INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK

29 September 2023

Hon. Manusha Nanayakkara
Minister of Labour and Foreign Employment
minister@labourmin.gov.lk

Mr. R.P.A. Wimalaweera,
Secretary of the Ministry of Labour
slmol@slt.lk

Re: Single Employment draft Act

Honourable Minister:

On behalf of the International Lawyers Assisting Workers (ILAW) Network, which comprises nearly 1,100 labour lawyers and scholars in over 90 countries, including in Sri Lanka, we write to express our serious concerns regarding the proposed Single Employment Law. If adopted, the law would significantly weaken labour rights and protections in the country, contrary to the government's obligations under the ILO Declaration on Fundamental Principles and Rights at Work (as amended) and relevant ILO Conventions. Moreover, the process by which the draft law has been introduced raises several concerns. This includes the very limited period of time for comment, the fact that the text is not available in Tamil and only a handful of chapters are available in English (limiting access to external legal support). Further, the government has circumvented the National Labour Advisory Council (NLAC), which was established specifically as a standing body for consultations on labour law and policy. Further, four active and representative trade unions were ejected from the NLAC just prior to the introduction of the draft law.[1]

As such, we join the international trade unions which have denounced the draft law.[2] Particularly in times of crisis, it is important that labour rights are protected, not weakened, and that trade

[1] We note that members of the NLAC filed a Representation in 2022 under Article 24 of the ILO Constitution alleging that Sri Lanka violated ILO Convention 144 and has submitted updated information to the ILO. It was deemed receivable in June 2023. See, https://ilo.org/gb/GBSessions/GB348/WCMS_885651/lang--en/index.htm. A court recently ordered the reinstatement of one union, the FTZ-GSEU, to the NLAC.

[2] See, Global Unions Statement On Attempts To Slash Labor Rights In Sri Lanka, online at, https://pop-umbrella.s3.amazonaws.com/uploads/1384b882-499d-41ff-afc8-f33b221d2d96_Global_Unions_Statement_on_Labor_Reforms_in_Sri_Lanka_082123.pdf?key=. See also IndustriALL Global Union, Sri Lanka: unions protest government's debt restructuring and labour law changes, July 25, 2023, online at https://www.industriall-union.org/sri-lanka-unions-protest-governments-debt-restructuring-

unions are partners in economic, social, and political recovery and renewal. The government of Sri Lanka has instead done exactly the opposite.

Below are just some of our concerns with the draft law:

1. Under current law, seven employees in an establishment can apply to form a trade union. Section 108(1) of the draft law, however, requires a minimum of 100 workers to apply to establish a union. In workplaces of less than 100 people, a minimum of 25 workers would be required. The government has not provided any rationale for this significant change, though its impact is clear - to make it more difficult to form new unions, and all but impossible to do so in micro and small enterprises. The proposed minimum membership requirements are in violation of Convention 87. See, e.g., Committee on Freedom of Association, Compilation of Decisions ¶ 441 ("While a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed."); See also ¶ 441 (finding a minimum membership of 30 being too high).

2. The draft law makes it easier for an employer to terminate the employment relationship. Under Section 2 of the Termination of Employment of Workmen (special provisions) Act no. 45 of 1971, a worker may not be terminated without the prior written consent of the worker or prior written approval of the labour commissioner. However, under Sections 15, 16 and 18 of the draft law, an employer can terminate an employment contract unilaterally and without compensation in response to any violation of workplace rules, an act of misconduct, harassment, and any act causing or creating an immediate danger to anyone in the workplace or public safety. There is no provision for an impartial inquiry into the employer's allegations prior to termination. These sections are in violation of Convention 158 on Employment Termination.

3. Currently, Sri Lankan labour law has no provisions governing fixed-term contracts.[3] Fixed term contracts do however exist. Section 5 of the draft law allows for the use of fixed term contracts; however, there do not appear to be any meaningful limitations on the use of such

and-labour-law-changes ("The changes proposed to labour laws by the Sri Lankan government to labour legislations significantly erode workers' rights and remove any protection they may have had under the previous laws. Moreover, by excluding independent unions from the National Labour Advisory Council (NLAC), it is clear that the government aims to weaken workers' representation and disempower them.")

[3] Judicial opinion in Sri Lanka indicates that, over time, an employee on fixed term contracts can have a reasonable expectation of continued employment unless there have been clear warnings of poor performance. Such a worker could thus sustain a claim for unjust termination.

contracts. We note that such contacts present serious challenges regarding termination of employment. Under current law, Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 does not apply to workers who have been employed by an employer for a period of less than 180 days in the continuous period of 12 months commencing from the date of employment if the termination occurred within that period of 12 months. Further, such contracts easily obscure acts of anti-union discrimination. If a worker engages in any activity to form or join a union, or to carry out activities in an existing union, an employer can simply let the contract expire and refuse to renew it. Employers can use the expiry of the contract to disguise their anti-union motive and can simply hire someone else under another fixed-term contract to continue the work.[4]

The use of fixed-term contracts also has a significantly negative impact for women workers. It is commonplace for employers to not offer or renew contracts to women who are or who have become pregnant. This facilitates sex-based employment discrimination in violation of Convention 111. Workers are further denied access to maternity protection they would have otherwise had access to had they been employed under unlimited duration contracts. The CEACR has repeatedly expressed concern regarding the maternity protection situation of women in temporary and contract employment, in light of the growth of these non-standard jobs.[5] Additionally, employers can and do exploit the significant leverage they have over workers on fixed-term contracts to engage in gender-based violence and harassment, conditioning the extension or renewal of contracts on sexual favours.[6]

4. Under Section 3 of the Shop and Office Act No. 19 of 1954 and the Wages Board Ordinance Act No. 27 of 1941, the workday shall not exceed 8 hours and the work week shall not exceed 45 hours - subject to overtime work with overtime pay. Section 31 of the draft law retains the

[4] See ILO, Giving Globalization a Human Face (Geneva 2012), p. 73; See also Committee of Experts, Convention 98, Ethiopia, 2008 (The Committee considers that all workers, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the rights afforded by the Convention and once again recalls that the only exceptions authorized by Convention are the members of the police and armed forces, and civil servants engaged in the administration of the State".); Committee of Experts, Convention 98, Belarus, 2021 (The Committee requests the Government to take, in consultation with the social partners, the necessary measures in order to adopt specific legislative provisions affording an adequate protection against cases of non-renewal of contracts for anti-union reasons.")

[5] ILO, Maternity and paternity at work: law and practice across the world (Geneva 2014), p.78.

[6] ILO, Non-standard employment around the world: Understanding challenges, shaping prospects (Geneva 2016), p. 202 ("Job insecurity can make temporary workers more vulnerable and susceptible to bullying and harassment, including sexual abuse. For example, in Japan, temporary employees were found to be at significantly higher risk of experiencing bullying; in Australia, temporary and part-time workers and those on FTCs were at significantly greater risk of being subjected to unwanted sexual advances. A large survey conducted in Quebec, Canada, found both temporary workers and part-time workers to be more at risk of sexual harassment and occupational violence than their fulltime permanent counterparts – a finding consistent with studies conducted in other countries.")

normal working day at 8 hours and the working week 45 hours. However, the proposed law allows for a compressed schedule under Section 32(1). Per a Ministerial Order, an industry or service can implement a 12-hour working day, including meal breaks, and be exempt from paying overtime. Additionally, Section 33 of the proposed law provides that employers can ask employees to work 16 hours without overtime payment in particular industries or services, with workers being allowed only a one-hour rest period. The same section also allows designated industries or businesses to operate 24-hour shifts with a payment of a 6-hour overtime allowance and two separate one-hour rest periods. It states that employers must obtain an agreement from employees to undertake these extended work periods during recruitment or later, though it is doubtful that workers will actually have a choice whether to work such shifts. These sections are in violation of Conventions 1, 30 and 47. Further, such long hours are certain to create significant occupational safety and health risks, in violation of Convention 155.

5. Section 76 of the proposed legislation eliminates existing restrictions of the night work of women (after 10 p.m.). Companies wanting to employ female workers at night can obtain written approval from the Labour Commissioner to do so for 15 days per month, following the consent of a woman worker. While the elimination of restrictions on night work is a positive step, we also note that the proposed law fails to address concerns raised by workers including ensuring safety from violence or harassment in transportation and the workplace. As such, unions see this amendment to be less about eliminating patriarchal attitudes in law and instead about the exploitation of the labour of women workers.

6. The right to strike has been even more tightly restricted. Under Section 137 of the proposed law, a secret ballot must be held to ascertain the consent of the majority of the members on the matter for which the strike is intended (in workplaces with under 1,000 members). The CFA has found that a majority of those voting, with a quorum, is appropriate, as an absolute majority may be difficult to obtain. See, e.g., Compilation of Decisions ¶ 807 ("The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike."). Workplaces with more that 1,000 members can decide to strike by a majority vote of the members of the general assembly. While an improvement, this should still be a majority of those voting, pursuant to the bylaws of the union.

7. Section 147(1)(b) of the labour law reform states that the employer and registrar must be notified in writing 28 days before the intended date of the strike. If these conditions are not

met, the proposed strike is illegal.[7] A prior notice of nearly a month is manifestly unreasonable. See, e.g., Compilation of Decisions ¶ 800 (Prior notice of 48 hours is reasonable.) Under current law, the Trade Union Ordinance of No.14 of 1935, a union is required to provide 21 days' notice, already an unreasonable notice period.

8. Section 142 of the proposed law empowers the Labour Minister to secure a court injunction to suspend a strike "in the public interest or in an essential service." Under Section 146, the Minister can declare, apparently unilaterally, any industry or service as essential with more restrictions placed on industrial action in these industries or services. Under Section 149, if the Minister "is satisfied" that the strike "is not in the public interest or will jeopardize or is likely to jeopardize the life or livelihood of the nation, economy or public safety," the minister can refer the industrial dispute to the Industrial Court and end the strike. There are several concerns here. First, the Minister appears to have total discretion to determine what is an essential service. According to the ILO, essential services are only those for which a strike would create "a clear and imminent threat to the life, personal safety or health of the whole or part of the population." See, e.g., Compilation of Decisions ¶ 836. Second, the proposed law permits the injunction of a strike on the vague basis of the "public interest" or the possibility the strike will jeopardize the life or livelihood of the nation, economy, or public safety. Again, this definition is much broader than the strict ILO definition. Finally, such a determination should be made by an independent body which has the confidence of all parties, not the Minister. See, e.g., Compilation of Decisions ¶ 825.

9. The proposed law would completely abolish the Wages Board Ordinance which provides for the drafting of employment conditions for each industrial sector and the specific employment sectors in a democratic manner, through tripartite deliberation and consensus. Instead, the Minister of Labour would have full discretion. With the Wages Board out of the picture, employers will have a free hand to decide on wages, especially in non-union workplaces (which are the majority of workplaces in Sri Lanka).

For these reasons, we urge the government to withdraw these proposed amendments. Should the Employment law need amendment, it should be done in consultation with representative trade unions and consistent with ILO conventions and recommendations. We would urge the government to obtain the technical advice of the ILO in formulating amendments to the labour laws of the country.

[7] We note that the notice period appears only in the Sinhala version and is missing in the English translation.

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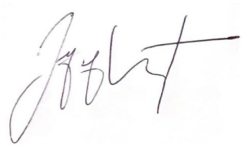
Sincerely,



Jeffrey Vogt
Chair, ILAW Network

cc:

Mr. Gilbert Houngbo,
Director General
International Labour Organisation