The Gender Equality Bill 2011

Nick Dunne – 27 July 2011
A Brief History

• First published for consultation in December 2009
• Lay dormant until March 2011
• Revised Bill gazetted on 20 June 2011
• Currently due to be presented to the Legislative Assembly in August/September 2011
Reaction

Less than universally acclaimed:

“[W]e strongly recommend that the Government withdraw the Bill” [Cayman Islands Chamber of Commerce]

“…measures which impose restrictions and further red tape on businesses should be discouraged. In our respectful opinion, the Bill is such a measure” [Cayman Islands Law Society]

“to consider passing this type of legislation where so many employers are just hanging on and fighting for survival is an insult…” [CIREBA]
What’s Going On?

- No response from Government to calls for withdrawal as yet
- Ministry of Gender Affairs planning public education programme
- External political pressure:
  - United Nations CEDAW Convention passed in 1979
  - Applies in other Overseas Territories, e.g. BVI and Turks & Caicos
  - Deputy Premier identified accession to CEDAW as a goal at the launch of the draft Bill in 2009
  - Constitutional obligations of government under Article 16
What is Gender?

“What the cultural, economic, social and political characteristics, roles and opportunities through which women and men are socially constructed and valued”
What is discrimination?

• “…any distinction, exclusion or preference the intent or effect of which is to nullify or impair equality of opportunity or treatment in any employment or occupation”

• On grounds of
  – Sex, marital status or pregnancy
  – Any characteristic based on gender which appertains generally or is generally imputed to persons of a particular sex or marital status or pregnant state

• Irrespective of intention

• May be direct or indirect
When is discrimination forbidden?

- Job Advertisements
- Interviews
- Selection
- Terms and conditions of job offer
- Creation, classification or abolition of jobs

**BUT** not for private households or private educational authorities
When is discrimination forbidden? Cont....

- Terms and Conditions of employment
- Occupational Health and Safety
- Provision of Facilities
- Promotions and transfers
- Training
- Access to benefits, facilities or services
- Retrenchments and dismissals

UNLESS...
Genuine Occupational Qualifications

- Essential nature of the job calls for a man or a woman for reasons of physique;
- Needs a person of particular sex to preserve decency or privacy
- Small workplaces where accommodation is provided
- Jobs that require married couples
- Single sex facilities at prisons and hospitals
Positive Discrimination

- Governor may authorise special measures to promote equality of opportunity
- Can only be for a specified period
Sexual Harassment

• “Unwanted conduct of a sexual nature in the workplace or in connection with the performance of or recruitment for work, which is threatened or imposed as a condition of employment on an employee or which creates a hostile working environment for the employee, being conduct which has the purpose or effect of violating the dignity of the employee or intimidating, degrading, humiliating or offending the employee”

• Acts of sexual harassment constitute discrimination

• Purely subjective- no requirement of reasonableness

• Third Party Complaints?
Equal Pay

- Employers are prohibited from paying unequal remuneration to men and women for work of equal value.

- Work of equal value means “work equal in value in terms of the demands it makes in relation to matters such as skill levels, duties, physical and mental effort, responsibility and conditions of work”

- Likely to apply to all forms of remuneration, including commissions or bonuses

- Burden of proof is on the employer
Specific Situations

• Professional Partnerships
• Bodies offering authorisations or qualifications
• Vocational Training Providers
• Employment Agencies
  - Not liable if they act in reliance upon representations from employer that an action would not be unlawful as long as it was reasonable to do so.
Loose Ends

• Discriminatory advertisements or notices are prohibited

• Provision of goods, services or facilities

• Application forms may not require information that would not be required in the same circumstances from a person of the opposite sex, different marital status or pregnant state
Criminal Offences

• Likely to supplement offences already present under the Labour Law

• New offences-
  – inducing a person to contravene the Gender Discrimination Law
  – Victimisation of complainants or witnesses

• CI$5,000 fine
Complaints

• Gender Equality Tribunal
  – 5 members in total, minimum quorum of 3
  – Extensive powers
  – Can compel production of documents, attendance of witnesses and take evidence on oath, with penalties for refusal
  – Can award maximum compensation of CI$20,000
  – May award costs
  – May order reinstatement with consent of employer
  – Right of appeal to Grand Court
A Mixed Bag

- Undoubtedly increases protection for individuals against unacceptable discrimination and behaviour
- Increases the practical ability to directly enforce rights
- Brings Cayman closer into line with international standards, and in doing so enhances jurisdictional reputation;
- Legislation potentially confusing and difficult to apply
- Exposes employers to potentially expensive and time consuming complaints
- Raises complex issues
- Will require significant resources to ensure a functioning Tribunal