

Draft 3

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## CONSULTATION DRAFT

## NON-DISCLOSURE AGREEMENTS ACT

BILL NO.

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BE IT ENACTED by the Lieutenant Governor and the Legislative Assembly of the Province of Prince Edward Island as follows:

**1. Definitions**

In this Act

- (a) **“agency of government”** means an agency of government as defined in the *Audit Act*, R.S.P.E.I. 1988, Cap. A-24, or any entity prescribed as an agency of government in the regulations;
- (b) **“discrimination”** means discrimination as defined in the *Human Rights Act*, R.S.P.E.I. 1988, Cap. H-12;
- (c) **“employee”** includes
  - (i) a person receiving or entitled to wages for work performed for another,
  - (ii) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
  - (iii) a person being trained by an employer for the employer's business,
  - (iv) a person on leave from an employer,
  - (v) a person who has a right of recall, and
  - (vi) a volunteer, as defined in the *Volunteers Liability Act* R.S.P.E.I. 1988, Cap. V-5,
- (d) **“employer”** includes a person who
  - (i) has or had control or direction of an employee, or
  - (ii) is or was responsible, directly or indirectly, for the employment of an employee;
- (e) **“Minister”** means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;
- (f) **“non-disclosure agreement”** means a provision in writing in an agreement, however described, between an employer and an employee whereby the employee agrees not to disclose any material information about the circumstances of a dispute between them

concerning allegations of sexual harassment or discrimination that are unlawful under a provincial or federal enactment;

- (g) **“relevant employee”** means the employee who has experienced or made allegations about sexual harassment or discrimination;
- (h) **“relevant individual”** means the person who committed or is alleged to have committed the sexual harassment or discrimination; and
- (i) **“sexual harassment”** means sexual harassment as defined in the *Employment Standards Act*, R.S.P.E.I. 1988, Cap. E-6.2.

## 2. Administration of Act

- (1) The Minister is responsible for the administration of this Act.

### Delegation

- (2) The Minister may delegate to any person the exercise of any of the powers given to, or the fulfillment of any of the responsibilities imposed on, the Minister pursuant to this Act and the regulations other than the power to enter into agreements.

### Terms and conditions

- (3) The Minister may impose any terms and conditions on a delegation pursuant to this section that the Minister considers appropriate.

## 3. Purpose

The purpose of this Act is to regulate the content and use of non-disclosure agreements.

## 4. Non-disclosure agreement

- (1) Other than in accordance with subsection (2), an employer shall not enter into a non-disclosure agreement with a relevant employee where
  - (a) the employee has experienced or made allegations of sexual harassment or discrimination; and
  - (b) the non-disclosure agreement has the purpose or effect of concealing the details relating to a complaint of discrimination or harassment.

### Non-disclosure agreement permitted

- (2) An employer may only enter into a non-disclosure agreement with a relevant employee in accordance with this section if such an agreement is the expressed wish and preference of the relevant employee concerned.

### Enforceability of agreement

- (3) Where an agreement is made under subsection (2), the agreement shall only be enforceable where
  - (a) the relevant employee has been offered, in writing, independent legal advice at the expense of the employer;
  - (b) there have been no undue attempts to influence the relevant employee in respect of the decision to include a requirement not to disclose any material information;
  - (c) the agreement does not adversely affect
    - (i) the health or safety of a third party, or

- (ii) the public interest;
- (d) the agreement includes an opportunity for the relevant employee to decide to waive their own confidentiality in the future and the process for doing so; and
- (e) the agreement is of a set and limited duration.

**Separate agreement prohibited**

- (4) An employer may not enter into a separate non-disclosure agreement solely with the relevant individual where the agreement has the purpose or effect of concealing the details of a complaint relating to the sexual harassment or discrimination concerned.

**Agreement null and void**

- (5) Where a non-disclosure agreement following an incident of sexual harassment or discrimination is made that does not comply with subsections (3) or (4), that agreement is null and void.

**Non-application**

- (6) An agreement made in accordance with subsection (2) shall not apply to
  - (a) any disclosure of information protected or required under the *Employment Standards Act*, the *Human Rights Act*, section 6 of this Act, or any disclosure protected or required under another enactment;
  - (b) general artistic expression by the relevant employee in relation to the harassment or discrimination; or
  - (c) any communication relating to the harassment or discrimination between the relevant employee and
    - (i) a person whose duties include the enforcement of federal or provincial law, with respect to a matter within the person's power to investigate;
    - (ii) a legal professional;
    - (iii) a medical professional;
    - (iv) a mental health professional;
    - (v) the Office of the Ombudsperson within the meaning of the *Ombudsperson Act R.S.P.E.I. 1988, Cap. [ not proclaimed ]*;
    - (vi) a prospective employer;
    - (vii) a friend, a family member or personal supporter; or
    - (viii) a person or class of persons prescribed in the regulations.

**Plain Language**

- (7) An agreement made under subsection (2) shall, insofar as is possible, be written in plain language.

**Non-disparagement agreement**

- (8) In this section, all references to a non-disclosure agreement shall be taken to also refer to a non-disparagement agreement where the non-disparagement agreement has the effect or purpose of concealing details relating to an incident of sexual harassment or discrimination.

**5. Enforcement**

Where a non-disclosure agreement was made before the coming into operation of this Act, it shall only be enforceable if it was made in accordance with subsection 4(3), save for any provisions protecting the identity of the relevant employee, which shall remain in effect.

**6. Report**

- (1) In this section, “**fiscal year**” means fiscal year as defined in the *Financial Administration Act*, R.S.P.E.I. 1988, Cap. F-9.

**Report, agency of government**

- (2) Each agency of government shall submit to the Minister, no later than June 30 each year, a report on the use of non-disclosure agreements within the agency of government, including
- (a) the number of non-disclosure agreements entered into by the agency of government during the previous fiscal year;
  - (b) the total sum of any money expended by the agency of government during the previous fiscal year to comply with the terms of non-disclosure agreements to which the agency of government is a party; and
  - (c) any additional information prescribed in the regulations.

**Report, employer**

- (3) Subject to subsection (4), each employer other than an agency of government shall submit to the Minister, no later than June 30 each year, a report on the use of non-disclosure agreements by the employer, including
- (a) the number of non-disclosure agreements entered into by the employer during the previous fiscal year;
  - (b) the total sum of any money expended by the employer during the previous fiscal year to comply with the terms of non-disclosure agreements to which the employer is a party; and
  - (c) any additional information prescribed in the regulations.

**Non-application, employers**

- (4) Subsection (3) does not apply to an employer if the employer
- (a) has not entered into a non-disclosure agreement during the previous fiscal year;
  - (b) was not required to expend any sum of money during the previous fiscal year to comply with the requirements of a non-disclosure agreement to which the employer is a party; and
  - (c) has no other reporting obligations relating to information prescribed in the regulations.

**Report by Minister**

- (5) The Minister shall publish, no later than September 30 in each year, a report containing
- (a) the number of non-disclosure agreements entered into by agencies of government during the previous fiscal year;
  - (b) the total sum of any money expended during the fiscal year by agencies of government to comply with the terms of a non-disclosure agreement to which the agencies of government are parties;
  - (c) the number of non-disclosure agreements entered into by employers other than agencies of government during the previous fiscal year;

- (d) the total sum of any money expended by employers other than agencies of government during the previous fiscal year to comply with the terms of a non-disclosure agreement to which the employers are parties;
- (e) information about any supports, services and accommodation available to employees as they relate to sexual harassment or discrimination;
- (f) information about any initiatives and programs established by the Government of Prince Edward Island to raise awareness of the supports and services available to employees affected by sexual harassment or discrimination; and
- (g) any additional information the Minister considers appropriate.

**Identifying information prohibited**

- (6) The report referred to in subsection (5) shall not contain individually identifying information of any person in relation to a non-disclosure agreement.

**7. Advisory opinions and interpretation bulletins**

- (1) The Minister may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act or the regulations.

**Not binding**

- (2) Advisory opinions and interpretation bulletins issued pursuant to subsection (1) are not binding.

**8. Additional duties and powers of Minister**

- (1) In addition to the other powers conferred or other duties imposed under this Act, the Minister's duties and functions include the development and implementation of educational programs to foster public awareness of the requirements of this Act, particularly on the part of employers.

**Minister may make inquiries**

- (2) Where the Minister has a reasonable belief that
  - (a) the number of non-disclosure agreements entered into by an employer during a fiscal year exceeds what is reasonable for an employer; or
  - (b) an employer has demonstrated a pattern of entering into non-disclosure agreements over multiple fiscal years;

the Minister may make inquiries to the employer relating to the use of non-disclosure agreements and what actions the employer is taking to address sexual harassment and discrimination with respect to employees.

**9. Offence**

An employer who, after the coming into force of this Act,

- (a) enters into a non-disclosure agreement that is not made in accordance with section 4; or
  - (b) fails to submit a report required to be submitted under subsection 6(3);
- is guilty of an offence and is liable on summary conviction to a fine of not less than \$10,000 or more than \$100,000, and to pay such restitution as the judge thinks fit to any employee aggrieved or affected by the contravention.

**10. Regulations**

The Lieutenant Governor in Council may make regulations

- (a) defining terms used but not defined in this Act;
- (b) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out the intent and purpose of this Act;
- (c) prescribing an entity to be an agency of government for the purpose of this Act;
- (d) establishing the maximum expense payable by an employer for the provision of independent legal advice to an employee under clause 4(3)(a);
- (e) establishing the maximum duration of a non-disclosure agreement under clause 4(3)(e);
- (f) prescribing persons or classes of persons to whom a non-disclosure agreement does not apply under subsection 4(6);
- (g) respecting the standard form of a non-disclosure agreement under this Act;
- (h) prescribing additional information that is required to be reported to the Minister under clauses 6(2)(c) and 6(3)(c); and
- (i) respecting the form and manner of a report submitted under subsection 6(2) or 6(3);
- (j) respecting the management, retention, and disposition of information collected under section 6.

**11. Appropriation required**

The moneys required for the purpose of this Act shall be paid out of moneys appropriated for that purpose by the Legislature.

**12. Commencement**

This Act comes into force three months following Royal Assent or on a date to be proclaimed by the Lieutenant Governor in Council, whichever is earlier.

## EXPLANATORY NOTES

**SECTION 1** establishes definitions to be used for the purposes of the Act, including definitions of “agency of government”, “discrimination”, “employee”, “employer”, “Minister”, “non-disclosure agreement”, “relevant employee”, “relevant individual” and “sexual harassment”.

**SECTION 2** provides that the Minister is responsible for the administration of the Act, and may delegate powers or responsibilities other than the power to enter into agreements, on such terms and conditions that the Minister considers appropriate.

**SECTION 3** establishes that the purpose of the Act is to regulate the content and use of non-disclosure agreements.

**SECTION 4** sets out various requirements governing non-disclosure agreements and provides that agreements that do not comply with the requirements are null and void.

**SECTION 5** provides that here a non-disclosure agreement was made before the coming into operation of the Act, it is only enforceable if it was made in accordance with the requirements of the Act, save for any provisions protecting the identity of the relevant employee, which shall remain in effect.

**SECTION 6** sets out annual reporting requirements for agencies of government, employers and the Minister.

**SECTION 7** allows the Minister to issue non-binding advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of the Act or the regulations.

**SECTION 8** requires the Minister to develop and implement educational programs to foster public awareness of the requirements of the Act, particularly on the part of employers, and empowers the Minister to make inquiries about an employer’s use of non-disclosure agreements where the Minister has a reasonable belief that inquiries are merited in the circumstances described.

**SECTION 9** establishes an offence for an employer who, after the coming into force of this Act, enters into a non-disclosure agreement that is not made in accordance with section 2 of the Act.

**SECTION 10** establishes regulation-making powers for the purpose of the Act.

**SECTION 11** provides for the moneys needed for the purposes of this Act to be paid out of moneys appropriated for that purpose by the Legislature.

**SECTION 11** provides for the commencement of the Act.

