International
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INTERNATIONAL LABOUR OFFICE

MEMORANDUM OF TECHNICAL COMMENTS ON THE DRAFT LABOUR LAW OF MONGOLIA

November 2014

Contents

Introductory remarks

National background and context:

1. The Government of Mongolia, by a letter dated 1 August 2014 and signed by State Secretary of Labour via ILO Country Office for China and Mongolia (CO-Beijing), submitted the draft Labour Law (hereafter "the Draft") to the International Labour Office (hereafter "Office") for official comments.

2. The Labour Law currently in force was adopted in 1999 and revised in 2003 following limited consultations with EASMAT (today's ILO Regional Office for Asia and the Pacific (ROAP) - Decent Work Team (DWT), Bangkok). The Ministry of Social Welfare and Labour initiated a fresh revision process in July 2010 based on further consultations with DWT Bangkok. In May 2011, DWT Bangkok with the support of the Global Jobs Pact programme commissioned an international consultant to undertake a wider range of consultations and prepared a technical background paper that was validated at a workshop in November 2011. In November 2011, DWT Bangkok conducted a training event to raise awareness among constituents on key concepts of modern non-discrimination policy. In May 2012, ILO CO-Beijing and DWT Bangkok participated again in tripartite consultations focusing on key legal concepts related to the employment relationship, employment contracts, labour dispute settlement and labour relations. After the elections in the summer of 2012, the newly formed Ministry of Labour – split off from the former Ministry of Social Welfare and Labour – formed a new tripartite Working Group on the Revision of the Labour Law under the chairmanship of Vice-Minister Batkhuyag. In January 2013, DWT Bangkok participated in a meeting of the Working Group, which discussed the basic framework of the Labour Law revision process.

3. On 5 March 2013, tripartite constituents signed a tripartite MOU to support the overall process of revising the Labour Law. The MOU resolved three issues. Firstly, the Labour Law would be extensively amended, but not completely rewritten. Secondly, a Law on Employers' Organizations would be developed to balance the Law on Trade Unions. Thirdly, the MOU committed the social partners and Government to contribute to the development of a single draft of the revised Labour Law (as opposed to individual constituents promoting competing drafts in the political arena). The MOU embodied a significant commitment among the tripartite partners to work collaboratively and cooperatively on revising and finalizing the new Labour Law. Reflecting this commitment, the Working Group, led by the Ministry of Labour, has drafted significant revisions to the Mongolian Labour Law.

4. The Working Group is preparing to have the draft revised Labour Law submitted for discussion at the National Assembly's fall session of 2014. This timeframe was confirmed during a meeting with the Vice-Minister for Labour in the second week of CO-Beijing's mission in September 2014. Once the Ministry of Labour has a complete and consolidated draft containing all proposed revisions and strong justifications for the reforms, it will be endorsed by the National Tripartite Committee on Labour and Social Consensus, sent to the Ministry of Justice for approval, and endorsed by the Government cabinet for submission to the National Assembly. A work plan to support the finalization of the Labour Law over the coming months has been drafted by the Working Group. The Working Group envisages further support from the ILO to assist with this process.

ILO technical assistance to this labour law reform:

5. As described above, the Office is engaged in this on-going labour law reform through the regular provision of specialist advice on labour standards, labour law and industrial relations. A series of missions have taken place by the ILO during 2013 (a two-week mission in April-May 2013 and a one-week mission in November 2013).
6. Missions to support the labour law reform process have taken place throughout 2014 to specifically provide technical assistance to the Working Group in revising and finalizing the Labour Law. A final tripartite consultative forum is envisaged in November 2014, for which the ILO is supplying a labour law specialist to provide technical assistance.
7. The ILO Bureau for Employers' Activities and Bureau for Workers' Activities have throughout the consultation process provided technical advice on selected issues to the Mongolian Employers' Federation (MONEF) and the Confederation of Mongolian Trade Unions (CMTU) respectively.

Preparation of these comments:

8. The International Labour Office in Geneva, in collaboration with Labour Law and Labour Standards or Labour Relations Specialists of the ILO DWT Bangkok and of the ILO CO-Beijing have examined the draft Labour Law, in light of both international labour standards and comparative labour law and practice. Mongolia has ratified 16 international labour Conventions (including all 8 fundamental Conventions), of which 15 are in force[1].
9. The Government is invited to note that:

   9.1. Absence of comments on any particular provision should not be taken as indicating a particular view as to compliance with international labour standards.

   9.2. These comments are provided without prejudice to any comments that may be made by the bodies responsible for supervising compliance with international labour standards.

   9.3. Some of the comments provided herein, having been made on the basis of the English translation provided to the Office, may not be relevant in relation to the original Mongolian version.

National Tripartite Consultative process:

10. Labour legislation provides the framework for fair and efficient industrial and employment relations. For that reason, the Office's technical assistance always seeks to increase the involvement of its primary beneficiaries – the social partners – throughout the process of labour law reforms. This reflects the centrality of the principles of social dialogue and tripartism for the ILO. It is also in keeping with the spirit of the *Tripartite Consultation (International Labour Conventions) Convention, 1976* (No. 144) (Convention No. 144), ratified by Mongolia in 1998. The Office therefore encourages the Government to share the present comments with representative workers' and employers' organizations.

[1] http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103142

Policy on confidentiality of this Technical Memorandum:

11. The Office will treat these comments as confidential for a period of 6 months from the date of their issuance. This policy is meant to respect and facilitate the Ministry of Labour's central role in developing legislation and managing a national process of tripartite consultation. The Government may decide and is encouraged to share the comments developed in this Technical Memorandum with the social partners at any time.

General comments

12. The Office welcomes this revision of the Labour Law, which aims at adjusting the legal framework to evolving labour market realities in Mongolia. The transformation of industrial and employment relations within enterprises does naturally challenge the enforceability of the current legislation and this calls for in-depth reform. The Office encourages the Government to continue the efforts it has been making to this end. A number of key areas have emerged in the Draft and shown progress as a result of technical assistance by the Office particularly during 2013 and 2014. A matrix has been produced reflecting the tripartite drafting discussions as well as the extensive technical advice provided by the Office field specialists, which could complement this technical memorandum. The Office commends the tripartite discussions, and generally endorses the technical advice already provided. It would none the less like to draw particular attention to the comments that this technical memorandum puts forward. Suggestions of additional changes to the Draft are provided (by Chapter) under the section: "specific comments".

Impact of technical assistance on the revision of draft Labour Law:

13. The Office acknowledges that a number of key areas have emerged in the Draft as a result of technical assistance during 2013 and 2014, including the following:

- Separate dispute resolution processes for interest disputes and rights disputes;
- Inclusion of procedures that better reflect international principles and standards to promote collective bargaining, bipartite agreement, and alternative disputes resolution;
- Establishment and provisions for the responsibilities of bipartite cooperation committees in enterprises with more than 50 employees;
- Defining the 'employment relationship' and prioritizing the 'employment relationship' in fact over the existence of a 'contract' for the purpose of implementing the revised Labour Law;
- Inclusion of provisions to regulate labour service providers and triangular employment relationships including: limitations for using labour supply companies; provision of minimum operating requirements; contracting between parties; and delineation of principal employer and labour service supply company responsibilities to workers;
- Incorporating international principles on collective bargaining, and unfair labour practices;
- Improved reflection of international principles and processes related to the right to strike;
- Inclusion of provisions to regulate fly-in-fly-out work in remote areas which reflect international standards through averaging of working hours over extended periods of time and guarantees for minimum rest time;

- Inclusion of provisions for the regulation of domestic workers, including migrant domestic workers;
- Improved regulations on wages, payment of wages, authorized deductions and forms of wages;
- Inclusion of provisions for the regulation of homeworkers;
- Inclusion of provisions recognising the specific characteristics of employment relationships in herding;
- Inclusion of provisions for part-time and fixed-term contracts, including limitations on the use of fixed-term contracts and protections for workers on recurrent fixed-term contracts;
- Defining and prohibiting harassment and sexual harassment and responsibilities of employers to prevent and address instances of sexual harassment in the workplace;
- Inclusion of additional grounds for discrimination that better reflect the ILO *Discrimination (Employment and Occupation) Convention, 1958* (No. 111) (Convention No. 111) definition of discrimination and exceptions;
- Inclusion of a positive duty on employers to provide for reasonable accommodation;
- Improved protection against discrimination of Mongolian workers with HIV and AIDS;
- Improved maternity protections;
- Incorporating the principle of equal remuneration for work of equal value;
- Better reflection of principles and international standards on the employment of children;
- Inclusion of provisions for persons with disabilities to access vocational training and explicit recognition of an individual right of a person with a disability to preferential treatment in decision-making processes during recruitment; and
- Inclusion of explicit provisions regulating the roles and responsibilities of labour inspectors (and eliminating the role of trade unions and NGOs in conducting labour inspections).

Ongoing challenges:

14. The Office is aware of the persistent challenges of ***translation*** in reviewing the Draft**.** There are a number of terms and concepts that do not appear to translate well into Mongolian. This resulted in a number of concepts/terms being incorporated through lengthy descriptions or explanations in the Draft. The reluctance or inability of the drafting group to directly translate ILO concepts and definitions is also a concern, as the core meaning of concepts can become lost in translation/adaptation. Similarly, translating Mongolian phrases and provisions into English does not appear to carry the same meaning as understood by constituents when reading the Mongolian version. The often convoluted translations led to lengthy discussions with constituents. **Future translators should take special care to ensure the precise meaning of provisions are adequately captured and appropriately reflected in translation.** The significant number of Chinese migrant workers employed in Mongolia warrants a further translation of the revised Labour Law into Mandarin, potentially adding further complications to the translation process.

15. The Office acknowledges there are still a number of issues that require further consideration by the Government with technical assistance from the Office. These include the following:

- Child labour and the regulation of involvement of children in artistic and cultural performances, including horse-racing;
- Remuneration of migrant workers in comparison to Mongolian workers doing work of the same value;

- Employment of foreigners by foreign-owned companies under another State's labour regulations; and preference of foreign-owned companies to hire foreign nationals;
- Methods of implementation of the principle of equal remuneration for work of equal value;
- Role of bipartite cooperation forums in larger companies vis-à-vis the role of trade unions;
- Requirement, in the law, for workers to pay trade union dues to unions if they wish to benefit from a collective agreement in an enterprise;
- Proposal to permit partial in-kind payment for wages of domestic workers and herders; and
- Uncertainty about the potential for multiple unions at the enterprise or at the sectoral level, competing for collective bargaining rights.

Comments made by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)

16. The Office also acknowledges that the reform aims at further aligning national labour legislation with international labour standards. The Office welcomes the fact that the draft Labour Law aims at addressing some concerns raised by the CEACR in its comments The Government's attention has been brought to the most recent Observations and Direct Requests (from 2013) from the CEACR as relevant to the labour law reform process, in particular during the technical assistance mission in April-May 2014 concerning the following ILO Conventions: the *Equal Remuneration Convention, 1951* (No. 100) (Convention No. 100), the *Maternity Protection Convention (Revised), 1952* (No. 103) (Convention No. 103), Convention No. 111, the *Minimum (Underground Work) Convention, 1965* (No. 123) (Convention No. 123), and the *Minimum Age Convention, 1973* (No. 138) (Convention No. 138).

17. It has not been possible to fully address all the comments of the CEACR through changes to the Labour Law. These and any other outstanding comments have been addressed below presenting the Office comments on specific provisions of the Draft.

Key revisions to be made to other laws, policies and institutions

18. As a result of labour law revisions, a number of other laws or policies will need to be amended to reflect changes in the Draft, including but not limited to the following:

Civil Code
- Amend provisions on employment contracts
- Prioritize payments to workers in the event of liquidation/bankruptcy of enterprises

Criminal Code and Law on Administratively Enforced Labour
- Harmonize definition of forced labour with definition in draft Labour Law to better reflect the ILO *Forced Labour Convention, 1930* (No. 29) (Convention No. 29) definition.

Employment Promotion Law
- Better regulate private recruitment agencies
- Protect workers, particularly migrant workers
- Revise mandate to include training and support to employers to employ workers with disabilities
- Include provision of reasonable accommodation to workers with disability

Law on Labour Safety and Hygiene

- Consistency between provisions on safety and hygiene (health) in this law and the Draft should be ensured

List of Jobs and Occupations Prohibited for Minors to be Employed (Enclosure to Order No. 107 of the Social Welfare and Labour Minister, 26 September 2008)

- Review and revise

Reconciliation and Mediation Law

- Reflect new role of mediators in interest disputes

State Inspection Law

- Reform institutional structure of the labour inspection (to remove trade union inspectors)

Social Insurance Law

- Retirement ages need to be amended to be the same for men and women
- Extend compensation for women on maternity leave to informal economy workers and provide full compensation (100% of salary) during maternity leave
- Include provision for paid paternity leave

Law on Vocational Training and Education[2]

- Change vocational training provisions to include children under 18 in apprenticeships
- Regulate apprenticeships to ensure proper training, skills development and certification

Law on Child Protection

- Consistency with the provisions of this present Draft relating to the employment of minors should be ensured, in any provisions (existing or envisaged) on children's work, including when carried out without employment relationships.

Suggestions for future guidance and other materials to support dissemination and understanding of the revised Labour Law

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[2] Although this law is not within the direct scope of the present technical memorandum, if this is not already provided for, there should also be an amendment to provide for *the inclusion of trainees with disabilities in the general vocational education and training programmes*, in light of Mongolia's commitments under ***the Convention on the Rights of Persons with Disabilities***, and also in light of the comment made in para 28 below (difficulties faced by persons with disabilities in accessing education and training, affecting their employability).

The report of Mongolia to the Committee on the Rights of Persons with Disabilities (para 54 (b) mentions the need to amend this law, as well as the Law on Education with provisions aimed to promote learning environment for and social participation of students with disabilities. The full report by the Government to the UN is available online at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMNG%2f1&Lang=en

19. It is highly recommended that a number of implementing regulations, guidelines, and/or codes of practices be formulated following the adoption of the Draft to support dissemination of the Labour Law and its implementation and enforcement. Though not exhaustive, the instruments mentioned in Annex 1 should be considered.

Fundamental principles and other important issues for consideration:

Freedom of Association and the Right to Collective Bargaining

20. Mongolia has ratified the *Freedom of Association and Protection of the Right to Organize Convention, 1948* (No. 87) (Convention No. 87) and the *Right to Organize and Collective Bargaining* Convention (No. 98) (Convention No. 98). In 2010, the CEACR requested the Government indicate whether trade unions could use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends and have recourse to sympathy strikes, and whether workers could declare a strike for an indeterminate period of time. The Draft addresses when and why strike action may be undertaken (**Article 102**).

21. **Role of the State in collective bargaining processes** – There is a need to clarify the principles of non-interference by the State in collective bargaining processes, unless the State is the employer. The Office acknowledges that this is still a relatively new concept in Mongolia given the past involvement of the State in sectoral level bargaining.

22. The role of collective bargaining as a **market-based mechanism** requires significant promotion efforts to ensure clear understanding by the national constituents. The Office draws the Government's and social partners' attention once more to the principle that the Government has no role in ultimately determining wages and other working conditions above legal minimum standards. The exception to this is in situations where the Government *is* the employer. Government influence should not be relied upon in sectoral level collective bargaining where determinations are achieved by collective agreements in which the government is *not* a signatory. The Office recalls it has previously provided language on the "autonomy of the bargaining partners" to the Government of Mongolia.

23. **Bargaining fees for union non-members** – There is concern among constituents about provisions requiring workers who do not belong to a union paying union dues in order to benefit from enterprise level collective bargaining agreements. Further capacity building is recommended to educate stakeholders on the valid role of bargaining fees in collective bargaining.

24. **Interest disputes** – The Office is aware that the drafters of the revised Labour Law have received technical assistance to better understand why processes for *interest disputes* should differ from dispute resolution processes for *rights disputes*. The Office is pleased to note that the Draft moves away from mandatory arbitration requirements and requiring mediators in the first instance to be decision makers. The draft Labour Law reflects the underlying principles of promotion of collective bargaining and mutual agreement. It is important to improve understanding of interest disputes and rights disputes through awareness raising activities, beyond the current labour law review.

25. **Lock outs and picketing** – Definitions provided in the Draft indicate a very weak understanding of lock outs and picketing and demonstrate a lack of awareness of safeguards and protections necessary during industrial action. Again, further capacity building is recommended to educate stakeholders on industrial relations generally, and more specifically interest disputes and the underlying protection needs of workers and employers in these situations.

Equality

26. From the **equality** point of view, the Office commends that the Draft provides for a section prohibiting both *quid pro quo* and hostile environment sexual harassment, and establishes the obligation on the employer to take preventive measures and raise awareness of existing measures to prevent and to remedy in case of sexual harassment. Measures shifting the burden of proof are also welcomed. The Draft contains several provisions concerning workers with family responsibilities, which is also commended.

27. **Disability** - There are some provisions in the Draft that promote employment of persons with disabilities, provisions for non-discrimination, quotas and a tax imposed on employers who fail to meet quota requirements. However, the tax for failing to meet quota requirements for hiring persons with disabilities only amounts to the equivalent of the minimum wage for one employee. The Office is of the view that this penalty is not sufficiently punitive to prompt employers to make sincere efforts to hire workers with disabilities. There are currently no incentives for employers who employ workers with disabilities. The funds paid by employers who do not fulfil their obligations under the quota scheme could and should be used to support employers who *do* fulfil these obligations – for example through grants for workplace adaptation, wage subsidies, or to cover the cost of reasonable accommodation. Incentives could also be provided in the form of tax and social insurance rebates, separately from what comes from the quota/levy fund. The Office is advised that it is difficult for employers to comply with quotas due to the many barriers faced by persons with disabilities in accessing education and training effecting their employability, and social barriers including perceptions that persons with disabilities are largely not employable. Capacity building and awareness raising about the working capacity of persons with disabilities is necessary to make the quota system and provisions of the Draft promoting the employment of persons with disabilities meaningful. The principle of reasonable accommodation has been discussed during the review process but not explicitly required in the Draft. Concrete suggestions are made below specifically relating to the definitions of terms in Article 4.1 and in Article 95 below. On another note, there is no protection of persons who develop a disability in the course of their employment unless the disability is the result of an industrial accident/cause. This should also be addressed, and provisions made for access to vocational rehabilitation as well as medical rehabilitation.

28. **Equal remuneration for work of equal value** – The Office is aware that this concept – which is one of the most fundamental principles at work – is still insufficiently understood and constituents fear the impact of application of this principle. There may also be concerns about developing measures for practical implementation of the provision. It is worth recalling that the principle of equal pay between women and men for work of equal value is fundamental and should be fully reflected in the Draft. At the same time, objective job evaluation, which is a key method for determining and comparing the value of jobs that are different, can be applied

progressively to existing wage structures as well as to the negotiation of new wage structures. In other words, it is not required that the revised Labour Law imposes a blanket obligation on all employers to operate complex job evaluation methodologies as long as workers and their representatives in a wage negotiation or dispute settlement process have the legal basis to invoke such evaluation to support their position. It is also necessary to enhance understanding beyond the drafting subcommittee of the difference between '*remuneration'* and '*basic salary'*. The Office recommends significant guidance and capacity building on wage evaluations and pay equity for stakeholders.

Forced labour and child labour

29. This reform of the Labour Law might also be an opportunity to consider additional improvements of the legal framework, for instance on **forced labour** and the **worst forms of child labour**, in particular ensuring coherence with the Criminal Code and other related legislation. Since labour laws are typically analyzed in conjunction with criminal laws in the context of forced labour, it is crucial to ensure cohesion between both laws. This is an area in which good collaboration with the Ministry of Justice is crucially important.

30. The Government's attention is drawn to **Article 4.1.11** of the Draft, which defines forced labour but is still quite confusing or misleading. For example, according to the international standards, forced labour may occur even in cases of remunerated work or work in acceptable working conditions. The Office recommends modifying the forced labour definition in line with Convention No. 29, Article 2. The broad definition provided for in Convention No. 29 aims to ensure flexibility in its interpretation according to the national conditions of implementing States. The Office invites the Government to consider re-wording this provision in order to ensure that forced labour is not limited to work without pay or work in disadvantageous conditions. Instead, forced labour should refer to "any work or service exacted under the menace of a penalty or by use of force or coercion, and for which the person has not offered him/herself voluntarily." The Government's explanation is that the definition used in the Draft is exactly the same as the definition of forced labour given in the newly revised Criminal Code. In this case, it is recommendable to revise the definition of "forced labour" in both the revised Labour Law and Criminal Code to ensure coherence.

31. Another concern is that the term "*forced labour*" is used in the 2002 version of the Criminal Code as a punishment to be imposed for offences, alongside fines and imprisonment. Thus, the definition of "forced labour" contained in Article 50 of the Criminal Code does not appear conducive to the efforts to *abolish forced or compulsory labour* (i.e. involuntary work exacted under menace of a penalty) in a wider sense, especially in the spirit of the newly adopted standards on forced labour. Having two parallel definitions of "forced labour" (one in the Labour Law and the other in the Criminal Code) is a source of confusion and needs to be addressed. If it has not already been done, there should be a stipulation that the imposition of "forced labour" as a punishment in terms of the Criminal Code is ***an exception to the prohibition*** of "forced labour" in accordance with both the criminal and the labour laws, because the ILO Convention No.29 indeed stipulates that "the term forced or compulsory labour shall not include" -- "(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations".

32. **Article 124** of the Draft sets out penalties for violation of law and legislation. **Article 124.1.3** sets monetary fines for forced labour as an "administrative" penalty (as part of Article 124.1). In accordance with Convention No. 29, Article 25, it is imperative to ensure that the "illegal exaction of forced or compulsory labour shall be punishable as a penal offence", and that the penalties imposed by law are really adequate and are strictly enforced. If the Draft does not address this issue, the Criminal Code should impose penal sanctions to any perpetrator of forced labour. The Government is invited to verify and review the terminology in Article 124, since this and some other provisions punish "an official" in English – It is not clear whether this is a translation issue or a problem of substance. Sanction on the violation of labour law provisions should be applicable generally to employer(s) and someone acting on their behalf. However, in some forced labour cases, there may be an intermediary that brings the worker into the situation through deception or other prohibited means, and penalties should be imposed on them too.

33. As to the ***worst forms of child labour***, those forms other than hazardous work (Convention No. 182, Articles 3(d) and 4) appear to be covered by the current Criminal Code. Any necessary revision of related provisions of the Criminal Code should take into account the comments made by the CEACR. For instance, the CEACR noted in its comments on Mongolia's implementation of Convention No. 182 that the term "*minor*" might also be defined in the Criminal Code as covering all "girls and boys below the age of 18 years" to ensure clarity. Since forced labour by children is also a worst form of child labour the above mentioned concern over the definition of forced labour is also relevant for children.

Other issues that are particularly useful to highlight

34. **Labour inspectorate** – On more than one occasion, constituents raised their concerns about the capacity of the labour inspectors to perform their functions. The Government has been conscious that labour inspectors are not adequately equipped to interpret, apply, and enforce the revised Labour Law. It is worth highlighting the need for capacity building of the labour inspectorate to meet the challenge of implementing the Labour Law once adopted.

35. **Triangular employment relationships** –Significant time has been dedicated to explaining and discussing the principles and necessary conditions and safeguards that should be included in the Draft to regulate the use of labour supply companies during the technical assistance missions of 2013 and 2014 supporting the Labour Law reform process. The Office understands it is an ongoing challenge to ensure that operation of triangular employment relationships is well understood by the national constituents.

36. **Rights disputes** – Provisions on rights disputes were underdeveloped at the time of the mission in spring 2014. Advice from international labour specialists on various processes and requirements for the resolution of rights disputes in a fair, expeditious, transparent and cost effective manner were provided to the Working Group for further consideration. Please see below for the specific comments on dispute resolution mechanisms for parties to rights disputes that are faster and possibly less arbitrational than court.

37. **Occupational Safety and Health (OSH)** – The Office recalls the principle that OSH is primarily dealt with through preventive measures aimed at hazard and risk control, and that, if such control fails, a worker must be allowed to refuse unsafe work. To a certain extent, hazard control requires employers to be innovative and do things in new, safer, and healthier ways. Workers should never be forced or induced into accepting unsafe work conditions, and it is

unacceptable to incentivize workers with extra benefits to accept unsafe work conditions. The definition of "a national preventative safety and health culture" in ILO *Promotional Framework for Occupational Safety and Health Convention, 2006* (No. 187) (Convention No. 187) includes that the principle of prevention is accorded the highest priority.

38. **Tripartism** – The Office commends the Draft for establishing the mandate of the National Tripartite Committee on Labour and Social Consensus as an apex tripartite body for regular consultation on national labour policy. The Office recalls the importance of ensuring members of the National Tripartite Committee on Labour and Social Consensus equally represent Government, workers', and employers' representatives. The Office encourages the Government to ensure the work of the National Tripartite Committee on Labour and Social Consensus is appropriately allocated and adequately resourced."

39. The Office is aware that there are other practical aspects related to monitoring the revised Labour Law that need to be addressed, such as the limited research and data collection capabilities within the Ministry, including the capacity of the Ministry's research unit to design and implement studies to monitor labour relations and working and OHS conditions of workers and at workplaces.

Scope of application

40. **Article 2.1** provides that this Labour Law will regulate "*employment relations*". **Article 4.1.1** defines "employment relations" as those relations that arise upon mutual agreement between an employer and an employee. The fundamental principles and rights at work, such as freedom of association, equal opportunity and treatment, the abolition of child labour and of forced labour require the coverage of all workers, not limited to those who work under the employer-employee relationship. For instance, the CEACR requested in its comments on Mongolia's application of Convention No. 138 that the Government amend its legislation to ensure coverage of work performed by children outside the framework of a labour contract and self-employment. While the Office acknowledges that the scope of application of the Labour Law is premised on the employment relationship, it nevertheless draws the Government's attention to the requirement under the international standards that children should not be admitted to work outside an employment relationship either, in contravention of the rules regarding minimum working age and other provisions. Convention No. 100 and Convention No. 111 also do not exclude any category of worker from their coverage. Therefore, if it is not practical to extend the scope of application of the Labour Law in its entirety to all workers, these fundamental principles and protections should be ensured also for independent (self-employed, or own-account) workers, either by stipulating that the relevant provisions are applicable beyond the employment relationship, or in the framework of other laws and regulations.

Drafting techniques

41. In general, the Draft is well structured. It is important to continue making efforts so that provisions are short and clear, which will facilitate their application, enforcement and interpretation.

Use of gender sensitive vocabulary:

42. The ILO encourages member States to follow contemporary legislative drafting techniques, which emphasize the desirability of using gender sensitive vocabulary in statutory language. The Office welcomes any effort by the Government to this end. This is important from a policy perspective to use gender-sensitive vocabulary and language in legislation to set an example and to encourage the rejection of discriminatory language and behaviour. It is also important to use gender-neutral language to ensure equality in access to and application of the law. The Office encourages the drafters to assess the Mongolian version of the text from that perspective.

Specific comments

Chapter 1 General provisions

Definition of terms

43. In **Article 4.1**, it would be desirable to define the term "*minor*" as covering all "girls and boys below the age of 18 years" (e.g. **Article 94.2** uses the term without specifying the age). **Article 4.1** should also contain definition of "*person with a disability/persons with disabilities*" based on the human rights approach of the Convention on the Rights of Persons with Disabilities (CRPD)[3] where persons with disabilities are recognized as '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'. "*Reasonable accommodation*"[4] should also be defined here; adapting the CRPD definition to the labour law context, it could be defined as "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 the right to work." There should also be the addition of a corresponding provision requiring the employer to ensure reasonable accommodation in **Article 95**.
44. **Article 4.1.14** of the draft Labour Law defines "part-time work" as shorter hours and days than is set by internal labour regulations. The "internal labour regulations" do not appear to be defined in this context. As this definition of part-time work will determine its usage in the rest of the Draft, it is important to be as specific as possible. Consideration should be given to Article 1 of the ILO *Part-Time Work Convention, 1994* (No. 175) (Convention No. 175), which states that part-time work means employed persons whose normal hours of work are less than those of comparable full-time workers. Article 1 of Convention No. 175 further stipulates that a comparable full time worker is defined as having the same type of employment relationship, is engaged in the same or similar type of work or occupation, and if there is no comparable full-time worker in the establishment then a comparable worker in the same enterprise or branch of activity. Providing greater detail in the definition should help to clarify any other related provisions on part-time work in the Draft.

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[3] Mongolia ratified CRPD on 13 May 2009 (by accession). For more information on CRPD:
http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx
In particular for the examination of Mongolia's report, please see:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=937&Lang=en

[4] Article 2 of the CRPD gives the definition of the term.

Prohibition of discrimination

45. **Article 6.1** prohibits direct and indirect discrimination. However, from the English version, the negative effect of the measure as a condition to be considered discriminatory is not clear. The Office draws the Government's attention to the fact that the most widespread and most pernicious forms of workplace discrimination are indirect. It is therefore suggested to follow the definition of discrimination as provided for in Article 1(1)(a) of Convention No. 111 and replace "that do not affect the employment" with "*which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*".

46. In addition, **Article 6.1** does not include "colour" as a ground of discrimination and refers to "opinion". In order to ensure that all grounds provided for in Convention No. 111 are adequately covered, it is suggested to add the ground of "colour", as well as to include the word "political" before the word "opinion" or to add the specific ground of "political opinion", after "opinion". Please note that *denial of reasonable accommodation of persons with disability* is also a form of discrimination. **Article 124.1** on penalties to be imposed for violation of law and legislation should be adapted accordingly.

Definition of discrimination:

47. **Article 6.3** defines discrimination as an "evident" difference, privilege or discrimination based on one or several grounds. The term "evident" is too restrictive and could lead to the exclusion from the protection of many cases of discrimination that are covered by Convention No. 111. Moreover, the distinction between direct and indirect discrimination in **Article 6.3** is not clear. In 2012, the CEACR referred in its General Survey on Fundamental Conventions to indirect discrimination as apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex, religion or disability and is not related to the inherent requirements of the job. As highlighted by the CEACR, intention should not be an element of the definition of discrimination[5]. It is suggested to replace the words "An evident" with "A", and to replace the words "intentional or unintentional" with "neutral."

Reversal of the burden of proof for discrimination cases:

48. **Article 6** prohibits discrimination at work and **Article 6.5** adds that "an employer has a duty to prove during the review process that no discrimination took place, if a worker has filed a complaint to a relevant authority that his/her rights… have been violated".

49. The Office welcomes the initiative to introduce in the Draft the reversal of the burden of proof in discrimination cases. In its review of international labour standards application, the CEACR has highlighted on several occasions that with respect to acts of direct or indirect discrimination, one of the main difficulties results from placing on workers the burden of proving that the act in question occurred as a result of discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin, union affiliation or activities.[6]

[5] ILO. CEACR General Survey on Fundamental Conventions, 2012, para. 745
[6] ILO. CEACR General Survey on Equality in Employment and Occupation, 1996, para. 230-231

50. Based on its comparative experience, the Office suggests redrafting **Article 6.5** to shift the burden of the proof to the employer, ***once the complainant has produced plausible or prima facie evidence of discrimination.*** Such requirement exists in laws of many national labour laws (e.g. European Union Directives).

Inherent requirements of the job

51. **Article 6.4** refers to "inseparable specifics of the given work place". Convention No. 111 refers to the inherent requirements of the job and not to those of the work place where different jobs can be performed. Article 1(2) of Convention No. 111 refers to "a particular job" as a definable job, function or task.[7] It is suggested to replace the words "work places" with the word "job".

52. **Article 28** refers to "Employment contract to be established with individual of rare talent, high performance, and rare profession". Following the considerations put forward in the previous paragraph, and in order to avoid undue discrimination it is suggested to redraft **Article 28** and **Article 28.1** in order to emphasize the specific characteristics of the job and not the characteristics of the person. The provisions could read as follows.

> *Article 28. Employment contract related to a job or a post requiring an exceptional or rare talent, high performance or rare profession.*
>
> *Article 28.1 an employer may establish an employment contract related to a job or a post requiring an exceptional or rare talent, high performance or a rare profession, with special conditions.*

53. It is suggested to review all the other articles under **Article 28.2 (28.2.1, 27.2.2, 28.2.3, 28.2.4, 28.2.5)** as these do not appear to be in connection with the subject.

    Article 48 should be modified in accordance with the new **Article 28** and **Article 28.1**.

HIV testing and HIV/AIDS related discrimination

54. Among the enumerated basis for discrimination in **Article 6.3**, the reference to "HIV/AIDS" should be broadened to include "*real or perceived status of HIV/AIDS*". Similarly, in **Article 6.8** (prohibiting the refusal of employment or the termination of employment due to HIV/AIDS status), it is advisable to include perceived HIV status, by adding words so as to read "*an employee who acquired, got diagnosed with HIV/AIDS or perceived to be in such status*". The Government is invited to refer to Paragraphs 9 to 11 of the ILO *Recommendation Concerning HIV and AIDS and the World of Work, 2010* (No. 200) (Recommendation No. 200) in this regard. Furthermore, the Office draws the Government's attention also to Paragraph 13 of Recommendation No. 200, which states: "Persons with HIV-related illness should not be denied the possibility of continuing to carry out their work, *with reasonable accommodation if necessary*, for as long as they are medically fit to do so."

55. The Office welcomes the prohibition under **Article 6.6** precluding employers from requiring an employee to undergo HIV testing, among other things. **Article 6.8** prohibits denial of employment or termination of an employee on the basis of HIV status, while **Article 6.9** prohibits employers from requiring the disclosure of information in this regard. It is important to extend the scope of these provisions to also cover "*those persons who are in search of*

[7] ILO. CEACR General Survey on Fundamental Conventions, 2012, para. 827-831

employment, including job applicants and migrant workers who are entering Mongolia", so as not to limit the protection to "employees" who are already in an employment relationship. **Article 124.1** on penalties should be adapted so as to explicitly impose sanctions not only on discrimination as such, but also on employers who impose HIV/AIDS testing or who disclose the acquired information in violation of these provisions (of **Articles 6.6, 6.8 and 6.9**).

56. The Office is informed that Ministers for Labour and Health issued a Joint Order requiring all migrant workers entering Mongolia to undergo a compulsory medical test, which includes an HIV test. The Office draws the Government's attention to the relevant paragraphs[8] of Recommendation No. 200, and also to relevant jurisprudence of the European Court of Human Rights[9]. If necessary, other laws regarding HIV and AIDS, orders or regulations contrary to these principles should be amended and be brought into line with these Draft provisions and with international norms.

Sexual harassment

57. **Article 7.4** provides:

> "Sexual harassment at workplace is considered to be depicting to an employee unwanted conduct of sexual nature verbal, physical or non-verbal forms
>
> 7.4.2 that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
>
> (b) that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to his/her well-being, but has no direct link to her/his employment."

58. In this respect, the reference to both *quid pro quo* and hostile environment sexual harassment are most welcome. However, in order to ensure that this protection is not undermined by undue limitations, it is suggested to delete the phrase "on reasonable grounds" from **Article 7.4.2** and from **paragraph (b)**. Besides, taking into account that these provisions refer to sexual harassment in the workplace, it is suggested to replace the phrase "but has no direct link to

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[8] (Recommendation No.200, excerpt): "Testing, privacy and confidentiality

> 24. Testing must be genuinely voluntary and free of any coercion and testing programmes must respect international guidelines on confidentiality, counselling and consent.
> 25. HIV testing or other forms of screening for HIV should not be required of workers, including migrant workers, jobseekers and job applicants.
> 26. The results of HIV testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement.
> 27. Workers, including migrant workers, jobseekers and job applicants, should not be required by countries of origin, of transit or of destination to disclose HIV related information about themselves or others. Access to such information should be governed by rules of confidentiality consistent with the ILO code of practice on the protection of workers personal data, 1997, and other relevant international data protection standards.
> 28. Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status.
> 29. Members should have in place easily accessible dispute resolution procedures which ensure redress for workers if their rights set out above are violated."

[9] The European Court of Human Rights cited international law (including the Recommendation No. 200) in a case involving mandatory HIV testing (*See* Kiyutin v. Russia (Application No. 2700/10), 10 March 2011.) In that case, Mr. Kyutin, an Uzbekistan national, had been residing in the Russian Federation for many years. He married a Russian woman and they had a child together. When he applied for a residency permit, he was required under the relevant Russian law to submit to a mandatory HIV test. When he tested positive, he was refused a residency permit. The Court cited international human rights law in finding that the denial was discriminatory, noting in particular that such an exclusion could not be justified by the government's public health interest arguments.

her/his employment" with the phrase "thus creating a hostile working environment". Finally the numbering of subsections should be reviewed: paragraph (b) should be Article 7.4.3.

Employer's and employee's duties

59. **Article 11.2.6** should be specific and refer to the Law on Labour Safety and Hygiene of 22 May 2008 ("LSH Law"). Accordingly, "11.2.6. provide labour conditions which meet occupational health and safety standards;" should be modified to read: "**11.2.6.** provide labour conditions and safe and healthy working environments which meet the requirements regulated in the Law on Labour Safety and Hygiene".

60. **Article 11.2.13**. Taking into consideration the definitions of "employment relations" and "employment contract", it would be more appropriate to use in **Article 11.2.13** the expression "employment relations" since it is broader than "employment contract". The rationale being that workers who do not have an employment contract but who are *de facto* remunerated for performing work for an employer should also be covered by this Article.

61. **Art 12.2.3.** reads: "(an employee shall) comply with requirements specified in occupational health and safety standards;" It would be preferable to modify this to read "*12.2.3. (an employee shall) cooperate in the fulfilment by the employer of the obligations placed upon him/her in meeting the requirements regulated in the Law on Labour Safety and Hygiene*". Reference is made to the *Occupational Safety and Heath Convention, 1981* (No. 155) (Convention No. 155), Article 19 (a) which provides that workers, in the course of performing their work, co-operate in the fulfilment by their employer of the obligations placed upon him. It is recommended to amend **Article 18.2** in the LSH Law to incorporate the same phrasing.

62. ***Right to establish a trade union***. The principles of Freedom of Association provide that workers have the right to establish and to join trade unions. **Article 12** on the rights and duties of employees only provides for the right to join an association (**Article 12.1.6**) and should be amended to also include a provision on *"the right to establish a trade union*".

Right of workers to remove themselves from imminent and serious danger

63. Article 19(f) of Convention No. 155 requires that a worker be able to remove himself or herself from any work situation in which the worker has reasonable justification to believe presents an imminent and serious danger to their life or health. While it is a valid question whether this topic (rights and duties in case of imminent and serious danger) should rather be dealt with in LSH Law, it is assumed that the provisions will be maintained also in the Draft. With reference to the relevant provisions in the LSH Law (in particular Article 18.1.4 of the LSH Law), it would be appropriate to revise **Article 13.1.1** of the Draft as follows:

> "13.1 An Employee has the right to refuse to perform work or duty on the following grounds:
>
> > 13.1.1. in a situation where *an employee has reasonable justification to believe that* performing his/her work would create serious danger to his/her own and other people's lives and health, ~~and where extreme caution may not prevent such danger~~"

64. Furthermore, the Draft does not appear to afford protection to a worker who does remove him/herself from an unsafe work situation from undue consequences (in accordance Article 13 of Convention No. 155). Therefore, it would be appropriate to insert a provision in the Draft protecting workers who have removed themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger, from undue consequences.

65. **Article 13.1.2**. currently reads, "when employer breached occupational health and safety standards, and exceeded maximum work limits" and should be modified to read "**13.1.2.** when employer breached occupational health and safety requirements regulated in the LSH Law, and exceeded maximum work limits,".

66. **Article 14.1.7.** Taking into account the latest comments of the CEACR on Convention No. 155 (Direct Request 2011) on Article 5(e) of the Convention relating to the protection of workers from disciplinary measures, and since a provision protecting workers' representatives (who are not trade unionists) could not be found in the Draft, it is suggested to insert an additional (new) **Article 14.1.8** stating, for example:

    - "Workers' representatives who are members of committees to promote cooperation at the workplace or members of business entities or organizations' committees in charge of labour safety and hygiene shall enjoy the same protection as trade unionists." or
    - "It is prohibited to impose disciplinary or financial punishment, transfer to a different job, not to promote to upper position or terminate employment contract of a workers' representative member of a committee to promote cooperation at the workplace or member of a business entities or organizations' committees in charge of labour safety and hygiene for exercising their functions."

    The Government is invited to refer to LEGOSH[10] for more examples.

Chapter 2 Collective negotiations

Free and voluntary nature of collective bargaining

67. While the provisions in relation to collective bargaining in **Article 14.2.2**, and **Article 15.4** do not as such contravene Convention No. 98, one should however bear in mind *the free and voluntary nature of collective bargaining*.

Collective bargaining processes and settlement of dispute

68. The Office is aware that the term "trade unions" is taken as synonymous with CMTU in Mongolia. Understanding that change may be progressively realized, it is important that Mongolia foster an environment in which multiple unions may compete for the chief bargaining position in collective bargaining. Whatever adjustment or period of adaptation is needed, it should be made within the framework of acceptable principles under Convention No. 87 and Convention No. 98.

69. The Draft manages to separate rights dispute and interest dispute in two different settlement processes. However, the Draft ultimately imposes a compulsory settlement in case of interest disputes, which is contrary to the principles of freedom of association.

70. One suggestion concerning the quite lengthy and detailed provisions concerning the collective bargaining process (i.e. **Article 18**): such provisions could be appended to the law and serve as a guideline to the negotiating parties who would also have the possibility to decide on alternate processes (for example, concerning deadlines).

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10 http://www.ilo.org/dyn/legosh/en/f?p=14100:2100:0::NO:2100:P2100_COUNTRYLIST,P2100_NODELIST:AF%3BAM%3BAR%3BAS%3BEU,104452

Chapter 3 Collective contract and collective agreement

Union dues of non-union members covered by a collective agreement

71. **Article 20.4** delegates to another law the provision regarding the application of the collective agreements to non-union member employees. A possible way to address this issue may be to require non-union members to pay unions dues of a lesser amount than those paid by union members.

CONTRACTS OF EMPLOYMENT

Fixed-term contracts of employment

72. **Article 26** details the regime of fixed-term contracts (FTCs). The Office observes an important trend in labour law reforms worldwide which focus on regulation of FTCs. While the rationale behind is to provide employers with more flexibility, the need of workers for secure and stable employment should not be neglected.

73. The main ILO standards on FTCs are the *Termination of Employment Convention, 1982* (No. 158) (Convention No. 158), not ratified by Mongolia, and its accompanying Recommendation (No. 166).

74. The Office notes that the rationale of **Article 26** is in line with Convention No. 158, which provides that adequate safeguards should be provided against recourse to contracts of employment for a specified period of time, whose aim is to avoid the protection against unjustified dismissals by circumventing the procedural and substantial requirements.

75. **Article 26.2** is also respectful of Recommendation No. 166, under which FTCs should be deemed contracts of employment of indeterminate duration, when they are concluded for performing permanent tasks or when their cumulative duration exceeds a specified duration.

76. The limitation of the maximum duration of FTCs in **Article 26.3** to three years is comparable with the trend observed in other countries (frequently this limitation is from two to five years).

77. However, it remains unclear if this limitation of three years is applicable to **Article 26.3** which deals with a continuation of the employment relationship in case of a tacit agreement between the employer and the employee.

78. **Article 26.4** appears to limit the duration of some types of contracts of employment to six months. Firstly, this list is confusing as it mixes several issues (worker's replacement, seasonal work, apprentice, probationary period). Secondly, this provision introduces some contradiction with the first two paragraphs which may be interpreted as limiting the same contracts of employment to three years.

79. The Office suggests that the Government consider redrafting of **Article 26** in order to avoid misinterpretation occurring after the law is adopted and comes into force.

80. For further information on these issues, the Office recommends reference to EPLex, the ILO's database on Employment Protection Legislation.[11] The comparative table of legal regulation of FTCs in selected countries is provided in **Annex 1**.

Probationary period

81. **Article 26** deals with the probationary period.

81.1. Convention No. 158 provides that a probationary period should be of reasonable duration and determined in advance.

81.2. By virtue of **Article 26.4**, the maximum duration of the probationary period appears to be six months. However, because this provision on probation is placed among those for regulating FTCs (**Article 26.1.2**), it may be misinterpreted as allowing its duration up to three years (**Article 26.2 -** maximum duration of a FTC).

81.3. The Office agrees that a FTC may be used instead of a probationary period for a new employee. However, for the sake of clarity, the Office recommends providing a separate provision to detail the legal regime for the probationary period.

81.4. In **Annex 2** some comparative information is summarized on the legal maximum duration of probationary periods worldwide.

Chapter 4 Regulation of employment relations

82. **Article 43.1** should include an obligation on the employer to facilitate the return to work of an employee who acquired a disability, following medical and vocational rehabilitation. Furthermore, **Article 46.1.2**. reads: (an employment contract may be terminated) "if it has been determined that the employee cannot meet the requirements of the job or position on account of professional qualification, skill or health reasons". However, the principle should be that "sick or injured workers should be transferred to lighter jobs and their contracts should not been terminated until options are exhausted." If the person can no longer perform the functions of the previous job, even with reasonable accommodation, the employer should be obliged to identify another job within the company. The employer should not be able to terminate until these options have been tried and exhausted, and only then with the agreement of the labour inspectorate.

83. In **Article 45**, the last phrase: ", *unless otherwise stated in employment contract*" should be deleted. Such a clause in an employment contract would run the risk of imposing forced labour. An employee should always have the right to leave.

[11] EPLex, which contains comparative information on various aspects of employment protection legislation of around 100 countries, is at: http://www.ilo.org/dyn/terminate/termmain.home

TERMINATION OF EMPLOYMENT

Collective dismissals for economic reasons

84. **Article 47** regulates collective dismissals for economic reasons. The Office welcomes this new provision, whose main ideas are in line with Convention No. 158 and Recommendation of No. 166.

85. The Office recalls that pursuant to Convention No. 158, when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he or she has to:

    85.1. provide the **workers' representatives** concerned in good time with relevant **information** including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

    85.2. give the **workers' representatives** concerned, as early as possible, an opportunity for **consultation** on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment;

    85.3. **notify the competent authority**, as early as possible, by giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

86. Convention No. 158 also indicates that the procedural requirements of consultation with workers' representatives and notification to the public authorities may be limited to the cases in which the number of workers whose termination of employment is contemplated is **at least a specified number or percentage of the workforce**.

87. **Articles 47.2 and 47.3** refer to the notification of employees and negotiation between "parties". The Draft in its current version appears to provide for individual discussions between the employer and employees. The Office suggests clarifying and introducing, if it is not currently the case, a consultation process with workers' representatives.

Priority of rehiring

88. Recommendation No. 166 stipulates that workers dismissed for economic reasons should be given a certain priority of re-employment, if the employer re-hires workers with comparable qualifications. This may be subject to some conditions, such as an explicit desire of the worker to be rehired which should be expressed within a given period of time.

89. In **Article 47.3**, the second sentence provides for the priority of rehiring the redundant workers within one year.

90. The Office welcomes this provision and suggests putting it in a separate sub-paragraph, to avoid confusion with the provision on the discussion of measures to avoid or reduce the number of dismissals for economic reasons.

Selection of workers for redundancy

91. As regards the **selection of workers to be dismissed for economic reasons**, Recommendation No. 166 suggests that this should be done by the employer, in consultation with workers' representatives, according to criteria, established wherever possible in advance, which give due weight both to the interests of the enterprise and to the interests of the workers.

    91.1. The Office welcomes the attention paid in the Draft to the gender ratio of employees to be dismissed. The Office suggests deleting the repetition of this provision in **Articles 47.2 and 47.5**. There is also some confusion, as an additional condition is provided in **Article 47.5** ("the third of employees made redundant").

    91.2. With respect to selection of workers to be dismissed for economic reasons, Recommendation No. 166 suggests that this should be done by the employer, in consultation with workers' representatives, according to criteria, established wherever possible in advance, which give due weight both to the interests of the enterprise and to the interests of the workers.

92. To conclude on **Article 47**, the Office recommends for further guidance on several aspects a comparative review of the regulation of collective dismissals for economic reasons.[12]

Certificate of employment

93. **Article 50.6** states that the employer has to provide a dismissed worker with "correct reference letters and statement of wage upon request of employee".

    93.1. The Office wishes to recall that, further to Recommendation No. 166, a worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying the dates of his or her engagement and termination of employment, as well as types of the work for which the worker was employed. Any evaluation of worker's conduct and performance may be given, at the worker's request, in this certificate or in a separate certificate.

    93.2. The Office suggests detailing the provision in the Draft to insist on the idea that such a certificate should only detail objective and factual data. It is important to prevent the

[12] Muller Angelika, 2011. "Employment protection legislation tested by the economic crisis. A global review of the regulation of collective dismissals for economic reasons", Industrial and Employment Relations Department, ILO, Geneva. http://www.ilo.org/ifpdial/information-resources/publications/WCMS_166754/lang--en/index.htm

employer from including negative evaluations, which could potentially jeopardize the worker's chances of finding new employment.

Chapter 5 Remuneration and Labour Norms

Minimum Wage

94. The articles in this Chapter of the Draft are meant to address wage and compensation issues. The concerns regarding this Chapter are inter-related. It should be noted that Chapter Five refers to "remuneration" as well as terms like "base salary". The Office was informed that a separate piece of labour legislation addresses minimum wages (Mongolian Minimum Wage Law of 2010), including topics such as base salary. For purposes of clarity and consistency in the Draft, it would be useful to link any appropriate references in the 2010 Minimum Wage Law to definitions and rights outlined in Chapter Five of the Draft, as well as other parts of the Draft where appropriate.

95. **Articles 51** of the Draft appears to be intended to set the base minimum wage. However, some of the provisions appear to be underdeveloped. For example, **Article 51.2** of the Draft identifies that the National Tripartite Committee on Labour and Social Consensus shall adopt regulation to determine average remuneration by classification of professions and positions. How does this provision relate to the "minimum wage" that is to "be determined by law" under **Article 51.1**? It is recommended that at the end of **Article 51.1** the following is inserted: "based on the decision of the National Tripartite Committee on Labour and Social Consensus as established under Article 117 and having powers under Article 118" to clarify that there is only one national tripartite committee with the power to set the minimum wage level. Consequently, **Article 118** concerning the power of the National Tripartite Committee could also be amended by including "(to) determine the level(s) of minimum wage" as an additional sub-paragraph 118.1.x.

96. With regard to the composition of the National Tripartite Committee (**Article 117.4**), which reads "… the National Tripartite Committee … shall consist of equal number of members from *three parties* of labour and social consensus" (emphasis added), it would be preferable to specify "(equal number of members) from government officials (including the Minister of Labour), employers, and trade union officials" for the sake of clarity. This composition is critical in ensuring that all voices are heard in any minimum wage level determination made by the National Tripartite Committee, which can contribute to improved adoption of the agreed minimum wage across the Mongolian labour market. Guidance on its composition can be found in Article 4 of the ILO *Minimum Wage Fixing Convention, 1970* (No. 131) (Convention No. 131) and Part IV (Minimum Wage Fixing Machinery) of the *Minimum Wage Fixing Recommendation, 1970* (No. 135) (Recommendation No. 135). The 2014 ILO General Survey on Minimum Wage Systems provides the reason why this important: "the criteria to be applied in determining the representative status of the organizations concerned have to be "objective, pre- established and precise so as to avoid any opportunity for partiality or abuse and... such determination should be carried out in accordance with a procedure that offers every guarantee of impartiality, by an independent body that enjoys the confidence of the parties, and without political interference".

97. While **Article 51.2** of the Draft identifies that the National Tripartite Committee on Labour and Social Consensus shall adopt regulation to determine average remuneration by classification of professions and positions, it does not determine on what basis it will make its decision, who is responsible for the final decision, and what regulatory instrument will provide the legal basis for the minimum wage.

98. With regard to how the National Tripartite Committee sets any minimum wage, it is important that reliable data is used in the deliberations and the agreed level at which it is set. Article 3 of Convention No. 131 stipulates *"the elements to be taken into consideration in determining the level of minimum wages shall, include (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; and (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."* In other words, national statistical data in these categories should be used to set the minimum wage. This Chapter of the Draft should include provisions based on Article 3 of Convention No. 131 as well as determining what additional data sources might be helpful. The following paragraphs – taken from the most recent ILO Minimum Wage Survey (2014) – can provide additional guidance on how other articles in this Chapter of the Draft should be structured. This needs to be done so that the National Tripartite Committee will know what data to request from the national statistical authorities for their deliberations regarding the level that the minimum wage is to be set and, by doing so, ensure that the data is routinely collected by the statistical authorities:

> *Recommendation No. 135 provides that, to the extent possible in national circumstances, sufficient resources should be devoted to the collection of statistics and other data needed for analytical studies of the relevant economic factors and their probable evolution. The Committee recalls that the Labour Statistics Convention, 1985 (No. 160), and the Labour Statistics Recommendation, 1985 (No. 170), provide guidance on this subject. In addition, as has been seen, for the adjustment of minimum wages, periodic surveys of the economic situation of the country, including changes in per capita income, productivity, employment, unemployment and underemployment should be carried out, to the extent that national resources allow.*
>
> *Accurate and recent data with comprehensive coverage are required for evidence-based policy-making and evaluation. Such data usually come from either labour force surveys (LFS) or establishment surveys. Analyses using both types of sources tend to be more accurate, as they produce different estimates due to the difference in coverage and accuracy between the two sources. Establishment surveys are generally acknowledged to have smaller errors in the measurement of earnings because the data are obtained directly from establishments. In contrast, while the earnings variable in an LFS has more measurement error (people do not like to report their earnings, or tend to report them inaccurately), the employee coverage is generally acknowledged to be larger. This is particularly the case for countries which have a large informal sector not captured in establishment surveys, or which carry out establishment surveys that are limited to companies of a certain size (for example, only firms with ten or more employees).*

99. The provision added in this Chapter of the Draft should require that the minimum wage level is set based on the criteria outlined in Article 3 of Convention No. 131 and based on the data in these categories provided by the National Statistical Office to the National Tripartite Committee.

100. This Chapter of the Draft does not determine who makes the final decision in setting the minimum wage or identify the legal instrument that will be used for regulatory implementation. It is strongly recommended that an article be included in this Chapter of the Draft that identifies who is responsible (for example, the Minister or Ministry of Labour) for issuing the final decree regarding the minimum wage level agreed by the National Tripartite Committee. In addition, an article should be included in this Chapter of the Draft that identifies the regulatory instrument (for example, ministerial decree or other administrative regulation) that will be issued to implement the legal minimum wage level determined by the National Tripartite Committee and mandated by the Government. The new article in the Draft should also indicate the legal obligation of the Government to disseminate this legal information and how and where it is should be displayed in the workplace by employers.

101. Perhaps it is an issue of translation, but the draft Law refers to "*minimum wage*" once (in **Article 51.1**) and then refers to "*remuneration*" and "*base salary*" in the rest of the Draft. As noted above, the minimum wage setting mechanism is not clear and this has implications for any basic level of compensation (either base salary or remuneration). It is therefore important to address the minimum wage issues identified above as well as using the terms clearly and consistently throughout the Draft so that workers and employers understand their rights and responsibilities. Articles in this Chapter should also be linked with the revised 2010 Minimum Wage Law in Mongolia, where appropriate.

102. **Article 53.3** provides that employees' base salary by hour and by output shall not be set below minimum wage. It is suggested to add a new provision for the need to *keep workers informed of the minimum wage rates in force* (by posting notices at the workplace or otherwise). The minimum wage legislation could also spell out appropriate enforcement measures, including a system of inspection and dissuasive sanctions. This could be stipulated as follows: *a system of supervision and sanctions shall ensure that the employers and workers concerned are informed of the minimum rates of wages in force and that wages are not paid at less than these rates in cases where they are applicable.*

103. It is also suggested to add a new provision to ensure that a worker who has been paid wages less than the minimum rate is entitled to recover by judicial means the amount by which he/she has been underpaid. This could be stipulated, for example, as follows: *A worker to whom the minimum rates are applicable and who has been paid wages at less than these rates shall be entitled to recover, by judicial or other legalized proceedings, the amount by which he has been underpaid, subject to such limitation of time as may be determined by national laws or regulation.*

Equal remuneration for work of equal value

104. **Article 55.1** provides that "Remuneration of similar jobs or jobs in similar nature shall be same for men and women workers. Remuneration for labour under special condition or requiring intense specialization, knowledge or a profession shall be greater." **Article 55.2** provides that "Base salary of workers performing same or similar jobs, or totally different jobs but equal in value shall be the same". In this respect, it should be borne in mind that the principle provided for in Convention No. 100 applies to the whole remuneration and not only to the "base salary". As highlighted by the CEACR in its General Survey of 2012, "if only the basic wage were being compared, much of what can be given a monetary value arising out of

the job would not be captured, and such additional components are often considerable, making up increasingly more of the overall earnings package"[13]. In this regard, it is suggested to merge **Articles 55.1 and 55.2** in order to ensure that the principle of Convention No. 100 is applied to the whole remuneration. Besides, in order to avoid any possible situation of undue discrimination, it is suggested to delete the phrase "Remuneration for labour under special condition or requiring intense specialization, knowledge or a profession shall be greater" as it is not very clear and also because the idea is already implicit within the principle of equal remuneration for work of equal value.

105. The Office suggests that **Article 55.1** could be modified to read as follows.

"Remuneration of men and women workers for similar jobs, jobs of similar nature and totally different jobs but equal in value, shall be the same."

Article 55.2 would become, as a consequence, no longer necessary and should be deleted.

Part-time employee

106. **Article 56** of the Draft stipulates that part-time employees are to be paid proportionate to the hours worked and output produced. However, because this refers to proportionate pay and output produced, it could result in lower overall pay for part-time workers than comparable full-time workers. Article 5 of the Convention No. 175 stipulates, "*Measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers, calculated according to the same method.*" Consideration should be given to reframing the wording of **Article 56** of the Draft to ensure that the basic wage is calculated on the same basis as comparable full-time workers. Linkages to the Mongolian Minimum Wage Law 2010 should be made here as well for purposes of clarity and consistency in the labour legislation.

Additional Pay for work on holidays and rest days

107. Draft **Article 58.3** provides that if an employee has worked on public holidays and week rest days and was not compensated with rest day, he/she shall be paid an amount equal to twice his/her base salary. In this respect, it is recalled that the weekly rest period may not be replaced by monetary compensation but must be granted independently of any cash compensation. This could be drafted as follows: "Agreements to relinquish the right to the minimum annual holiday with pay prescribed or to forgo such a holiday, for compensation or otherwise, shall be null and void or be prohibited".

Additional pay for night-time work

108. **Article 60** of the Draft states that if an employee worked during the night time and has not been compensated with rest days, additional pay will be set by internal regulations. It should be noted that rest days for night work are important for the safety and well-being of these workers. It is recommended that this be reflected more strongly in this article of the Draft. In

[13] ILO. CEACR General Survey, 2012, para. 687

addition, if the worker in this case is supposed to receive additional pay it would be useful to link this article with the Mongolian laws on wages (for example, the Mongolian Minimum Wage Law of 2010) which will improve the clarity and consistency of the Draft.

Payment and protection of wages

109. Chapter Five of the Draft is a welcome provision that addresses many of the important legal issues with regard to remuneration and ensuring it is paid in a timely manner. However, the law is unclear about whether payslips are to be given so that workers understand what they are being paid, if there are any deductions made, what those deductions are for, and the time period that the payment covers. Further consideration should be given to Section III (Notification to Workers of Wage Conditions) and IV (Wages Statements and Payroll Records) of the ILO *Protection of Wages Recommendation, 1949* (No. 85) to develop a legal provision in the Draft (or perhaps in the implementing regulations) that requires *payslips* that stipulate the clear amount of wages a worker is being paid during any specified pay period as well as the type and amount of any deductions.

110. It is further suggested that possible improvements in line with the ILO *Protection of Wages Convention,* 1949 (No. 95) (Convention No. 95) could be introduced, particularly as regards the following issues: (a) **Article 66.1** may be supplemented by a new wording on payment of wages "*in legal tender*", and according to Article 3 of Convention No. 95, it is advisable to expressly "*prohibit to pay wages in the form of promissory notes, vouchers or coupons, or in any other form alleged to represent legal tender*"; (b) The provision of **Article 67.1** regarding non-cash remuneration appears unclear. For more clarity, the conditions under which the partial payment of wages in the form of allowances in kind (non-cash remuneration) may be authorized need to be spelled out unambiguously (that the non-cash form of remuneration *shall not exceed 30 %* of the total remuneration; that it is *only allowed for domestic workers and hired herders* – therefore no other categories of employees shall be paid in non-cash form other than for rewards and bonuses as per **Article 66.2**; and that the contents of non-cash remuneration and the amount attributed to its value *shall be set by mutual agreement*); (c) a new paragraph could be added (perhaps to **Article 55** on principles of remuneration) expressly *prohibiting employers from limiting in any manner the workers' freedom to dispose of their wages*; (d) similarly, *the conditions under which and the limits within which wages may be attached or assigned* could be defined.

Protection of Workers' Claims in the event of the Insolvency of their Employer

111. The Office invites the Government to give consideration to the possibility of including an article in the Draft that relates to PART III (Protection of Workers' Claims by a Guarantee Institution) of the ILO *Protection of Workers' Claims (Employer's Insolvency) Convention, 1992* (No. 173). This is important to workers in terms of ensuring payment of any wage and holiday pay claims by the Government Fund in the event that an enterprise goes bankrupt. In addition, this may also arguably help employers generally secure capital for their business as financial institutions will know that in the event that the enterprise goes bankrupt, any outstanding wage or other remuneration claims will be addressed by a government run fund (and thus workers will not be creditors with a claim on assets of the bankrupt firm). The article (or articles) in the Draft should clearly identify the bankruptcy fund, how it is funded and administered, and branch of the government would be responsible for administering this fund. Furthermore, articles should be added to the Draft that determine administrative procedures such a time frame and the methods of payment from this fund for outstanding wage and compensation claims made by workers.

112. The Office proposes the following alternative for consideration: include a new provision to set out the preferential treatment of workers' wage claims in bankruptcy proceedings. It could be drafted as follows: *In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.*

Chapter 6 Work and Leisure Time

113. Mongolia has not ratified the *Hours of Work (Industry) Convention, 1919* (No. 1), *Hours of Work (Commerce and Offices) Convention, 1930* (No. 30) or *Night Work Convention, 1990* (No. 171) on *hours of work*, neither is it bound by any of the Conventions on *weekly res*t (i.e. *Weekly Rest (Industry) Convention, 1921* (No. 14) and *Weekly Rest (Commerce and Offices) Convention, 1957* (No. 106) on weekly rest. Mongolia also has not ratified any of *annual paid holidays* Conventions (*Holidays with Pay Convention, 1936* (No. 52), *Holidays with Pay (Agriculture) Convention, 1952* (No. 101), and *Holidays with Pay Convention (Revised), 1970* (No. 132)), either.

114. The main issues in this Chapter (on work and leisure time) of the Draft are that there are no provisions that determine *maximum working hours*. This has consequences for all of the issues in this Chapter of the Draft and thus available working hour protections for all workers in Mongolia. **Article 71** of the Draft states that regular hours of work shall not exceed eight hours per day and 40 hours per week and **Article 78** allows these working hours to be exceeded by agreement between workers and employers. However, regular working hours are not maximum working hours, as maximum hours can include overtime hours. Furthermore, in the present Draft there does not appear to be any numerical limit on maximum working hours. Daily and weekly maximum working hours are not just critical for the health and well-being of workers, but they are also central in the in the determination in the aggregation of working hours (see **Article 77** of the Draft) and payment for working overtime hours (including overtime premia). Both Conventions No. 1 and No. 30 provide a weekly working hours limit of 48 hours per week. It is strongly suggested that an article or sub-article is added to **Article 71** of the Draft <u>*setting maximum daily and weekly working hours*</u> in line with international labour standards. Setting maximum working hour limits will provide greater clarity and consistency in the remaining working hour articles of this Chapter of the Draft.

115. The Draft does not fully address under what *exceptional circumstances* regular working hours might be exceeded. There are times when there may be a crisis or emergency in the physical workplace that needs to be addressed outside of normal working hours. However, it is also important to specifically define what types of crisis or emergencies should be included in the law so that these situations are not used to regularly exceed maximum working hours. Guidance as to how such an article in the Draft might be crafted can be found in Article 3 of Convention No. 1 which stipulates that "*The limit of hours of work prescribed in Article 2 may be exceeded in case of accident, actual or threatened, or in case of urgent work to be done to machinery or plant, or in case of "force majeure", but only so far as may be necessary to avoid serious interference with the ordinary working of the undertaking.*" The article added to this Chapter of the Draft should also require that <u>working hours performed during any crisis or emergency (outside of normal working hours) be considered as overtime hours and compensated on this basis (e.g. overtime premia pay or days of in lieu)</u>. The article added to

the Draft should also stipulate that overtime compensation will be paid if working hours to address a crisis or emergency results in the worker exceeding their total maximum weekly working hours.

Shift work and shift roster

116. **Article 72.2** provides that the total number of one shift shall not exceed eight hours. If upon negotiation or agreement with employee, the total number of hours of shift may be extended to 12 hours, and employee's remuneration will be increased by remuneration for hours worked extra, in accordance with **Article 59.1** of this Draft. This Article is problematic. It may be recalled that normal hours of work is 48 hours a week and eight hours a day. It may be spread over the week, maximum nine hours a day. In exceptional cases, under agreement and regulations, hours of work may be spread over a longer period, but not more than an average of 48 hours a week. For example, work in industry may be extended, provided the average over a maximum three-week period does not exceed eight hours a day and 48 hours a week. However, this limit of hours of work may also be exceeded in those processes which are required by reason of the nature of the process to be carried on continuously by a succession of shifts, subject to the condition that the working hours shall not exceed 56 hours a week on average. Such regulation of the hours of work shall in no case affect any rest days which may be secured by the national law to the workers in such processes in compensation for the weekly rest day.

117. Regarding **Article 73** (Shift Roster), a question arises as to whether or not this article is intended to be sector specific (i.e. mining), and if so whether shift work provisions are best placed in the Labour Law or sectoral legal instruments (i.e. collective agreements).

118. **Article 73.2** states that a worker shall not have less than one day of rest for every 14 days worked. This can be problematic for the health and safety in the workplace and for the worker health in general. Guidance as to how this article can be revised can be found in Article 2 (1) of the Convention No. 14 which stipulates "*The whole of the staff employed in any industrial undertaking, public or private, or in any branch thereof shall,..., enjoy in every period of seven days a period of rest comprising at least twenty-four consecutive hours.*"

Night hours

119. **Article 75.4** could be supplemented so as to read, for example, as follows: "*An employee who regularly works at night hours shall undergo medical examination once a year without charge and to receive advice on how to reduce or avoid health problems associated with their work before taking up an assignment as a night worker; at regular intervals during such an assignment; and if they experience health problems during such an assignment which are not caused by factors other than the performance of night work*".

120. **Article 75.7** may be supplemented as follows: "*Where an employee is prohibited to work night hours as stated in Article 75.6, the employer shall have a duty to transfer the employee to day shift, or to different quality work. If transfer to such a job is not practicable, the worker shall be granted the same benefits as other workers who are unable to work or to secure employment. A night worker certified as temporarily unfit for night work shall be given the same protection against dismissal or notice of dismissal as other workers who are prevented from working for reasons of health*".

121. **Article 77** of the Draft is meant to address the estimation of aggregate hours of work. However, this article of the Draft does not give a time frame for how aggregate hours are

calculated. Aggregate calculations can be done by the month or annualised. However, it should be noted that any calculation should result in no more than the maximum weekly working hours established within the Draft. As noted above, the maximum weekly working hours set in the Draft should be in line with international labour standards, such as those found in Conventions No. 1 and No. 30.

122. It is suggested to remove **Article 78.1**. Please see above under **Article 72.2**. It is suggested that this provision be made for a daily eight-hour limit to normal working hours; Additional provisions could be introduced concerning the need to *inform workers of applicable work schedules by posting of notices in conspicuous places* and also the need *to keep records of additional hours worked*. It is suggested to improve this Article as follows: *every employer shall be required to keep records of the times at which hours of work begin and end, and, where work is carried on by shifts, the times at which each shift begins and ends*.

123. **Article 80.1** of the Draft suggests public holidays shall be defined by the law. Technically these public holidays could be listed here for purposes of clarity for workers and employers. It should be noted that the listing of public holidays should be done by day (e.g. Calendar New Year's Day 1 January) and not the day the public holidays falls on as it will change from year to year (e.g. Wednesday 1 January).

124. It is suggested to delete **Article 82.2**. Even with the employee's consent, the work during public holidays or weekly rest should remain the exception under certain condition as it is specified under **Article 82.1**.

Annual leave

125. Even though Mongolia has not ratified Conventions No. 52, No. 101, or No. 132, it is suggested to remove **Article 83.1**. **Article 83.1** is contrary to the principle of the Conventions No. 52, No. 101, or No. 132 which prohibit *any agreement to relinquish the right to paid annual leave or to forego such leave in exchange for compensation*, save in the event of cessation of the work relationship. The Office recommends introducing a new Article guaranteeing that workers should be entitled to at least two uninterrupted working weeks of leave (i.e. 10 working days); in this connection, consideration may be given to including an express requirement as to the timing of a worker's leave pay, i.e. worker should be paid in advance his/her annual leave; period of incapacity due to sickness or injury should not be counted as part of the annual holiday with pay; the principle that a worker may not be deprived of his/her annual leave entitlement when this is not exercised, irrespective of any monetary compensation should be expressly recognized.

126. **Article 83.3** (extra leave) provides that abnormal work ("non-regular working conditions" in the translation available at the Office) entitles workers to an additional five days leave, and the Government has explained that this includes: heavy hardship, hot, underground, and chemical work. A clearer link needs to be made with the extra leave and the nature of the working conditions, while it must be underlined that additional leave days cannot be offered in exchange for unsafe working conditions in violation of OSH rules.

Chapter 7 Working conditions and Occupational Safety and Health

Social Security

127. Mongolia is not bound by any of the ILO Social Security Conventions; nonetheless those Conventions may provide valuable policy directions and guidance. The Draft provides for

compulsory enrolment in social and health insurance, compensation for psychological damage caused to the employee due to his/her performance of duties under the labour contract, and compensation for damages caused by industrial accident, acute poisoning and occupational diseases without affecting the pensions and allowances to be received by the worker in accordance with the social insurance legislation. These general provisions are in line with ILO principles.

128. However, it has to be highlighted that Chapter 7 on Conditions of Work and Occupational Safety and Health could be extended. Only one Article of this Chapter (**Article 85**) provides for the payment of a compensation which can represent between nine months salary to 36 months salary. The Office draws the Government's attention to Article 5 of the *Workmen's Compensation (Accidents) Convention, 1925* (No. 17) provides that "*the compensation payable to the injured workman, or his dependents, where permanent incapacity or death results from the injury, shall be paid in the form of periodical payments; provided that it may be wholly or partially paid in a lump sum, if the competent authority is satisfied that it will be properly utilized.*".

Occupational safety and health

129. The draft Labour Law of Mongolia is examined below in light of the one OSH standard ratified by Mongolia, the Occupational Safety and Health Convention, 1981 (No. 155) – ratified by Mongolia. Some suggestions are, however, also made from the perspective of the other two key OSH standards, the Protocol of 2002 and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), which have not been ratified by Mongolia.

130. The Office recalls that Mongolia already enacted the LSH Law of 2008, and Occupational Safety and Health matters are regulated by that law. The new Labour Law should align with the requirements of the LSH Law, and support its implementation. As a practical and temporary step, the new Labour Law should also strengthen the LSH Law by adding missing points and filling gaps, but ideally and in the medium-term perspective, the LSH Law should be amended to embrace all relevant provisions on occupational safety and health. This is especially important if the Labour Law and the LSH Law are administered and enforced by different bodies.

131. After Article 85.1.2, a new **Article 85.2** should be added, which states "85.2, the government, after consultation with the social partners, shall define the details related to occupational diseases based on National List of Occupational Diseases regulated in Article 30.1 of the LSH Law 2008". In terms of diagnostic criteria for occupational diseases, such should also be based on international standards and practices. Consistency with the social security legislation should also be checked and ensured regarding the compensation for the occupational diseases.

Chapter 8 Employment of some groups of population

Maternity protection

132. Some provisions in this Chapter of the Draft combine i) maternity protection (for female workers by definition) and ii) provisions for workers (both male and female) with family

responsibilities. It could be a consideration to separate these two sets of provisions for clarity. However, since the *Maternity Protection Convention (Revised), 1952* (No. 103) has been ratified by Mongolia some remarks are made here first, particularly on maternity protection, and with reference to Articles in other Chapters. In 2014, the CEACR raised the following issues about Mongolia's application of Convention No. 103: a) the introduction of a compulsory period of post-natal maternity leave and the prohibition of dismissal during maternity leave (Article 3(2) and 3 of the Convention); b) adequate benefits financed through social assistance funds guaranteed by the Law on Social Assistance (Article 4(5)); and c) medical benefits granted under the Health Care Law, 1998. The Draft does not contain provisions concerning maternity cash and medical benefits, but both are provided for by other laws, namely: the Law on Pensions and Benefits (a copy of which has been requested by the CEACR); the Law on Social Assistance and the Health Act.

133. The Office welcomes, from the information received during the technical assistance for the labour law review, the fact that improvement in the protection of pregnant workers against discrimination has been identified as a key area and that the draft Labour Law now provides for compulsory leave after confinement and prohibits dismissal during maternity leave (120 days).

134. Concerning employment protection, **Article 86.1** of the Draft provides that "an employer is prohibited to terminate employment contract of a pregnant woman and an employee on special leave to take care for a child, by employer's initiative, except cases provided for in Articles 45.1.4 and 45.1.5 of the law." It seems that maternity leave is included in the protection period. To avoid confusion, it is suggested that the government modify this Article to specify that the employer is prohibited from terminating an employment contract "*during maternity leave*". Furthermore, **Articles 45.1.4 and 45.1.5** mentioned do not exist.

135. Finally, the Office welcomes that the Draft goes beyond the principles enshrined in Convention No. 103 concerning employment and provides for:

- non-discrimination based on pregnancy (**Article 6.1**);
- non-discrimination in employment and access to employment (**Article 6.2**);
- burden of proof on the employer in case of discriminatory act (**Article 6.5**);
- prohibition of pregnancy testing (**Article 6.6**); and
- retaining of the position of the pregnant woman or woman on maternity or childcare leave (**Articles 41.1.2 and 41.1.3**).

136. Concerning ***compulsory post-natal leave***, **Article 89.2** refers to **Article 86.1** and mentions prenatal and postnatal leave, which appears inadequate. Neither **Article 86.1** nor any other provision specifies the duration and the compulsory nature of the post-natal maternity leave. According to Article 3 of Convention No. 103, the period of compulsory leave after confinement must not be less than six weeks. It is suggested that the Government consider introducing a provision specifying *the duration of the post-natal leave* and *the compulsory nature of the first six weeks after childbirth*. The duration of prenatal leave as well as the dates of beginning and ending of the maternity leave should also be specified.

137. ***Payment of breastfeeding breaks***: **Article 88.3** provides that "the break time for breastfeeding and caring for infants shall be incorporated into the hours of work, and payment equal to base salary shall be paid by the employer." **Article 53.3** indicates that the "base salary" shall not be set below the minimum wage and **Article 52.1** indicates that "remuneration" shall consist of base salary, additional pay, reward, bonus, and allowance.

Thus, it seems that breastfeeding breaks are paid less than normal working hours. Convention No. 103 provides that "interruptions of work for the purpose of nursing are to be counted as working hours and remunerated accordingly". It is suggested that the Government modify this provision to put it in line with Convention No. 103 by including remuneration other than the base salary.

138. ***Duration of Maternity Leave***: The Draft provides for 120 days of maternity leave which is longer than the prescription of the most up to date convention on this matter – the *Maternity Protection Convention, 2000* (No. 183) - which provides for 98 days. However, it has to be underlined that Convention No. 103 also provides for: a) the extension of the prenatal portion of maternity leave by any period elapsing between the presumed date of childbirth and the actual date of childbirth, and the prohibition of any reduction in the compulsory portion of postnatal leave, b) additional leave before confinement in case of medically certified illness arising out of pregnancy, and c) extension of the leave after confinement in case of medically certified illness arising out of childbirth.

139. ***Health Protection***: **Article 78.2** provides that "unless employee agreed, it shall be prohibited to assign pregnant women, employees with family responsibility to work night-time, overtime, also on work travel. Not agreeing to work nighttime, overtime and go on work travel shall not serve as a basis for discrimination". It is worth highlighting that Article 3 of Convention No. 183 states that "*Each Member shall, after consulting the representative organizations of employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother's health or that of her child.*". As women could be pressured to perform work, the Government could consider the possibility of including more general principles of protection into the Draft.

140. Finally, the Office commends the Government that the Draft goes beyond the principles enshrined in Convention No. 103 and provides for temporary transfer to another job or reduction of hours of work of pregnant or breastfeeding woman without salary decrease (**Articles 39.1.4** and **61.4**).

Workers with family responsibilities

141. **Article 86** reads as follows "Prohibition of termination of employment contract of a pregnant woman or a woman (single father) with child under 3 years of age." **Article 86.1** provides that "An employer is prohibited to terminate the employment contract of a pregnant woman and an employee on special leave to care for a child, by employer's initiative, except in cases provided for in Articles 45. 1.4 and 45.1.5 of this law."

142. In order to ensure coherence between **Article 86** and **Article 86.1** it is suggested to replace "a woman (single father)" by "*female or male employee*" in **Article 86**. It is also suggested to insert the words "*female or male*" before the word employee in **Article 86.1**. As mentioned above, reference to (non-existent) **Articles 45.1.4 and 45.1.5** should be reviewed.

143. **Article 88** refers to an additional break for breast-feeding and care of a child. **Article 88.1** provides that "besides the break for rest and meal and regular break, an additional break of at least 1 hour to breastfeed and take care of a child shall be provided to a woman with a child under one year of age or a child who has reached one year of age but requires special care according to a medical conclusion; or work hours can be shortened." In this respect, it should

be borne in mind that legislation should not reflect the assumption that the main responsibility for family care lies with women or exclude men from certain rights and benefits. This would reinforce and prolong stereotypes regarding the roles of women and men in the family and in society. Measures to assist workers with family responsibilities should be available to men and women on an equal footing[14]. Taking into account these considerations, it is suggested to re-draft **Article 88.1** as follows:

"An additional break of 1 hour or the shortening of working hours could be provided to:

1) breastfeeding employees of children under 1 year of age;

2) to female and male employees taking care of a child under 1 year of age or a child who has reached one year of age but requires special care according to a medical conclusion."

144. **Article 90** provides that female and male workers that adopt a child will be entitled to equal leave as workers "who give birth to a child" but only until the child has reached 60 days old. **Article 89.1** provides that mothers will be provided for 120 days of pregnancy and maternity leave. It is not clear if adopting parents have the right to the same amount of days of leave as natural parents. It is suggested that both adopting and natural parents have the right to the same amount of leave days after the child's birth.

145. **Article 91** of the Draft refers to annual leave for baby care. Perhaps this is an issue of translation, but leave for childcare is different from annual paid leave. Childcare leave is meant to address the needs of parents and their infant or young children. Paid annual leave is to allow workers a period of rest and recuperation from the stress of work. To better phrase this article so that the provisions are defined in a manner that addresses these two separate issues, the Government is invited to consult the ILO *Workers with Family Responsibilities Convention, 1981* (No. 156) and the ILO *Holidays with Pay Convention (Revised), 1970* (No. 132). Further guidance on workers with family responsibilities can also be found in the ILO *Workers with Family Responsibilities Recommendation, 1981* (No. R165).

146. **Article 91.1** provides that "An employer shall grant a leave to a mother/father/ who had maternity leave or annual leaver for baby care, or to a working grandfather or grandmother for care of grandchild, if wanted, for a period until a child reaches three years old." It is suggested to eliminate the phrase "who had maternity leave or annual leave for baby care" and redraft **Article 90** and **Article 90.1** as follows:

"An employer shall grant leave to a female or male worker to take care of her/his child or her/his grandchild, for a period until the child reaches three years old.

147. **Article 91.3** provides that "The employer is obliged to allow a mother/father/, grandfather/ grandmother/ to take up her/his previous job or position upon the expiry of the baby care leave or before the expiry, if the employee wishes so." Following the considerations above, it is suggested to redraft **Article 91.3** as follows:

The employer is obliged to allow a female or male worker to take her/his previous job or position upon the expiry of the child care leave or before the expiry if the worker so wishes.

[14] ILO. CEACR General Survey, 2012, para. 786 and 788

Employment of minors

148. **Article 93.1**. As noted in the CEACR's comment under Convention No. 138, the minimum age for admission to employment (15 years) should not be lower that the age of completion of compulsory schooling (which the Government has indicated is 16 years). This is a topic that requires collaboration with other Ministries, such as that of education, and needs coherence between laws (e.g. with law on compulsory education, or a law concerning child rights). The most important point is that a child should not be allowed to enter into the labour market (other than under prescribed exceptions) before finishing compulsory education. For that purpose, it is suggested to consider an addition to **Article 93.1** so as to prohibit "employment of children less than 15 years of age, *and of those who have reached that age but who have not yet finished compulsory education*" (other than for exceptions according to the provisions of the law)

149. **Article 93.5**. This provision dealing with exceptional work by children below 13 years of age relates to Article 8 of Convention No. 138 (artistic performances). The Government's attention is drawn to the comments of the CEACR on Mongolia's application of Convention No. 138 which noted that, under Article 8.1 of the Law on the Protection of the Rights of the Child, a list of plays and performances that may adversely affect a child's health will be developed and approved by Governmental officials responsible for health issues. In this respect, the CEACR recalled that exceptions to the specified minimum age of admission to employment or work for such purposes as participation in artistic performances may only be allowed by permits granted by the competent authority in individual cases.

150. The Government therefore will need to make provision for a system of registers (and individual permits, for artistic performances) for children below the age of 15 (and not 13 years – the "light work" exception for children between 13 to 15 years of age is different from artistic performances – please see the following paragraph) and will need to set limits for the hours during which, and prescribe the conditions in which, such employment or work is allowed.

151. **Article 93.10**. Attention is drawn to the fact that the CEACR has commented upon Mongolia's application of Article 7 of Convention No. 138 for a number of years concerning the need for the competent authority – either in the Labour Law or other regulations – to prescribe the number of hours during which, and the conditions in which, light work may be undertaken for persons 13 to 15 years of age. For the purpose of clarification it would be advisable to add to this Article, after "Easy and light work that can be performed by minors," a specific reference to read "*in accordance with Article 93.4 above*". It would be misleading to give an impression that a child of any age can be engaged for light work.

Employment of an employee with disability

152. **Article 95.2** should include other options for employers other than paying a levy, in the case of non-compliance: for example, in part fulfilment of the quota obligation, employers could provide on-the-job training opportunities, apprenticeships opportunities or work experience, or purchase goods and services from enterprises of or employing persons with disabilities.

153. **Article 95.4** – This provision is unnecessary as the Draft prohibits discrimination on the ground of disability. It is also contrary to the principle of reasonable accommodation, which should be included in the Draft. The Office recommends either deleting this clause entirely or amending it to read, for example: "If a job seeker with a disability is capable of performing a

job, taking into account the inherent requirements of the job, and providing reasonable accommodation as required, an employer must not refuse to hire that job seeker because of their disability." The Office reminds the Government that disability is not only a physical condition, persons with disability include individuals with hearing or speech impairments, intellectual disabilities, and mental health disabilities. The Office repeats the need to define 'persons with disabilities' at **Article 4** of the Draft.

154. **Article 95.5** should be moved to become the first clause under this heading (i.e. **Article 95.1**), as this is a more general requirements than the quota obligation, and be amended to include an explicit requirement on employers to provide "reasonable accommodation" for persons with disabilities in the workplace.

Employment of older person

155. **Article 96.3** states "Upon the request of an older person, an employer may reduce his/her working days, hours or transfer such person to a job not harmful to his/her health." A definition of "older persons" should be mentioned explicitly.

Chapter 9 Regulation of labour interest disputes

156. *General observations*: The Office has been advised that some provisions have been revised with the ILO's continuing technical assistance since the version submitted officially to the Office for comments, and certain issues of translation in this Chapter were acknowledged and addressed.

157. The Office recommends further review, restructuring and development of Chapters 9 and 10 with a view to increasing legal and institutional clarity as well as establishing conformity with ILO standards. Institutionalizing, strengthening and building the capacity of tripartite committees on dispute resolution by establishing clearer rules and procedures separately for rights disputes and interests disputes might be an option. Involvement of a professional judge(s) or neutral experts (e.g. academics) could also be considered for rights disputes.

158. **Article 98.1**: Contexts in which dispute over interests could arise might be more detailed to facilitate better understanding of the concept. Interest disputes concern cases where there is disagreement over the determination of terms and conditions of employment, or the modification of those already in existence if the parties claim new rights or seek to establish new obligations, which typically arise in the context of collective bargaining where a collective agreement does not exist or is being renegotiated.

159. **Articles 98.4 and 98.5**: It is suggested to include clearer rules and procedures for the appointment of "labour intermediaries", their duties, qualification requirements, requirements for conciliators/mediators, assignment of cases, and the terms of appointment. The ILO Labour Legislation Guidelines[15] might provide some useful examples.

160. **Article 99.1**: Time limits (five days with a possible extension up to three days) for conciliation/mediation within this Article are very short and this limits the scope for conciliators' chances of bringing about amicable settlements. The period during which a

[15] See: http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch4.htm#12

conciliator/mediator should attempt to resolve a dispute could be extended, so far as there is an agreement between the parties.

161. **Article 98.2**: Although this may be related to the translation, the Office notes that the term "labour intermediary" is preferred to the term "conciliation", due to the specific meaning of the latter under the Law on Conciliation (2013) in Mongolia. The important point is that a consensus-based solution is sought through third-party assistance. If there are no equivalent terms in Mongolian, it is suggested that the term be clearly defined.

162. **Article 98.4**: This is a process whereby an independent and impartial third party assists the disputing parties in reaching a mutually acceptable agreement to resolve their disputes. Consideration might be given to rephrasing the line stating that "parties shall appoint tripartite committee on labour dispute resolution", which gives rise to an issue regarding impartiality and independency of mediation/conciliation provided through such committees. It is suggested that such tripartite committees be institutionalized with appropriate rules and procedures including those concerning appointment of members. The Office understands that this provision has since been changed to provide that: if parties to the dispute are unable to agree on the choice of "labour intermediary", the Tripartite Labour Dispute Settlement Committee appoints the "labour intermediary" and that the Tripartite Labour Dispute Settlement Committee trains and appoints all "labour intermediaries".

163. **Article 100.1.3**: It is recommended that clarity be introduced to ensure that conciliators' separate and joint meetings be organized with both disputing parties, not only employers.

164. **Article 101.2**: The Office pointed out the need to re-examine the time limit so as to increase the scope for the possibility of mutual agreements, and has been advised that the "10-day time limit" is not for completing conciliation process but a limit for the Tripartite Labour Dispute Settlement Committee to commence action.

165. **Article 101.3**: The Office recommends that the term "decision" within this Article be replaced by the term "recommendations".

166. **Article 101, paragraph 4: (**numbered as **103.4**, presumably a typing error**)** states that "A decision by a tripartite committee on interest disputes at given business entity and organizations that belong to sectors stated in Article 103 of this law is binding". The Office understands that it meant to refer to **Article 105** on prohibition, postponement or temporary suspension of a strike in organizations listed under **Article 105.2**. Any other cross-referencing to other provisions of the Draft should be verified.

167. With the understanding that the above-mentioned **Article 101, paragraph 4** on binding arbitration ("decision" in the translated text) is applicable to services listed under **Article 105.2**, the Office notes that the list of essential services includes "organizations which are responsible for defence, health, telecommunication and public ordinance, civil aviation organization, business entities and organizations in electricity heating and public water supply".

168. The Office recalls that the ILO Committee on Freedom of Association (CFA) has stated that "compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants

exercising authority in the name of the State or in essential services in the strict sense of the term"[16].

169. The Office also recalls that essential services in the strict sense of the term are only "those the interruption of which would endanger the life, personal safety or health of the whole or part of the population", and that the CEACR is of the view that "it would not be desirable – or even possible – to attempt to draw up a complete and fixed list of services which can be considered as essential."[17] In this connection, the CEACR has recommended that "[i]n order to avoid damages which are irreversible or out of all proportion to the occupational interest of the parties to the dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility . . . rather than impose an outright ban on strikes in the strict sense of the term."[18] In light of the above, the Office recommends that this Article be amended so as to ensure that compulsory arbitration ("decision" in the translated text) is only permissible in disputes arising in essential services in the strict sense of the term and in those concerning public servants directly engaged in the administration of the State.

170. The Office understands that **Article 103** has been updated in referring to the **Article 18** (and not to "Article 17.8" which does not exist) and clarifying that the provisions of **Articles 103.2 and 103.10** relate to services considered to be "*essential services*" based on the necessity to ensure protection of the health and safety of the *population*, when they originally stated "measures to ensure health and safety of '*people*' during the strike" and 'protection of *human* health and safety, as well as property'. Further, **Article105.2** is understood to capture "essential services".

Consequences of the strike or lock-out considered illegal

171. **Article 108.1** should be redrafted. The following questions arise from the current provision:

- why should a trade union be liable for a temporary lock-out declared illegal?

- why is there a systematic link between a strike declared illegal and damage caused to materials?

Furthermore, trade unions should not be liable for damage caused by individuals or external groups during the course of the strike.

Chapter 10 Regulation of labour rights dispute

172. **Article 109**: The Office recommends that separate procedures and processes for disputes over interest and those over rights be institutionalized with separate rules, if tripartite committees on labour dispute resolution handle both interest and rights disputes and these

[16] ILO, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006, para. 564.
[17] ILO, *General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949* (Report III (Part 4B)), International Labour Conference, 81st Session, 1994, para. 159.
[18] Ibid., para. 160.

committees are recognized by the social partners as those resolving labour disputes. Separate quasi-judicial administrative processes and procedures could be established for disputes over rights so as to ensure independence and impartiality under which binding awards or orders are issued.

173. **Article 109.6**: "the court has applied and explained the law incorrectly" should read, "the tripartite committee on labour disputes has applied and explained….".

174. **Article 109.6**: A 10-day time limit to refer to a primary court might have the effect of limiting parties' recourse to the courts and excluding them from pursuing their lawful entitlements. The Office understands that consideration is being given to extending the period to 30 days in line with the Civil Code.

175. **Articles 109 to 110**: It is not clear whether **Article 109** only concerns collective rights disputes while **Article 111** sets forth procedures for individual rights disputes.

176. **Article 110**: While **Article 109.6** provides for an appeal against a decision of the tripartite committees on labour disputes, there is no equivalent to this Article which appears to solely concern individual rights disputes. The Office recommends that such a provision be included so as to ensure that the protection of the rights of parties to disputes is referred to as a matter of law, rather than by their own consent. Further, workers' recourse to the courts appears to be permissible only when the workers' complaints concern "wrongful dismissal or transfer or rotation….". Recourse to the judicial authorities should be secured so as to ensure that workers are not excluded from pursuing their lawful entitlements. Workers should be able to have recourse to the court, in cases where they are not satisfied with the decisions by the tripartite committee on labour dispute resolution or such decisions are unfair, to seek a judicial review and a final settlement of the case.

177. The Office invites the Government to refer to the ILO's *Examination of Grievances Recommendation, 1967* (No. 130), and in particular to Paragraph 17: "Where all efforts to settle the grievance within the undertaking have failed, there should be a possibility, account being taken of the nature of the grievance, for final settlement of such grievance through one or more of the following procedures:

(a) procedures provided for by collective agreement, such as joint examination of the case by the employers' and workers' organisations concerned or voluntary arbitration by a person or persons designated with the agreement of the employer and worker concerned or their respective organisations;

(b) conciliation or arbitration by the competent public authorities;

(c) recourse to a labour court or other judicial authority;

(d) any other procedure which may be appropriate under national conditions."

178. **Article 111**: based on the clarification of translation issues, the Office understands that this Article regulates resolution of interest disputes through the court.

Chapter 11 Internal labour Regulations, labour discipline and material liability

Chapter 12 Labour management and control

179. **Article 118** sets forth the powers of National Tripartite Committee on Labour and Social Consensus as an apex tripartite body for regular consultation on national labour policy and which develops tripartite agreements. The Office draws the Government's attention to the fact that it is not the role of the Government to make the final decision in tripartite agreements.

Cooperation at the level of the undertaking

180. **Article 120** of the Draft provides that a business entity or organization with more than 10 employees shall establish a committee to promote cooperation at workplace, and pursuant to **Article 120.5**, this Committee shall have a consultative structure on occupational safety and health.

181. In this regard, the Government's attention should be drawn to Article 4(2)(d) of Convention No. 187, which provides for cooperation at the level of the undertaking on OSH issues, regardless of the number of workers. The Government could consider the possibility of including in the legislation flexible arrangements in undertakings with less than 10 employees that promote cooperation between management, workers and their representatives as an essential element of workplace-related prevention measures.

182. **Article 120.** Regarding the "Committee to promote cooperation at workplace" (Article 120), it should be clarified (either in the Labour Law, LSH Law, a specific Regulation on OSH committees) if this committee can assume the functions of the "Business entities and organizations' committee in charge of labour safety and hygiene" (Article 27 of the LSH Law) or whether both committees are completely independent and they shall coexist at the level of the undertaking.

183. If the committee mentioned at **Article 120** is different from the LSH Committee, **Article 120.5** could be amended so as to read: "*The Committee shall have a consultative structure on occupational safety and health, and cooperate with the LSH Committee regulated in Article 27.2 of the LSH Law to identify OSH risks and discuss and implement measures for improvements.*" Clarification of the responsibilities and functions of the Labour-management committees and the LSH committees is important, noting that the provisions in the LSH Law on that matter are very weak. An overall feasibility assessment as to actual scope for labour-management committees vis-a-vis LSH Committees and their functions and requirements could also be useful, although it may be out of scope of this current Labour Law review. A question might arise as to whether it is feasible to have both types of committees at workplaces down to 11 workers.

Labour Inspection

184. Mongolia has not ratified the ILO *Labour Inspection Convention, 1947* (No. 81) or the ILO *Labour Inspection (Agriculture) Convention, 1969* (No. 129) nonetheless these instruments provide useful guidance on labour inspection. The following comments will focus on the Articles of Convention No. 81 with the understanding that the corresponding Articles of Convention No. 129 are also covered by these comments.

185. In addition to the provisions in the Draft, the Law on State Inspection, 2003[19] (as amended) governs the various inspection functions in the country, which at present are undertaken by the General Agency for Specialized Inspection (GASI). The labour laws, including the Labour Law, the LSH Law and the Social Insurance Law are only a few out of several laws enforced by GASI, which comprises a central organization (authority) under the Deputy Prime Minister's Office and inspectors in the aimags throughout the country.

186. The State Inspection Law is also under revision and during a recent mission the ILO was requested to provide comments on it, once the English version became available. The concurrent revisions provide an excellent opportunity to review the labour inspection system and functions and ensure conformity with international standards. The Government should seek coherence between the provisions of relevance to labour inspection in the draft State Inspection Law and those on labour inspection in this Draft and other laws, including the Law on LSH, being mindful of provisions concerning the competent labour inspection authorities and the functions and powers entrusted to labour inspectors. The Government is invited to refer to Article 5 of Convention No.81 which reads: "*The competent authority shall make appropriate arrangements to promote:*

(a) effective co-operation between the inspection services and other government services and public or private institutions engaged in similar activities; and

(b) collaboration between officials of the labour inspectorate and employers and workers or their organisations."

187. Many provisions concerning labour inspection can also be found in the Law on LSH[20], such as provisions relating to the competent authorities entrusted with labour inspection in the area of occupational safety and health (Article 32 of the Law on LSH), the functions entrusted to labour inspectors in the area of OSH (Article 33.4 of the Law on LSH), the notification and recording of industrial accidents and occupational diseases (Article 29 of the Law on LSH), and the power of injunction and the right to initiate or impose measures with immediate executory force in the event of imminent danger to the health or safety of workers (Article 33.3 of the Law on OSH).

Central authority (for labour inspection)

188. **Article 121.1.2** of the Draft entrusts the function of labour inspection, amongst other things, to a "State special inspection by an authorized organization in charge of state labour inspection within this law and respective legislation", ", while **Article 122.1** stipulates that the "State Authority in charge of labour inspection shall monitor implementation of labour law and legislation".

189. In addition, **Article 121.1.1** envisions that State general inspection in terms of implementation of Labour Law and by legislation shall be exercised by State Great Khural, Government of Mongolia, and Governors at all levels, within their respective powers.

190. In the English translation, the distinction between the three above bodies in terms of their role in inspection, and particularly labour inspection, is not entirely clear to the Office, but it is

[19] Translated as Law on State Supervision by "google" translation.

[20] This law is available in the NATLEX database.
http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=MNG&p_classification=14&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY

possible that the inspection in **Article 121.1.1** refers to the general responsibility for oversight and monitoring of the implementation of the labour law and legislation, whereas **Article 122.1** might refer to the general monitoring of their implementation. The latter would be important for exercising the labour inspection function: "to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions" (Article 1(c), Convention No. 81).

191. Unless the ambiguity is solely due to translation challenges, the Government is encouraged to ensure clarity in the respective roles and responsibilities of the different State bodies, including clarity as to the central authority for labour inspection functions.

192. The Government could be advised that if it is not intended to clearly designate the central authority in the Labour Law (**Article 121.1.2** does only refer to "a" specialized governmental body), reference could be made to other laws, such as Ministerial Decrees designating the central authority entrusted with labour inspection functions.

193. In this context, the Government's attention is drawn to Article 4 of Convention No. 81, which provides for the placement of the labour inspection under the supervision and control of a central authority, one of the main objectives of which is to ensure a degree of cohesion and the application of a single inspection policy throughout the country.

194. In this regard, and if the responsibilities in **Article 121.1.1,** in particular, also entail labour inspection, clarifications should be sought with the Government as to the functions assumed by the other entities entrusted with labour inspection functions, including the Parliament and the executive authorities referred to in **Article 121.1.1** of the Draft.[21] If relevant initiatives are not yet under way, the Government should be encouraged to give consideration to streamline inspection functions and encourage cooperation and coordination among different inspection agencies, as provided for in Article 5(a) of Convention No. 81.

Labour inspection is a public function

195. The Office is informed that the CMTU has been contracted to undertake labour inspection and that the functions and powers of the CMTU officials serving as inspectors have been extended to equal those of the inspectors from GASI as of September 2014. This arrangement has been entered into to increase the number of labour inspections in the country. Until September 2014, CMTU officials also undertook inspections, but only in certain sectors and possibly not with all the powers of the GASI inspectors.

196. Though it may be a well-intentioned arrangement, and one which in a short-time frame should increase the number of labour inspections, the Government is strongly advised to reconsider this arrangement, as it is incompatible with the requirements in Convention No. 81 (and Convention No. 129) that "inspection staff shall be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences". The Government is encouraged to design and implement a plan to increase the capacity of the Government to exercise an efficient and effective labour inspection, including increasing the numbers of government inspectors.

[21] Clarification should be sought in particular as to whether the functions of the legislative and executive bodies are limited to the adoption of laws concerning labour inspection and the issuance of relevant Ministerial regulations, which would not raise any problems with the application of the Convention.

Functions of the state authority in charge of labour inspection

197. **Articles 121.1.2 and 122.1** of the Draft set out the functions of the state authority in charge of labour inspection. These articles mandate the labour inspectorate with the function of securing the enforcement of legal provisions relating to conditions of work and the protection of workers (in conformity with Article 3(1)(a) of Convention No. 81) and also drawing the authority's attention to defects or abuses not specifically covered by existing legal provisions (**Article 122.1**). While it is evident in practice that labour inspectors have the latter function, as the labour inspectorate has been consulted in the drafting of the draft, the function in Article 3(1)(c), together with the one in Article 3(1)(b) should be reflected in the Draft for greater clarity.

198. The Office notes with concern that there does not appear to be an article empowering state labour inspectors to supply technical information and give advice (in conformity with Article 3(1)(b) of Convention No. 81). The Government is encouraged to include this important function of the labour inspectorate in future drafts.

Functions of the labour inspectorate

199. **Article 122.1** of the Draft sets out the functions of the state labour inspectorate. This article mandates the labour inspectorate with the function of securing the enforcement of legal provisions relating to conditions of work and the protection of workers (in conformity with Article 3(1)(a) of Convention No. 81).

200. However, there appears to be no article empowering state labour inspectors to supply technical information and give advice (in conformity with Article 3(1)(b) of Convention No. 81). Furthermore, the third function of the labour inspection system in accordance with Article 3(1)(c) of Convention No. 81, namely drawing the authority's attention to defects or abuses not specifically covered by existing legal provisions, is also not clearly reflected in the Draft. While it is evident in practice that labour inspectors have this function, as, according to the technical memorandum, the labour inspectorate has been consulted in the drafting of the draft, the function in Article 3(1)(c), together with the one in Article 3(1)(b) should be included in the revised draft.

Powers of the Labour Inspectorate

201. **Article 123.2** of the Draft outlines the powers of the state labour inspectors, and this article reflects many of the powers outlined in Article 12 of Convention No. 81. The Office has, however, been informed that, in respect of State Inspection, there is separate legislation that was amended in 2010 so as to require labour inspectors to give five days' advance notice to employers. If that is the case, that provision in the other law should be amended in line with **Article 123.2.1** of the Draft (which gives State labour inspectors power to have free access to work premises to be inspected "without prior notice") and also to be in conformity with Article 12 (1)(a) of Convention No.81.

202. While the labour inspectorate must retain the power to enter "without prior notice", it does not prevent the inspectorate from using announced visits (planned or unplanned, compare with the State Inspection Law), when considered that this would serve the purpose best. Several labour inspectorates use an appropriate mix of announced and unannounced inspections.

203. Furthermore, **Article 123.2.2** should be amended so as to bring the methods of inspection in conformity with Article 12(c)(i) of Convention No. 81, concerning the power of inspectors

to interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking.

204. The power to enforce the posting of notices, as provided for in Article 12(c)(ii) of Convention No. 81, could also be included in this Article.

205. For example, **Article 123.2** could be revised to include:

123.2 State labour inspector shall exercise the following powers:

[…]

123.2.xx to enter by day any premises which they may have reasonable cause to believe to be liable to inspection.

123.2.2 to interrogate, ***alone or in the presence of witnesses****, the employer* ***or the staff*** *of the undertaking on any matters concerning the application of the legal provisions;*

123.2 XXX to enforce the posting of notices required by the legal provisions;

Additional functions of the labour inspectorate

206. **Article 123.3** of the Draft states that

"123.3 State Labour Inspector shall have the following duties: […]

123.3.6. other duties as stated in legislation".

In this regard, the Government's attention could be drawn to Article 3(1) and (2) of Convention No. 81, pursuant to which a distinction is made between the main functions of labour inspectors and additional functions. Specifically, Article 3(2) of the Convention provides that: "Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers." The Government's attention could be drawn to the fact that labour inspectors should not be assigned pursuant to article 123.3.6 any functions which would interfere with their primary duties.

207. **Article 123.3.4** of the Draft states that State Labour Inspectors have the duty to keep confidential the source of complaints and keep employers and their representatives uninformed about the complaint that led to the inspection. The Office is informed that GASI inspectors have difficulties in meeting this requirement, in particular with unplanned inspections, as the inspector may only address the conditions covered by the complaint and not other violations discovered during the inspection. If this is correctly understood, this procedure is contrary to Article 15(c) of Convention No. 81, which requires a labour inspector to "treat as absolutely confidential the source of any complaint bringing to their notice a defect or breach of legal provisions and shall give no intimation to the employer or his representative that a visit of inspection was made in consequence of the receipt of such a complaint".

208. **Article 123.3.5** requires the labour inspector "to cooperate with employer and industry trade unions". It would be advisable to amend the article with the following "*…or workers' representative(s), in cases where no industry trade union has been formed"*.

209. **Article 123.4** concerning confidentiality applies "to the period despite the fact if inspector is dismissed from job". This should also apply to situations when inspectors have resigned or have retired from the job.

Regulations concerning labour inspection

210. The previous Labour Law of Mongolia of 1999, in the chapter on labour inspection (Chapter 14) made specific reference to "Rules of the State Labour Inspection" (Articles 140.2 and 140.3). It may be considered to include a reference to the Law on State Supervision and implementing Rules.

211. The Draft does not contain a reference to such rules. However, the Draft does not address many aspects important of labour inspection (for example, conditions of service of labour inspectors (Article 6, Convention No. 81), recruitment (Article 7(1) and (2), Convention No. 81), and technical expertise (Article 9, Convention No. 81). If regulations on labour inspection are going to be developed, it would be appropriate to insert a reference to forthcoming rules or regulations in **Article 122 or 123** of the Draft.

Chapter 13 Other provisions

Penalties to be imposed for violation of law and legislation

212. In **Article 124**, there are a number of places where reference is made to "an official" rather than employer or employee. This may be a question of translation and could mean someone who has an institutional capacity in the employment relationship, but would benefit from clarification.

213. In order to ensure greater coherence, the order of the clauses within **Article 124.1** should be reconsidered, for example, to keep them in the numerical order of the relevant substantive provisions; or to start with the fundamental issues first. For instance, the Government is invited to consider moving **Article 124.1.8** to up front and insert it as one of the first sub-paragraphs of 124.1.

214. As to **Article 124.1.3,** noting that the Criminal Code contains no provisions criminalizing and sanctioning forced labour, the Government's attention is drawn to the fact that, in order to prevent and combat the practice, it is essential that the perpetrators be punished by sufficiently dissuasive penal sanctions, in accordance with Article 25 of Convention No. 29 on forced labour (ratified by Mongolia).

215. In addition, the Draft does not appear to contain a penalty for violations of **Article 13.1.1**. It would therefore be appropriate to include in **Article 124** of the Draft (entitled "penalties to be imposed for violations of law and legislation"), a provision in this regard. For example, the following clause could be inserted in **Article 124.1**:

> *124.1.xx A state labour inspector or judge may impose a fine of 25-50 times the minimum wage, if employer demands employee to work or had employee work during a condition specified in Article 13.1.1 and 13.1.2 of this law;*

If these provisions are adopted in the Labour Law, the Government is encouraged to ensure consistency with the provisions in the LSH Law. As to the level of the fine, the amounts should, on one hand, be sufficiently deterring and on the other hand be realistic and in proportion to the offence ,"25-50 times" the minimum wage is only indicative here, and may still appear low for a serious breach. It may also need further consideration as to a procedural issue: if the employer/company is fined by an administrative fine, what implication does that have on the scope for taking the employer/company to court?

216. Regarding **Article 124.1.15**, it is not clear how this provision relates to those of **Articles 95.2 and 95.3** concerning levies for not reaching the quota for employing workers with disabilities. Generally, quota levies are paid through the labour inspectorate or directly by

employers to the employment promotion fund or its equivalent. Viewing it as a fine to be imposed by a judge is contrary to the spirit of successful quota/levy schemes. If this Article 124.1.15 is a further specification of the quota/levy scheme, it is suggested to amend the provision to say "*State labour inspector*" rather than "Judge". There should also be an amendment to the clause to read "while his/her *impairment* does not prevent …" (instead of "physical conditions").

Miscellaneous errors

217. Although these may be errors of translation, there appears to be certain obvious mistakes in the text, including but not limited to the following:

- **Article 6.10** refers to the word employee before the word "shall". It should read "employer".
- **Article 6.11** refers to "employee" before the word "shall". It should read "employer"
- **Article 69.1** in fine refers to "employer" between "that" and "has". It should refer to "employee".
- **Article 7.6** starts with the word "Employee" it should read "Employee".

It is suggested to review the Draft to ensure that all references to employer and employee are adequate.

Geneva, November 2014

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Annex 1: Suggestions for future regulations, guidance and other materials to support dissemination and implementation of the revised Labour Law

- Regulations or ordinances to implement the provisions of the revised Labour Law;
- Development/consolidation of lists of hazardous work and the prohibited forms of work for minors by regulations;
- Implementing regulations for the regulation of labour supply companies;
- Law/regulation on employer organizations;
- Rules and regulations on the establishment of a national tripartite committee on labour and social consensus;
- List of jobs/types of jobs performed in 'difficult working conditions': i.e. identifying those jobs that are particularly hazardous, dangerous or difficult due to the working environment or nature of the work
- System for registration, recognition and monitoring of labour supply companies;
- System for registering and recording of different types of workers including – domestic workers, minors, homeworkers;
- System for regulating and providing permits for employers employing children under the age of 15 for artistic performances, scientific research and commercial advertising;
- Establishment of an institutional framework for conducting gender-neutral pay evaluations;
- Guidelines or a code of practice on sexual harassment providing practical guidance to employers on how to prevent and respond to instances of sexual harassment in the workplace;
- Guidelines or a code of practice on harassment providing practical guidance to employers on how to prevent and respond to instances of harassment in the workplace;
- Informative guidelines on pay equity;
- Practical guidelines for conducting gender-neutral pay evaluations to support application of the principle of equal remuneration for work of equal value;
- Guidelines on establishing and operating bipartite cooperation units in enterprises;
- Guidelines and training for employers on reasonable accommodation and employment of persons with disabilities;
- Guidelines or code of practice for employers on HIV and AIDS and the world of work;
- Guidelines for mediators to support understanding of their role in interest disputes and rights disputes settlement;
- Code of practice on picketing by a tripartite social consensus committee;
- Guidelines on collective bargaining procedures and negotiation in industrial relations;
- Guidelines or code of practice or rules of conduct for intermediaries in both interest and rights disputes;
- Guidelines for social partners to understand the process of interest dispute resolution and their roles and responsibilities;
- Guidelines on strikes – legal and illegal actions and the role and responsibilities of parties involved in strikes, including workers, trade unions, employers, government and public authorities;
- Guidelines for understanding the process and requirements for rights dispute resolution;
- Guidelines or code of practice or procedural guidance for arbitrators hearing rights disputes.

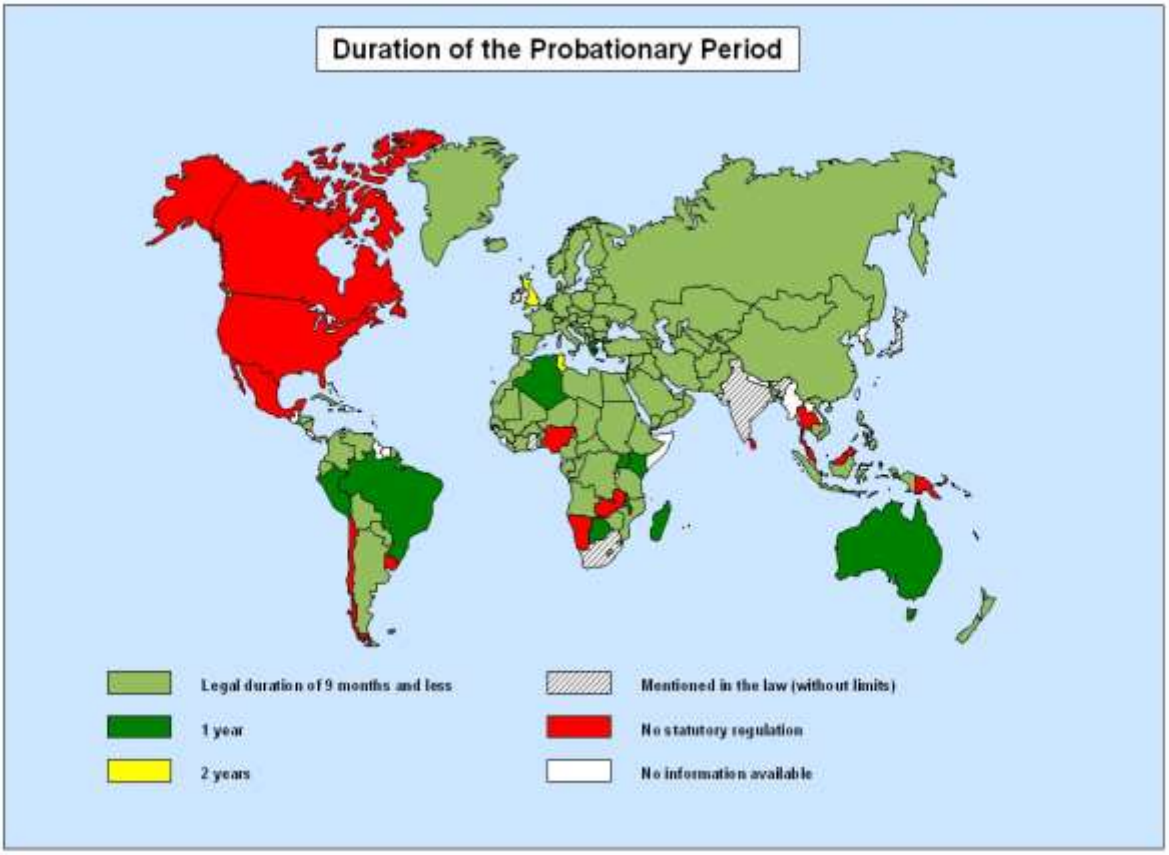
Annex 2: Regulation of Fixed-term contracts

Maximum duration of FTCs, including renewals	Countries
1 year and less	Chile, Guinea-Bissau, Pakistan*, Panama, Serbia, Sierra Leone, Venezuela, Zimbabwe*
2 years	Bolivia, Bosnia and Herzegovina, Brazil, Burkina Faso*, Cambodia, Central African Republic, Republic of Congo, Czech Republic, Djibouti, Côte d'Ivoire, Ecuador, Equatorial Guinea, France, Germany, Greece, Guinea, Iceland, Republic of Korea, Lebanon*, Luxembourg, Madagascar, Maldives, Mauritania, Montenegro*, Morocco*, Palau, occupied Palestinian territories, Senegal, Slovenia, Spain, Sweden, Thailand, Venezuela
3 years	Algeria, Angola, Belgium, Bulgaria, Colombia*, Comoros, Croatia, Cuba, Czech Republic, Greece, Indonesia, Italy, Japan*, Latvia, Liberia*, Myanmar, Netherlands, Panama*, Portugal, Romania, Sâo Tomé and Principe, Saudi Arabia*, Slovakia, Timor-Leste
4 years	Benin, Cameroon, Chad, Democratic Republic of Congo, Gabon, Georgia, Germany, Ireland*, Libya, Malta, Niger, Norway, Sudan, Togo, Tunisia, United Arab Emirates*, United-Kingdom*
5 years	Argentina, Armenia, Azerbaijan, Bahrain, Belarus*, Cape Verde, Costa Rica*, Finland, Honduras, Hungary, Jordan*, Kuwait, Kyrgyz Republic, Lithuania, Macedonia (FYR), Moldova, Mongolia*, Paraguay, Peru, Qatar, Romania, Russian Federation*, Senegal*, Syria, Tajikistan, Turkmenistan, Uzbekistan
6 years	Mali, Mozambique, Portugal, Viet Nam
10 years	China, Estonia, Switzerland*
No legal limits for the maximum duration of fixed-term contracts	Afghanistan, Albania, Antigua and Barbuda, Australia, Austria, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Burundi, Canada (federal), Cyprus, Denmark, Dominica, Dominican Republic, Egypt, El Salvador, Eritrea, Ethiopia, Fiji, Gambia, Ghana, Grenada, Guatemala, Guyana, Haiti, Hong Kong (SAR, China), India, Iran, Iraq, Israel*, Jamaica, Kazakhstan, Kenya, Lao, Lesotho*, Malawi, Malaysia, Marshall Islands, Mauritius, Mexico, Namibia, Nepal, New Zealand, Nicaragua, Nigeria, Oman,

	Papua New Guinea, Philippines, Poland, Rwanda, Samoa, Seychelles, Singapore, Solomon Islands, South Africa, Sri Lanka, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sri Lanka, Suriname, Swaziland, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkey, Uganda, Ukraine, United States, Uruguay, Vanuatu, Yemen, Zambia

Source: Muller, Fixed-term contracts: Global overview of labour laws, (forthcoming in 2015) with data from ILO EPLex, World Bank Doing Business Database, and national labour laws.
Note: For countries marked with "", specific comments and assumptions are provided in Muller, 2015 (forthcoming).*

Annex 3: Maximum duration of the Probationary period



Source: Muller Angelika, "Legal regulation of the probationary period worldwide" (forthcoming in 2015), ILO, Geneva