

Summary of discrimination consultation

Service area / [Employment, Pensions and Incentives](#)

Location / [Guernsey](#)

Date / [September 2019](#)

Introduction

The States of Guernsey Committee for Employment & Social Security (the Committee), has opened its consultation on its proposed multi-ground discrimination legislation. Responses are invited from stakeholders, who have until 30 September 2019 to participate in the consultation.

The States have published Technical Draft Proposals, as well as a summary of those proposals, a proposed list of exceptions to the legislation, and a questionnaire which can be used as the basis of a response. This note outlines what we at Carey Olsen regard as some of the key issues from an employer's perspective on what is proposed and where your input may be key. To help you, the note includes comparisons to the key equivalent provisions in the UK and Jersey law in this area, given that these are the jurisdictions with which the majority of you will be most familiar.

We welcome your comments and would be glad to assist you with any queries on these matters or the consultation process generally.

Discrimination in employment

The proposed legislation will prohibit discrimination by employers and service providers on the basis of any of the following protected characteristics:

- Age
- Carer status (for carers of children and adults with a disability only – see 'Definition of Disability' below)
- Disability

- Marital status
- Pregnancy or maternity status
- Race
- Religious belief
- Sex
- Sexual orientation
- Trans status.

The proposals set out the proposed reach of the legislation. Thus, it is proposed that an employer (of any size) must not discriminate on any of the protected characteristics in relation to:

- Job advertising
- Access to employment
- Terms and conditions of employment
- Equal pay
- Vocational training and work experience
- Promotion or re-grading
- Classification of posts
- Dismissal
- Contract workers.

As such, the proposed legislation will capture, for example, personal office holders who are not employees e.g. non-executive directors will have protection from discrimination in relation to their appointment, its terms, their opportunities and termination of their position.

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Legal concepts

The sorts of activity that it is proposed will be subject to protection are comprehensive and include protection against:

- Direct discrimination (less favourable treatment because of a protected characteristic).
- Indirect discrimination (the application of a provision, criterion or practice (PCP) which places those with a particular protected characteristic at a disadvantage/detriment when compared to those who do not share that characteristic, and which cannot be objectively justified).
- Discrimination by association (less favourable treatment because of a protected characteristic of a person associated with the victim of discrimination e.g. an employee with a disabled partner).
- Failure to make appropriate adjustments (when it is difficult for a person with a disability to access equality of terms and conditions without an adjustment and it would not impose a disproportionate burden on the employer to make such an adjustment).
- Discrimination arising from disability (less favourable treatment due to something caused by a person's disability e.g. their absence from work, and which cannot be objectively justified).
- Harassment (unwanted conduct relating to one of the protected characteristics and which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment).
- Sexual harassment (unwanted conduct of a sexual nature with the purpose or effect as above).
- Victimisation (less favourable treatment of a person because they made a good faith allegation/complaint of discrimination).
- An anticipatory accessibility duty.

The questionnaire proceeds on the basis that the proposed legislation should cover all of the protected characteristics and all of the prohibited activities listed above, and the responses sought by the questionnaire are therefore limited in scope. As a consequence, it is unclear what room there is to influence these matters. As some of these strands have been introduced with little or no consultation with business, it is imperative in our view that business does make its views known, if it considers that the provisions are problematic for any reason.

It is worth noting that Guernsey already has direct/indirect discrimination and victimisation within its Sex Discrimination (Guernsey) Ordinance, 2005 (the Ordinance), and so employers are likely to be familiar with some of the basic anti-discrimination concepts from the Ordinance. However, the Ordinance does not currently have a specific provision on harassment, so this will be a new area of protection. Nonetheless, as similar definitions to what is proposed already feature in many Guernsey employers' internal policies, it is unlikely that this change will be particularly difficult for employers to adapt to.

The most significant change and, we suspect, concern for Guernsey businesses will likely be the introduction of the multiple grounds of discrimination law and its extensive scope with intentionally wide definitions and application. As these are likely to represent the areas of concern for employers, we have outlined the key issues relating to these below, along with what we regard to be other points of note.

Key issues

Definition of disability

The definition of disability which has been proposed is predominantly based on the Irish definition and is therefore significantly different from that used in the UK and Jersey. The definition approaches the issue of what counts as a 'disability' from a 'social model' perspective, rather than a 'medical model'. What this means is a shift in focus from disability being assessed on the basis of recognised medical difficulties affecting those with impairments, to a focus on the social impact and barriers which prevent those with impairments from being able to fully participate in society and the workplace.

One critical difference between what is proposed and the regimes in the UK and Jersey, therefore, is that employees who seek to establish disabled status will not have to show that their impairment is of a long term nature (lasting for a minimum of a year in the UK and 6 months in Jersey) nor that it has a substantial/adverse impact on their ability to carry out day to day activities.

The working draft definition is as follows:

'disability' includes but is not limited to:

- a. the total or partial absences of a person's bodily or mental functions, including the absence of a part of a person's body,*
 - b. the presence in the body of organisms or entities causing or likely to cause, disease or illness,*
 - c. the malfunction, malformation or disfigurement of a part of a person's body,*
 - d. a condition or malfunction which results in a person learning differently from a person without the condition or malfunction,*
- or
- e. a condition, disease or illness which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour;*

To avoid doubt where a disability is otherwise covered by this definition, the course or duration of the disability is not relevant and there is no required level of impact on the ability of the affected person to function.'

Continued

The final sentence is particularly crucial – there is no qualifying period for the condition before the individual will attract protection, nor is there any de minimis level of impact. This is a highly significant change to the position in the UK and Jersey and one which should be a serious concern for employers. The UK and Jersey laws reflect a policy decision reflecting the needs of their societies, both individuals and employers, and represent a careful balancing act between their respective interests.

In our view, it is questionable whether the Committee's proposals afford an equivalent balance of interests for Guernsey businesses. This concern is plainly not lost on the Committee as their guidance concedes that the nature of this definition could have a significant impact on employment and that any short-term period of sickness could give rise to a disability discrimination claim. For example, in terms of the approach Guernsey employers should take if this definition is adopted, the Committee's suggestion is that they should not take sickness absence into account in recruitment decisions and redundancy scoring exercises, and should apply appropriate 'discretion' in applying capability procedures and making decisions in respect of the termination of employment.

Perhaps more fundamentally, it is entirely possible that this significant shift in balance will have an impact on whether or not new business will be attracted to Guernsey as a place to do business or indeed to continue to operate in.

Discrimination arising from disability

This prohibits less favourable treatment of a disabled person, not on the ground of a person's disability but because of something arising in consequence of that disability (e.g. their need for flexible working, or their symptoms which manifest at work). The UK's Equality Act contains a similar provision which was enacted in part as it was conceptually difficult to bring a claim for direct disability discrimination. For example, the reason for an employer dismissing a disabled employee due to long term absence is unlikely to be the employer's desire not to employ a disabled person, but instead is the employer's response to the consequences of that person's disability.

Unlike direct discrimination, discrimination in consequence of a disability can be objectively justified. Thus, an employer can treat a disabled person less favourably if they can show that doing so was a proportionate means of achieving a legitimate aim e.g. a small business may have the legitimate aim of providing continuity of client care through face to face meetings, which it is unable to meet due to the frequent requirement of an employee with a mental health issue to work from home.

Appropriate adjustments

The concept of appropriate adjustments is similar to that of 'reasonable adjustments' in the UK and Jersey law. No draft wording is yet provided, but it is proposed that such an adjustment should:

- not impose a 'disproportionate burden' on the employer;
- respond to the needs of a particular person;
- involve consultation with that person; and
- be 'necessary and appropriate'.

The denial of an appropriate adjustment will amount to discrimination – unless the employer can show that to make it would be disproportionate. It is anticipated that the duty will apply to employers only when they have knowledge or could reasonably be expected to have knowledge of the employee's disability.

No definition of what constitutes a disproportionate burden will be provided in the legislation but the guidance suggests the tribunal will be directed to consider the benefits/detriments of the adjustment, the financial circumstances of the employer and the cost of the adjustment, and the availability of financial and other assistance to the employer e.g. grant funding.

It is emphasised by the Committee that the duty to make an appropriate adjustment will not oblige employers to employ someone who cannot undertake the essential functions of the role. The Committee are also considering whether any state funding will be made available in relation to this duty. In this area we consider that the use of occupational health services will be key to assisting employers in understanding their responsibilities.

Anticipatory accessibility duty

This is being pitched as a 'proactive' duty rather than the 'reactive' nature of appropriate adjustments. It is not proposed that employers would have to comply with this duty in relation to their employees generally in anticipation that some employees may be disabled. However, employers who provide education/goods and services/accommodation to the general public will be caught, in so far as the duty will apply to any interactions the public has with their services (including their premises unless perhaps these are not customer-facing).

Those businesses to which the duty applies would be required to do the following:

- demonstrate that they have considered how accessible their service is to those with common disabilities/impairments, particularly those most prevalent in their normal customer/client base;
- On the basis of those considerations, create an appropriate and proportionate plan to improve access to their service; and
- Be able to show that this 'access plan' is being implemented.

Continued

The immediate focus here is on having a plan rather than making any immediate major changes to service provisions and it is suggested that businesses undertaking an 'access audit' is an appropriate first step. In due course there may be codes of practice issued by the proposed independent body, the Equality and Rights Organisation (ERO) (if formed) which may set out appropriate standards.

However, whilst there may be transitional arrangements to let businesses adapt, there are teeth in the proposals. Thus, it is proposed that the ERO will be able to investigate any allegations of non-compliance with the duty and issue a compliance notice, failing which a fine may be imposed.

An access plan may be relevant in evidence when a business is defending an indirect discrimination claim in the context of goods and services. It is also foreseen that it may be relevant in defending a failure to make an appropriate adjustment claim, although less so given this will be specific to an individual.

As to timeframe, it is proposed this duty will be delayed following the implementation of the legislation to allow time for action plans to be put in place. The questionnaire specifically asks respondents to comment on what they view as an appropriate timescale for phased implementation (they propose 2 years to have a plan and 10 years to make any required physical changes).

Harassment and vicarious liability

Harassment is a form of discrimination. Employers will be liable for the actions of their employees who harass colleagues and will be held to have discriminated against the victim of harassment, unless they can make out the defence that they took 'reasonable steps' to avoid this. It is proposed that an employer will avoid liability if they have taken reasonable steps to: (i) address harassment which has occurred, and/or (ii) prevent harassment from occurring. Under UK case law reasonable steps have been found to include having a robust equality policy and providing regular, meaningful training on it. Although it might seem rather technical, you will note the language used provides that the defence is available on an 'and/or' basis – in other words, if the employer can show either or both that steps were taken before or after the relevant act. This appears to be different from the position in the UK and Jersey, which is only interested in the steps taken by the employer prior to the harassment. This is potentially helpful for claims during the early stages of the new regime, whilst employers are getting to grips with implementing appropriate training/policies.

It is also proposed that employer's liability will be extended to include liability for the actions of third parties such as clients/customers with whom their employees come into contact, if it was foreseeable that harassment could occur. This creates a significant potential for additional liability.

Under the current Jersey and UK law claims can be brought against both the alleged harasser and the employer. While the guidance does not confirm if this will be the case in the Guernsey legislation, as the existing law stands this can also be done and so it is expected the position will be the same as in Jersey and the UK.

Age discrimination

This is a new protected characteristic. As well as impacting on retirement arrangements, a key proposal to note here is that employees, workers or applicants of school leaver age (16) and above will be able to raise a claim of age discrimination against employers. This is likely to be relevant to businesses which employ apprentices. It is also relevant to the recruitment process as, if enacted, decisions to reject a school leaver candidate cannot be made on the basis of age. The questionnaire asks for replies on this specific proposal.

Also, although it does not form part of the questionnaire, an obvious and significant impact of age discrimination is on the use of fixed retirement ages and fixed term contracts after retirement to continue employment of 'retired' employees. Such contractual clauses will now have to be objectively justified (e.g. because of health and safety considerations). This is likely to prove troublesome for much of Guernsey's office stock and may make such arrangements very difficult in practice.

Carer discrimination

A further proposed protected characteristic which is of note is the 'carer' status. The States' consultation questionnaire does not invite specific comment on this characteristic, but we consider it to be of wide ranging consequence. It is proposed that an individual will qualify as a 'carer' if they provide "continuing, regular or frequent care or support" to either a dependent child who is under 18, or an adult aged 18 or over with a disability which gives rise to the need for such care and support.

Using the extremely broad definition of disability, it is likely that this status will apply to a significant proportion of Guernsey's working population, many of whom provide care or support to elderly parents or friends and neighbours. It is unclear what the threshold for 'regular' or 'frequent' will be (e.g. will doing your neighbour's shopping every two weeks mean you are covered under this status). Unlike other jurisdictions, there is also no requirement for an individual to reside with the person they purport to provide care for.

Importantly, it is difficult to see how all working parents with parental responsibilities would not be deemed to be carers. This is in fact a policy aim of the status, as the Committee have confirmed one of the aims of including this characteristic is to protect individuals of both sexes experiencing discrimination due to family responsibilities. We consider that this will have a significant impact on how employers approach issues like flexible working requests.

Continued

Definition of protected characteristic of sex/trans status

Specific input is requested on whether 'sex' should be defined on a biological or gender identity basis for the purposes of the legislation. As many will be aware, there has been much public debate on this issue in relation to trans men and women. The reason this matters is because of the need in discrimination claims for an appropriate comparator. The Committee's preference is to leave the legislation on the basis that sex is defined as 'being a man or woman' (as it is in the UK and Jersey legislation) and leave the determination of the issue to the tribunal.

It should be noted that this particular question is unrelated to the question of the introduction of a protected characteristic for trans people. Thus, a trans woman (even if determined to be a man for the purposes of a sex discrimination claim) could still raise a claim of discrimination on the grounds of her trans status and her comparator would be an individual who was not trans. The definition of trans status will be broadly the same as the definition used for 'gender reassignment' that is included in the UK and Jersey law.

Equal pay and equal treatment

It is proposed there will be an ability for employees to make a claim for equal pay if they can identify a comparator who is doing work of equal value and there is a pay discrepancy due to their differing protected characteristics (even if unintentional). Equal value is analysed as equal skills and effort of the employee, not the perceived value brought to the employer. Employers may regard this as another instance of a surprising policy imbalance.

The suggestion is that employees will be able to compare themselves with employees from the same or an associated employer. There is however, yet no guidance on the territorial scope the definition of 'an associated employer', other than it would cover 'different branches of a parent company'. This is consistent with the way that the various operations of an employer have always been taken into account when considering employer responsibility under Guernsey's unfair dismissal regime.

The questionnaire asks if there should be a delay before implementation of the right to make an equal pay claim. The relevance of this is the question of whether businesses will need and/or be allowed a period to carry out pay audits and put in place job evaluation schemes to enable them to identify if there is an issue and thereafter to take appropriate remedial steps.

It is also proposed that employees will be able to make a claim in relation to equal treatment if they can identify a comparator who is doing work of equal value and who is engaged on more favourable terms and conditions due to their differing protected characteristics. Such claims may be objectively justified in terms of indirect discrimination if the employer is applying a policy, e.g. granting more holiday in line with length of service, which has a legitimate aim.

Exceptions/permitted forms discrimination

- Positive action – it is foreseen that actions by employers which seek to improve equality in the workplace by giving some type of preferential treatment to those with a certain characteristic, will generally not be discriminatory as long as the employer does not extend this to the use of quotas in recruitment/appointments. Targets can be set to attract applications from those in underrepresented groups, but a candidate's possession of a particular characteristic cannot be the determining factor in the employer's decision. The Committee recommends that employers use an action plan to justify any positive action.
- Direct age discrimination (in limited circumstances) and objective justification of indirect discrimination and discrimination arising from disability.
- Genuine and determining occupational requirements – these will have to be evidenced as objectively justified by employers and will apply only in limited circumstances, where e.g. a particular sex is required for privacy considerations.
- Guernsey specific exceptions – the legislation will contain a list of exceptions i.e. scenarios which are, on the face of it, discriminatory under the new regime but which will be subject to an express carve out where the discrimination is in effect permissible. A proposed list of such carve outs is provided as part of the consultation documents. In relation to employment it is proposed there will be exceptions for: minimum wage, pay during statutory leave (e.g. maternity pay), length of service and seniority, occupational benefit and pension schemes, immigration and population management, provision of accommodation, providing benefits in relation to employee's family members, qualifications, supported employment, ministers of religion and safeguarding.

Procedure

Proposed changes to the current Tribunal procedure are as follows:

- Extension of time limits for raising a claim from 3 months to 6 (with an option to extend up to 12 months in total). This extends the period of risk/uncertainty for businesses quite considerably.
- Employer has one month rather than 2 weeks to respond to a claim.
- Employee can file a 'pre-complaint' when trying to resolve issue informally within 6 months of the discrimination and, if accepted, the tribunal will then offer an extended time limit for the formal complaint to be filed.
- It has been suggested that, in addition to case law from Guernsey courts and tribunal, cases from the UK, Ireland, Jersey and Australia could be persuasive before the tribunal, particularly if the claim relates to a similar piece of legislation to that upon which the Guernsey legislation is based.

Continued

Remedies

Financial compensation

Rather than the fixed award of 3 months' pay currently available under the existing sex discrimination regime, it is proposed that financial compensation will be available to cover both actual financial loss (e.g. in a case of dismissal loss of earnings) and injury to feelings. In assessing the appropriate awards for injury to feelings, the Committee suggests that the tribunal should adopt a version of the 'Vento' bands used in the UK.

There is currently no cap proposed to that compensation but respondents are asked for their views on whether there should be an upper limit. In Jersey, the maximum award for a case of discrimination is £10,000 (with a maximum of £5,000 attributable to hurt and distress). In the UK, loss of earnings is uncapped in claims of discrimination but the maximum award for injury to feelings is £44,000 (although average awards are around £8,000). Once again, Guernsey businesses may consider that the policy direction of the Committee represents a surprising imbalance in favour of employees over business.

Non-financial remedies

It is proposed that the tribunal be given additional scope to impose remedies including certain orders for action such as an order for equal treatment and orders for re-instatement (reinstating an employee into their previous role) or re-engagement (putting an employee back in the company but in an alternative role/branch/location).

General

There is currently a "no costs" regime in the Tribunal and it is proposed that this will remain the status quo.

There is currently no suggestion that the make-up of the Tribunal panel will be changed. This is surprising given that the new regime involves a novel amalgam of concepts and approaches from different jurisdictions, which are untested and for which therefore there will be limited precedent. It may be queried whether this is a fair or sufficient approach given the current configuration of the tribunal panels as a lay panel.

The employment rights organisation

The Committee invites responses on the establishment of an ERO and in particular what functions stakeholders would value in an ERO. This will then form part of the Committee's business case for its creation. It is not clear what empirical data there is in relation to the means for funding or indeed the need for such an organisation. Given the States' drive to ensure self-funding of States bodies to the extent possible, there is plainly a risk, therefore, that the cost of the ERO will ultimately fall on business either through levies, registrations or fines.

This is not to say that in theory an ERO is a bad idea: similar organisations are used in other jurisdictions with mandates that focus on awareness, advisory work and education. A similar mandate is proposed in Guernsey. At this stage, the Committee appears to be open to suggestions in terms of the mandate of the ERO. Some possibilities include the ERO assisting by: producing codes of practice to assist employers in understanding their obligations; providing a form of informal dispute resolution before a concern reaches claim status (e.g. mediation); or, acting as an enforcement body (either instead of the tribunal or in relation to certain types of claims/concerns). An ERO may be a commendable aim, but as yet its role, remit and funding are fundamental matters which still need to be addressed. We therefore encourage you to respond with your suggestions.



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