government agencies to promote equal employment opportunities for persons with disabilities. However, more explicit requirements are included in the Teaching Service Act 2013 and Vanuatu Maritime Authority Act 1998.
- There is a significant amount of legislation providing that individuals in senior positions (usually in the Public Service or on Public Sector Boards), can be removed from their positions if they have a disability. In many examples, the presence of a disability is accorded the same status as misconduct, bankruptcy, neglect of duty, incompetence or holding a criminal conviction. In doing so, such legislation appears to reflect an inherent assumption that a person is incapable of holding a position if they have any form of disability.

Over a number of years there have been various efforts to revise the existing legislative framework to improve consistency with International Labour Standards, including the eight Fundamental Conventions of the ILO. The development of the Employment Relations Bill by the Tripartite Labour Advisory Council (with technical assistance from the ILO) provides an important opportunity to explicitly prohibit discrimination against persons with disabilities in employment.

Introduction

This paper focuses on the application of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Vanuatu with respect to legislation in the field of employment. It therefore does not explore the wider implementation of the CRPD in other spheres of political, economic, social and cultural life. This paper also makes reference to relevant International Labour Organisation (ILO) standards relating to the protection and promotion of the rights of people with disabilities.

The United Nations General Assembly adopted the CRPD in 2006, affirming that people with disabilities are entitled to equal participation and protection with respect to political, economic, social and cultural life. The CRPD definition of disability accords a wide meaning to the concept, by providing:

“Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” (Article 1, CRPD)

For the purposes of the Convention, the term “discrimination on the basis of disability” refers to:

“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.” (Article 2, CRPD)

For the purposes of the Convention, the term “reasonable accommodation” refers to:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. (Article 2, CRPD)

The subject of this review primarily relates to the protections afforded in Article 27 of the CRPD which recognises:

“the right of persons with disabilities to work, on an equal basis to others; this includes the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”

The CRPD not only calls for States to adopt all appropriate legislative, administrative and other measures for the implementation of the rights” recognised in the Convention, but also, inter alia, take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes. While this paper focuses primarily on the legal framework, it also

refers to efforts undertaken by the Government of Vanuatu with respect to policies and programmes.

The protection and promotion of the rights of persons with disabilities is also an important part of the ILO's commitment to social justice and achieving decent and productive work for all. While all international labour standards apply to persons with disabilities, the primary ILO Conventions and recommendations of importance are:

- Discrimination (Employment and Occupation Convention, 1958 (No.111)
- Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)
- Recommendation 168 on the Vocational Rehabilitation and Employment (Disabled Persons) Convention.

The purpose of Convention No. 111 is to protect all persons against discrimination in employment and occupation on the basis of race, colour, sex, religion, political opinion, national extraction and social origin, with the possibility of extending its protection to discrimination on the basis of other grounds. Although disability is not included in the grounds of discrimination, the Convention provides that after consultation with social partners, special measures in the case of persons with disabilities should not be deemed discrimination. Further, the Convention foresees that additional grounds of discrimination can be determined by member States after consultation with representative organisations of employers and workers. Therefore disability discrimination in employment is often considered within the context of this Convention.

The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) requires ratifying States to introduce a national policy based on the principle of equality of opportunity between disabled workers and workers generally, respecting equality of opportunity and treatment for disabled women and men and providing for special positive measures aimed at effective implementation of these principles. The emphasis on full participation is reflected in the definition of vocational rehabilitation as “being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such a person’s integration or reintegration into society.”

Context

The Republic of Vanuatu is a member of the United Nations and the ILO. It has ratified key human rights instruments relating to the protection and promotion of the rights of persons with disabilities, most notably, it was the first Pacific Island country to ratify the CRPD in 2008. Vanuatu also ratified the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No 111) in 2006 which is among eight “Fundamental” Conventions of the ILO. The Government has not ratified the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) despite it being referred to among priorities in Vanuatu's *Decent Work Country Programme (2009 – 2012)*.

For a number of years, the Government of Vanuatu has increasingly prioritised the rights of persons with disabilities. This has included the following efforts:

- In April 1999, Vanuatu became a party to the first Asian and Pacific Decade on Disabled Persons, 1993-2002 through the signing of the *Proclamation on the Full Participation and Equality of People with Disabilities in the Asia and Pacific Region*
- In 2001, the Ministry of Health included in its health policy a statement on non-discrimination on the grounds of disability
- The Education Act 2001 was enacted which prohibits discrimination on the grounds of disability so children with disabilities can access education
- In 2004, the Council of Ministers approved the National Disability Policy Framework
- In 2006, the Council of Ministers approved the recommendation to establish the National Disability Committee
- In 2006, the Office of the Prime Minister, through the National Disability Committee, initiated a national consultation process towards the drafting of the National Disability Policy and Plan of Action

Since the ratification of the CRPD, the Vanuatu Government has established National Disability Policy and Plan of Action 2008-2015, the Mental Health Policy and Plan 2009-2015, Inclusive Education Policy and Strategic Plan 2010-2020, and adopted the Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities (2013–2022) as well as the Incheon Strategy to “Make the Right Real” for Persons with Disabilities in Asia and the Pacific. The Government also created a Disability Desk within the Ministry of Justice and Community Services to monitor the implementation of disability related policies and to coordinate collaboration with government institutions, civil society and development partners. Moreover, efforts are reportedly underway on a variety of service provision programmes, including community-based rehabilitation, physiotherapy, sports therapy, and awareness-raising activities.

The Vanuatu Government has collected data on disability using a range different instruments: the 2009 National Population and Housing Census (NPHC); the 2013 Vanuatu Demographic and Health Survey (VDHS); and the 2014 Vanuatu Disability Pilot Survey (VDPS). Administrative data on children with disabilities enrolled in school are also available from Vanuatu’s Education Management Information System (VEMIS). Each of these disability data collection instruments has advantages and limitations.

According to Vanuatu’s 2009 Census and based on the definitions used in this report, around 5 percent of the population have a mild, moderate or severe disabilities. However, according to the VDHS, the disability prevalence rate is only 3.3 percent, but it is possible that the survey undercounts people with mild and moderate disabilities. The rate of severe disability according to the VDHS is 2.4 percent, which is similar to the rates found in studies in other countries.

Further studies conducted by United Nations Children Education Fund in partnership with Vanuatu National Statistics Office highlight that prevalence of disability in Vanuatu is higher in rural areas than urban areas, and among adults, strongly correlated with old age. Due to data limitations, little can be inferred about the relationship between disability and age for children and adolescents. The study did not find a consistent relationship between gender and disability, except at the upper end of the age distribution; i.e. men over 70 years of age are about twice as likely to have a disability.

Further the study examined the relationship between disability and employment and reports that people with disabilities are equally likely to take part in productive activities as non-disabled people, however, are less likely to be employed outside the home and more likely to be either self-employed or working in a family business. The finding is evident to support that despite the willingness and capability of people with disabilities to undertake productive activities, there are barriers preventing them from obtaining employment.

The table below is with other studies of disability and employment in developing countries, i.e that the rate of employment for people with disabilities is very similar to that for people without disabilities, however, people with disabilities were much less likely to be employed outside the home.

Table 1: Work Status by Disability – Adults Aged 20 to 59 Years

Work Status (%)	Disabled	Not Disabled	Total
Not Working	11.0	12.5	12.4
Self Employed or Working in Family Business	74.8	57.6	58.6
Employed outside Home	14.2	29.9	29.0

Source: VDHS, 2013

Legislative Framework Relating to Employment

Overview

The Constitution of the Republic of Vanuatu is the supreme law of Vanuatu. It guarantees fundamental rights and freedoms for all citizens. Article 5 provides that all citizens are equal before the law and fundamental freedoms are guaranteed without discrimination. Such fundamental freedoms include for example, the right to freedom from forced labour and freedom of association. Discrimination for the purposes of Article 5 means “race, place of origin, religious or traditional beliefs, political opinion, language or sex”. The absence of any reference to disability appears to leave scope for discriminatory legislation to be in place without contravening the Constitution.

Vanuatu is similar to most countries in the Pacific region in that it has not enacted specific legislation protecting and promoting the rights of persons with disabilities consistent with the CRPD. Consequently the protection and promotion of the rights of persons with disabilities does

not feature to any significant extent in Vanuatu's legislative framework, other than in a small number of areas¹ and therefore is more piecemeal in approach.

The regulatory framework relating to public and private sector employment is primarily governed by the Employment Act 1983, Trade Disputes Act 1983, Trade Unions Act 1983, Workmen's Compensation Act 1987 and Public Service Act 1998. The most notable feature of the existing framework is an absence of legislative protections for workers from discrimination in employment and limited references to the promotion of equality for all workers.

The Employment Act primarily deals with terms and conditions of employment including annual leave, maternity leave, the abolition of forced labour, contracts of employment, hours of work, overtime, sick leave, termination of employment and other matters. The scope of coverage applies to both the public and private sector with the exception of the police force, armed forces or prison service.² Further the Minister may by Order in Council exempt any person, class of persons or any public authority from any contract of employment or from the operation of the Act. The Act provides no protection for workers from discrimination of any kind in employment other than a prohibition of sex discrimination to workers covered by the Act with respect to remuneration.³

The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) in considering the Government's last report under Article 22 of the ILO Constitution on the application of Discrimination (Employment and Occupation Convention, 1958 (No.111) noted that:

"Recalling the obligation to ensure and promote the application of the principles of the Convention to all workers, the Committee requests the Government to indicate the manner in which those categories of workers that are excluded from the coverage of the Employment Act ...enjoy adequate protection against discrimination on the grounds set out in the Convention".⁴

The Committee also noted efforts by the Government of Vanuatu to finalise a new Employment Relations Bill, welcoming the inclusion in the Employment Relations Bill of all the grounds of discrimination enumerated in Article 1(1)(a) of the Convention, as well as a number of additional grounds as foreseen in Article 1(1)(b), and requested the Government to ensure that they will be included in the new Employment Relations Act when it is adopted.⁵ A more detailed description of the Bill is set out later in this paper.

¹ Most notably the Education Act 2014 which prohibits discrimination on the grounds of disability with respect to admission into schools.

² Section 76(3), Employment Act 1983

³ Section 8, Employment Act 1983

⁴ Direct Request (CEACR) - adopted 2014, published 104th ILC session (2015)

⁵ Direct Request (CEACR) - adopted 2014, published 104th ILC session (2015)

Despite the absence of specific provisions in the Employment Act to prohibit discrimination against persons with disabilities in employment, the Employment Act with respect to other terms and conditions of employment applies equally to workers.

With respect to social protection, the Workmen's Compensation Act provides that if a worker is injured in employment, he or she is entitled to compensation at a rate of three times the annual wages of the employee in the event of "total disability".

Enabling legislation

Legislation promoting equal employment opportunities

The promotion of equal employment opportunities appears in some legislation regulating public sector employment. The Public Service Act 1998 contains general provisions which appear to implicitly include the promotion of equal employment opportunities for people with disabilities. It provides in s.15, the Public Service Commission (the body with responsibility for all Public Service appointments), is required to "be a good employer" and to:

- a. ensure the fair and proper treatment of employees in all aspects of their employment; and
- b. require the selection of persons for appointments and promotion to be based upon merit; and
- c. promote good and safe working conditions, and
- d. encourage the enhancement of the abilities of individual employees; and
- e. promote and encourage an equal opportunities programme.

However, the Teaching Service Act 2013 and the Vanuatu Maritime Authority Act 1998 take a more specific approach. The Teaching Service Act specifically promotes the rights of persons with disabilities in employment. Part III of the Act establishes duties on the Teaching Commission to be a "good employer" – which among other things provides that the Commission must:

"...ensure that the recruitment, promotion, professional development, transfer and all other aspects of the management of its employees is carried out without discrimination on the basis of gender, religion, nationality, race, language, home island, disability, trade union membership or activity, marital status, pregnancy, sexual preference or age."⁶

The Vanuatu Maritime Authority Act 1998 provides that the Authority must operate a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring (et al) "no discrimination against persons with disabilities."

Legislative barriers for persons with disabilities

Provisions limiting people with disabilities from engaging in employment

⁶ Section 18(2), Teaching Service Act 2013.

There is a significant body of legislation in Vanuatu relating to the removal of persons from particular senior positions, usually in the Public Service or on Public Sector boards, based on disability. In many examples, the presence of a disability is accorded the same status as misconduct, bankruptcy, neglect of duty, incompetence, holding a criminal conviction, or otherwise not performing the duties of a position in a satisfactory manner. In all of these cases “disability” is left undefined and disconnected for a person’s ability to perform a particular job. In doing so, such legislation appears to reflect an inherent assumption that a person is incapable of holding a position if they have any form of disability. Examples of these restrictions are set out below:

- Government Contracts and Tenders Act 1998 - the Chairperson of the Government Tenders Board can be removed by the Prime Minister upon a resolution of Parliament for incompetence, disability, bankruptcy, neglect of duty or misconduct.
- National Bank of Vanuatu Act 1989 - the Chairperson of the Board of Directors of the Bank can be removed from that office by the Prime Minister on the unanimous recommendation of a panel comprising the chairman of the Public Service Commission and the Chairman of the Vanuatu Financial Centre Association Limited, for incompetence, disability, bankruptcy, neglect of duty or misconduct.
- Expenditure Review and Audit Act 1998 – the Auditor General may be removed or suspended from office by the Public Service Commission for incompetence, disability, bankruptcy, neglect of duty or misconduct.
- Government Remuneration Tribunal Act 1998 - a member of the Tribunal may be removed from office by the President for disability, bankruptcy, neglect of duty, misconduct, or convicted of an offence involving moral turpitude.
- Public Service Act 1998 - with respect to the appointment of Directors General or Directors of Departments, such persons can be removed from office after investigation by the Commission for incompetence, disability, bankruptcy, neglect of duty, misconduct or a breach of his or her performance agreement.
- Asset Management Unit Act 1998 – the Prime Minister may remove a Board member for incompetence, disability, bankruptcy, neglect of duty, misconduct or breach of his or her contract
- State Law Office Act 1998 - the Attorney-General may be removed from office by the President on the advice of the Judicial Service Commission for disability, bankruptcy, neglect of duty, incompetence or misconduct.
- Vanuatu Agricultural Council Act 2005 - with respect to members of the Vanuatu Agricultural College Council, a member may be removed by the Minister in consultation with the Council if the member is involved in serious misconduct; has a physical or mental disability; fails to attend three consecutive meetings without prior approval of the Council;

is a person having professional qualifications and is disqualified or suspended from practicing his or her profession; becomes bankrupt; is convicted of an offence; or in the Minister's opinion is not performing in a satisfactory way.

- Maritime Regulations regulating the licensing of "officers" on vessels provide that a license can be revoked on the grounds of incompetency; physical or mental disability, habitual drunkenness or drug use; wilful failure to comply with the provisions of the Act or Orders; criminal conduct; or other conduct incompatible with proper performance of duties and obligations as an officer.

These examples do not make any reference to a person's ability to perform a particular position. One other example contained in the Civil Aviation Regulations, attempts draw a connection to provide that in granting a license to maintenance engineers, the Director must be satisfied that the applicant "does not suffer from any disability likely to affect his or her technical skill or judgment under clause 217(3A)(c)."

Compulsory Medical Testing

A worker's ability to perform the requirements of a particular position occasionally arises in the context of medical testing sometimes provided for in legislation in Pacific Island countries. In Vanuatu, s.41 of the Public Service Act provides that the Commission may require any applicant for appointment to the Public Service or any employee to submit to a medical examination by a registered medical practitioner at the applicant's own expense.

A worker's state of health should only be taken into consideration by employers with regard to the specific requirements of a particular job, and not be considered automatically as affecting the right to access to employment, or conditions of work within the employment relationship. Taking into account the past or present physical or mental state of health of an individual could be a major barrier to applying the principle of equal access to employment. Unless there is a very close link between a worker's current state of health and the normal occupational requirements of a particular job, using state of health as a reason to deny or continue employment contravenes the spirit of Convention 111.⁷

The Employment Relations Bill

Since Vanuatu joined the ILO in 2003 there have been a series of labour law reviews undertaken. In 2003 'A Review of the Labour Laws of the Republic of Vanuatu' (2003 Review) was carried out by Howards Lawyers in Fiji. The 2003 Review included an assessment of the compliance of existing ni-Vanuatu labour laws with ILO Core Conventions. Subsequently in 2004, the University of the South Pacific (USP) drafted a 'Review of Labour Laws in Vanuatu' (2004 Review).

⁷ ILO *Equality in employment and occupation*, Special Survey on Equality in Employment and Occupation in respect of Convention No. 111 (1996), para. 255.

In October 2005, the Institute of Justice and Applied Legal Studies (associated with USP), undertook the 'Labour Law Review Project – Vanuatu,' which analysed both the 2003 and 2004 Reviews and resulted in the drafting of the Employment Relations Bill 2006. The Bill consolidates and amends the existing Employment Act 1983, Trade Unions Act 1983 and Trade Disputes Act 1983. The Bill was also reviewed by ILO technical specialists.

A final draft of the Bill is under active policy consideration by the Vanuatu Tripartite Labour Advisory Council. It takes a comprehensive approach to protecting the rights of equity groups from discrimination in employment, including persons with disabilities. The term “disability” is defined widely in s.4 to include “physical disability or impairment, physical illness, intellectual or psychological disability or impairment or the presence in the body of organisms capable of causing illness” and also, under s.7(3) includes real or perceived HIV AIDS status. The Bill prohibits disability discrimination in the following circumstances:

- a. omitting to employ a person;
- b. offering less favourable terms of employment, fringe benefits, opportunities for training, promotion and transfer;
- c. terminating employment;
- d. otherwise subjecting a worker to any other detriment in circumstances with other workers or applicants employed in the same circumstances would not be subject to such detriment; or
- e. requiring or causing a person to retire.

The Bill also does not prohibit a distinction based on disability if it relates to the “inherent requirements” of a particular job under s.99. Further this exception will not apply where a reasonable accommodation could be made to allow a person with a disability to perform the inherent requirements of a job. However, there is a general qualification on this exception that permits different treatment if the position is such that a person could perform the duties with the aid of special services or facilities and it is not reasonable to expect an employer to provide those services or facilities.

The Bill also makes provision for “special measures” in s.100. It provides that a person may invoke a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute (e.g. disability). Such measures are not considered discrimination if they are undertaken in good faith, are reasonably likely to achieve the purpose of promoting substantive equality, are proportionate and are justified because the members of the group concerned have a particular need for advancement or assistance.

Conclusion

The existing legislative framework relating to the protection and promotion of the rights of persons with disabilities in employment in Vanuatu is limited for the following reasons:

- The Employment Act which is the primary statute governing employment relationships does not prohibit discrimination (other than sex discrimination with respect to remuneration).
- There are a few examples of legislation promoting equal employment opportunities. The Public Service Act appears to implicitly include persons with disabilities, but more explicit requirements to promote equal employment opportunities for persons with disabilities are included in the Teaching Service Act and Maritime Authority Act.
- There is a significant amount of legislation providing that persons in senior positions (usually in the Public Service or on Public Sector Boards), can be removed from their positions if they have a disability. In many examples, the presence of a disability is accorded the same status as misconduct, bankruptcy, neglect of duty, incompetence, holding a criminal conviction, or otherwise not performing the duties of a position in a satisfactory manner. In doing so, such legislation appears to reflect an inherent assumption that a person is incapable of holding a position if they have any form of disability.

The development of the Employment Relations Bill by the Vanuatu Tripartite Labour Advisory Council provides an important opportunity to explicitly prohibit discrimination against persons with disabilities in employment.

Appendix 1: Selected Sections of the Employment Relations Bill

7. Fundamental Principles and Rights

(3) No person shall discriminate against any worker or prospective worker, either directly or indirectly, in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship, on any of the following grounds, whether actual or perceived: ethnic origin, race, colour, gender, sex, sexual orientation, religion, political opinion, national extraction, social origin, age, marital status, pregnancy, social class, economic status, family responsibilities, state of health including real or perceived HIV / AIDS status, trade union membership or activity, or disability.

PART 11 – EQUAL EMPLOYMENT OPPORTUNITIES

98. Discrimination in employment matters

(1) If an applicant for employment or a worker is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not —

- (a) refuse or omit to employ the applicant on work of that description which is available;
- (b) offer or afford the applicant or the worker less favourable terms of employment, conditions of work, or other fringe benefits, and opportunities for training, promotion, and transfer that are made available to applicants or workers of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;
- (c) terminate the employment of the worker, or subject the worker to any detriment, in circumstances in which the employment of other workers employed on work of that description would not be terminated, or in which other workers employed on work of that description would not be subjected to such detriment; or
- (d) retire the worker, or to require or cause the worker to retire or resign, subject to any written law or contract of employment imposing a retirement age,

by reason of any of the prohibited grounds of discrimination set out in sub [section 7\(3\)](#) or by reason of the worker's involvement in the activities of a union.

(2) If a worker reports an employment dispute under [Part 17](#) in relation to action by an employer falling within subsection (1) the burden of proof is on the employer to establish that its actions were not by reason of any of the prohibited grounds of discrimination set out in sub[section 7\(3\)](#).

(3) For the purposes of subsection (1), a worker is deemed to be involved in the activities of a union if, at any time within 12 months before the action complained of, that worker -

- (a) was an officer of a union or branch of it, or was a member of the committee of management of a union or branch, or was otherwise an official or representative of an organisation or branch;
- (b) had acted as a negotiator in collective bargaining;
- (c) had represented a union or branch of it in negotiations between employers and workers;
- (d) was involved in the formation or proposed formation of a union;
- (e) had made or caused to be made a claim for some benefit of a collective agreement or individual contract of employment either for that worker or any other worker or had supported the claim, whether by giving evidence or otherwise;
- (f) had submitted another employment grievance to that worker's employer;
- or
- (g) had participated in a strike.

(4) If a worker has been involved in the activities of a union within 12 months before the action complained of, the burden of proof is on the employer to establish that action falling within subsections 1(a) or (1)(b) was not by reason of the worker's involvement in those activities.

(5) For the purposes of this section a representative of a union includes a person authorised or recognised, either expressly or impliedly, to represent the union or some of the members of a union, whether as a worker or otherwise.

99. *Exceptions in relation to inherent requirements of the position*

(1) Subject to this section, this Act does not prohibit any distinction, exclusion or preference made based on an objective assessment of the worker or job applicant's individual capacity to perform the inherent requirements of a particular job.

(2) The inherent requirements of a particular job may include but are not limited to the worker or job applicant's individual capacity to -

- (a) perform the tasks or functions which are a necessary part of the particular job; or
 - (b) meet productivity and quality requirements for the particular job; or
 - (c) work effectively in the team or other type of work organisation concerned with that particular job; or
 - (d) work safely in carrying out that particular job.
- (1) The exception to prohibited discrimination set out in subsection (1) will not apply where reasonable accommodations could be made to allow a worker or job applicant to perform the inherent requirements of a particular job.
- (2) Subsection (3) does not prevent different treatment based on physical disability if the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities.

100. Exceptions in relation to special measures

- (1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, including a ground set out in subsection 7(3).
- (2) A person does not discriminate against another person by taking a special measure.
- (3) A special measure must-
- (a) be undertaken in good faith for achieving the purpose set out in subsection (1); and
 - (b) be reasonably likely to achieve the purpose set out in subsection (1); and
 - (c) be a proportionate means of achieving the purpose set out in subsection (1); and
 - (d) be justified because the members of the group have a particular need for advancement or assistance.
- (4) A measure is taken for the purpose set out in subsection (1) if it is taken-
- (a) solely for that purpose; or
 - (b) for that purpose as well as other purposes.
- (5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.
- (6) A person who undertakes a special measure has the burden of proving that the measure is a special measure.

(7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.