

# Carey Olsen Starting Point Employment Law Guide – The Discrimination (Jersey) Law 2013

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

Legal jurisdiction / [Jersey](#)

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This Starting Point Guide addresses the fundamentals of discrimination law in Jersey.

## Introduction

Carey Olsen Starting Point Guides are intended as a general introduction and guide to different aspects of Jersey employment law.

They are a summary of the most important issues that we come across. They are very much edited highlights of those issues. If you would like legal advice in relation to any specific circumstances, please do give us a call.

## Jersey – not just cows

Jersey is the largest of the Channel Islands and is a British Crown dependency. It has its own financial, legal and judicial systems. It is not part of the UK or of the European Union (although it has close relationships with both). It also has its own breed of instantly recognisable cows.

## The Discrimination (Jersey) Law 2013 (the “Discrimination Law”)

The Discrimination Law first came into force on 1 September 2014. It currently applies to the following protected characteristics: sex, sexual orientation, gender reassignment, maternity and pregnancy, age, race and disability. These protected characteristics are considered in more detail below.

## What approach to take

There are several areas to consider in preparing for and responding to the Discrimination Law.

In particular, you will need to think about your general approach. Does your organisation want to do what it needs to do in order to comply with the Discrimination Law and no more – or does it wish to consider a more ambitious approach to diversity and inclusion?

The answer to this question is likely to be informed by the size and resources of your organisation. However, it is worth being aware that in many organisations there is a clear business case for engaging more closely with diversity and equality issues – you should be clear about your approach and ensure that you do not lose out on potentially significant benefits.

Areas to consider might include the following:

- **Find a champion** – in most organisations, no initiative will get started without backing at a senior level. Diversity is no different.
- **How diverse are you?** – understanding where you are at the moment is crucial.
- **Look at how and where you recruit** – by going outside the “usual” channels and/or eliminating potential bias, talent may be located in some less obvious places.
- **Think about your employer “brand”** – how are you regarded by your employees, by potential candidates and (often the most difficult one) former employees?
- **Look at your workplace culture** – does your workplace welcome diversity? Is it an inclusive place? Do you reward presenteeism (e.g. long but not necessarily productive hours) over other measures of performance?
- **Are there problem areas (or problem individuals)?**

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- **Can you make work more flexible?** – a growing body of evidence shows a more flexible approach to work is invaluable in attracting and retaining employees and improving company performance.
- **Understand your legal obligations** – irrespective of anything else you do, you must be aware of your legal obligations.

### Who has duties under the Discrimination Law?

All Jersey employers, whatever their size, are covered by the Discrimination Law.

Small employers may have practices that are more informal, have fewer written policies (and HR/management resources), and may be more constrained by financial resources than larger employers, but no employer is exempt from the Discrimination Law because of size.

### What the Discrimination Law means for you as an employer

The Discrimination Law applies to a wide range of individuals who supply services. In fact, it may be better in many cases to think in terms of workers rather than employees – the Discrimination Law is likely to apply to the following categories of workers:

- **Employees**, as defined in the Employment (Jersey) Law 2003 (the “Employment Law”), a person is an employee if:
  - a. they work under a contract of service or apprenticeship;
  - b. they are under a contractual obligation to perform work or services personally (save for those who are providing services to clients or customers in the course of a profession trade or business undertaking which is carried on by the individual in question);
- **Partners** in partnerships;
- **Temporary workers** supplied by an employment agency;
- **Apprentices and vocational trainees;**
- **Voluntary workers.**

### Other areas

The Discrimination Law also applies in a variety of non-employment related areas, including:

- education;
- the provision of goods, facilities and services;
- access to and public premises;
- the disposal and management of premises; and
- clubs.

The above areas are not covered by this note – you should ensure that you are aware of your obligations if you are active in any of the above areas.

### Protected characteristics

The Discrimination Law works by prohibiting certain behaviour in relation to those with a certain protected characteristic. The relevant protected characteristics are as follows;

- **Race** is a broadly drafted concept in the Discrimination Law and covers:
  - a. Colour;
  - b. Nationality;
  - c. National origin (including being of Jersey origin); and
  - d. Ethnic origin.
- **Sex** which includes a person who:
  - a. is a man;
  - b. is a woman; or,
  - c. has intersex status – defined in the Discrimination Law as physical, chromosomal, hormonal or genetic features that are:
    1. neither wholly male or female;
    2. a combination of male or female; or,
    3. neither male nor female.
- **Sexual orientation** which includes a sexual orientation towards:
  - a. People of the same sex
  - b. People of a different sex
  - c. People of the same sex and a different sex
- **Pregnancy and maternity** which in certain circumstances includes breastfeeding.
- **Gender Reassignment** which covers transgender persons, defined in the Discrimination Law as a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s gender by changing the person’s physiological or other attributes that are associated with a particular gender.
- **Age.**
- **Disability** which, under the Discrimination Law, applies to a person who has one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect their ability to engage or participate in any activity in respect of which an act of discrimination is prohibited. A long-term impairment is one which:
  - a. Has lasted, (or is expected to last), for no less than 6 months; or
  - b. Is expected to last until the end of the person’s life.

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## What kinds of behaviour?

The Discrimination Law prohibits certain behaviour in the workplace on the basis of a protected characteristic, e.g. that someone has a protected characteristic, is perceived to have or is associated with somebody who has a protected characteristic.

The Discrimination Law protects people when seeking employment, during employment or when engaged in activities related to their work. It also protects people after they leave employment in some circumstances (see below).

### Key concepts

The behaviours which the Discrimination Law prohibits in the workplace are as follows:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation

### Direct discrimination

Direct discrimination arises when one person treats another person (the “subject”) less favourably than others because of the subject’s protected characteristic (actual or perceived). For race discrimination this includes segregation from others. Direct discrimination will also occur if the less favourable treatment is due to the subject’s association with someone else who has a protected characteristic.

A person directly discriminates against another person (the “subject”) if

because of a protected characteristic

the person treats the subject less favourably than the person treats or would treat others

Unless (in the case of age) the treatment can be shown to be objectively justified

Direct discrimination includes:

- Less favourable treatment because of an employee’s own protected characteristic;
- Less favourable treatment because of an employee’s association with someone who has a protected characteristic (associative discrimination) e.g. where they have caring responsibilities to a family member; and
- Less favourable treatment in circumstances where someone is (rightly or wrongly) **perceived** to have a protected characteristic.

Generally, direct discrimination is not capable of being justified (with certain exceptions such as those connected with Genuine Occupational Requirements – see below under “General Exceptions”). However, if a subject claims to have been treated less favourably because of a protected characteristic of **age**, in certain circumstances the employer may be able to objectively justify the less favourable treatment.

To objectively justify less favourable treatment because of age an employer must show that the discrimination is a proportionate means of achieving a legitimate aim.

**Disability discrimination and direct discrimination** – Direct discrimination in the context of disability extends to cover situations of less favourable treatment even when that less favourable treatment is because of something **arising as a consequence** of an individual’s disability.

A person directly discriminates against a disabled person (the “subject”)

If by reason of something arising as a consequence of the subject’s disability

That person treats the subject unfavourably

Unless that person can show that the treatment is a proportionate means of achieving a legitimate aim

An example of less favourable treatment because of something **arising as a consequence** of an individual’s disability would be if an employer dismissed an employee for absences that were due to their disability. Therefore employers should be cautious when deciding whether or not to dismiss a disabled employee whose disability-related absences have triggered the organisation’s attendance policy.

### Indirect discrimination

Indirect discrimination occurs in the following circumstances:

A person (A) indirectly discriminates against another person (B) if

‘A’ applies a provision, criterion or practice (PCP)

The PCP puts those of ‘B’’s protected group at a particular disadvantage compared to other groups

Unless ‘A’ can show that PCP is a proportionate means of achieving a legitimate aim

Indirect discrimination can be justified in relation to all protected characteristics as long as the employer can show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

In considering an argument related to justification, the Tribunal would need to take into account:

- The nature and extent of the disadvantage caused to individuals;
- How feasible it would be to overcome or mitigate the effects of that disadvantage;
- Whether the employer’s aim is in fact a legitimate one; and
- Whether the disadvantage caused is disproportionate in view of the employer’s aims.

Continued

**Disability discrimination and indirect discrimination** – Indirect discrimination in relation to disability extends to cover the employer’s **failure to make reasonable adjustments** resulting in a positive duty on the employer.

A person (A) applies a provision, criterion or practice (PCP)

That PCP puts a disabled person (B) at a substantial disadvantage compared to those who are not disabled

‘A’ discriminates if they fail to take reasonable steps to avoid the substantial disadvantage

This would apply in the following circumstances;

- **Auxiliary aids** – Failing to take reasonable steps to provide **auxiliary aids** if, but for the provision of an auxiliary aid, a disabled person would be put at a substantial disadvantage compared to those who are not disabled.

If, but for the provision of an auxiliary aid

A disabled person would be put at a substantial disadvantage compared to those who are not disabled

A person discriminates if they fail to take reasonable steps to provide the auxiliary aid

- **Physical features** – If a **physical feature of the premises** puts a disabled person at a substantial disadvantage compared to those who are not disabled, then failing to take reasonable steps to avoid the substantial disadvantage can amount to indirect discrimination.

If a physical feature of premises

Puts a disabled person at a substantial disadvantage compared to those who are not disabled

A person discriminates if they fail to take reasonable steps to avoid the substantial disadvantage

A physical feature of the premises includes;

- a. A feature arising from the design of construction of a building;
- b. A feature of an approach to, exit from or access into a building;
- c. A fixture, fitting, furniture, furnishings, materials, equipment or other chattels, in or on premises; or
- d. Any other physical element or quality.

To avoid the substantial disadvantage caused, an employer may remove the physical feature in question, alter it or provide a reasonable means of avoiding it e.g. an alternative entrance.

In all cases, it is important to remember that the duty imposed is to take reasonable steps to avoid the disadvantage – it is not a requirement to take all steps possible to remove the disadvantage. What is reasonable for one business may not be so for others. Therefore, when determining whether such steps taken are reasonable, the Law outlines matters that should be taken into consideration, for example:

- the extent to which:
  - the likelihood of the substantial disadvantage was reasonably foreseeable; and
  - any steps which are, or would be if taken, proportionate to such degree of likelihood;
- the extent to which any steps are, or would be if taken, effective to prevent or remove the substantial disadvantage;
- the extent to which any steps are, or would be if taken, practical;
- the costs of any steps that have or might be taken;
- the extent of the financial, administrative and any other resources available to the person, including any provided by a third party, for the purposes of taking any steps; and
- characteristics of the person such as the nature of the person’s business, if any, and size.

#### Harassment

An employee is harassed if they are subjected to unwanted conduct as follows:

Unwanted conduct relating to a protected characteristic

That has the purpose or effect of

Violating a person’s dignity

or

Creating an offensive, intimidating or hostile environment

Unless no reasonable person could regard the conduct as having that effect

Harassment also includes unwanted conduct of a sexual nature on the grounds of sex, sexual orientation or gender reassignment. It also includes being treated less favourably because of the subject’s rejection of or submission to the conduct.

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## Victimisation

Victimisation is included in the Discrimination Law to protect individuals against retaliation should they make or support a complaint under the Discrimination Law. A person victimises another if they treat them less favourably or otherwise subjects them to a detriment on the grounds that they have:

- made a complaint under the Discrimination Law;
- instituted proceedings against the person or any other person under the Discrimination Law;
- given evidence or information in connection with proceedings brought by any person against the person or any other person under the Discrimination Law;
- otherwise done anything for the purposes of or in connection with the Discrimination Law in relation to the person or any other person;
- alleged that the person or any other person has committed an act which is prohibited by the Discrimination Law.

There is an exception for complaints made or other acts done in bad faith – but this is rarely used.

Should someone be victimised, they will essentially have a free standing complaint under the Discrimination Law.

## Helping or instructing someone else to discriminate

The Discrimination Law makes it unlawful to knowingly help someone discriminate against, harass or victimise another person.

A person who helps another in this way will be treated as having done the act of discrimination themselves. It is also unlawful to help a person to discriminate against or harass another person after employment has ended, where that discrimination or harassment arises from and is closely connected to that employment.

It is unlawful to instruct or attempt to induce someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act. An instruction or inducement may amount to no more than persuasion and need not be applied directly – it can be indirect. Nor does any act need to result from the instruction or inducement.

## Liability for discrimination

Generally speaking, an employer will be liable for anything done by one of its employees acting in the course of his or her employment. What constitutes “acting in the course of his or her employment” is not defined – but it should be assumed to include anything in the workplace and any situation closely connected to the workplace – such as work related social events.

The only circumstances in which the employer will not be liable for the discriminatory acts of its employees is if it can prove that it has taken all reasonably practicable steps to prevent the employee from acting in a discriminatory manner.

The JACS Guide to the Discrimination Law suggests the following steps should be taken:

- Employers should adopt a clear policy emphasising that discrimination will not be condoned or tolerated;
- Provide training for managers and appropriate staff on equality issues and the need not to discriminate; and,
- Implement a company culture which takes complaints of discrimination seriously and does not tolerate discriminatory conduct on the part of employees.

## Individual liability

An employee (or agent) may be personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment or while acting with the authority of their employer. This applies irrespective of whether the employer is also liable.

But there is an exception to this. A worker or agent will not be responsible if their employer or principal has told them that there is nothing wrong with what they are doing and the employee or agent reasonably believes this to be true.

## General exceptions

There are some circumstances in which it is not unlawful to treat people less favourably.

These include:

- complying with a legal requirement, another applicable law or court ruling, or for the purposes of safeguarding national security;
- complying with a policy adopted by the States of Jersey or a Ministerial Decision where the implementation of the policy applies criteria based upon a person’s birth or length of residency in Jersey and the act is for:
  - a. promoting employment or other opportunities; or
  - b. providing access to facilities and services;
- Selection for domestic employment – this only applies to the recruitment decision only; and
- Genuine Occupational Requirements – where someone of a specific protected characteristic is required because of the specific requirements of the job (for example in a retail environment for reasons of decency and privacy).

## Exceptions – sex discrimination

### Religion

Religious organisations are permitted to discriminate in recruiting a person to conduct religious services where the employer requires their employees to be of a particular sex, have a particular sexual orientation or to be/not be a transgender person.

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## Short term contracts

An employer is permitted to refuse to recruit a woman where:

- the employer aims to recruit a person on a limited term contract to undertake a project of work that is required to be completed within a particular time frame and the employer has no plans to renew the contract; and
- the person who is not recruited is pregnant and the likely timing of her absence on maternity leave would interfere with completion of the project.

## Exceptions – age discrimination

Age discrimination comes with a number of exceptions. For instance, age discrimination is not to be prohibited in education, premises and the provision of goods, facility and services to those under 18. There are also certain carve outs for the provision of pensions, employment benefits and redundancy payments. In addition, unlike the other protected characteristics, employers are able to objectively justify an act of direct discrimination as a proportionate means of achieving a legitimate aim.

## Exceptions – disability discrimination

A person is not considered to fall within the definition of disability under the Discrimination (Jersey) Law based on that person's tendency to:

- start fires;
- steal;
- physically abuse others; or
- sexually abuse others.

A severe disfigurement is to be treated as an impairment having adverse effect **except where** the disfigurement is:

- a tattoo;
- a piercing (for decorative or other non-medical purposes); or
- any object attached through the piercing for such purposes.

This differs from the exceptions in UK equivalent legislation which narrows the scope of the 'disability' definition further. In the UK, the following are additional exclusions;

- Addiction (including a dependency) to alcohol, nicotine or any other substance (unless addiction has resulted from a medically prescribed drug or treatment);
- Seasonal allergic rhinitis (usually known as hay fever);
- Exhibitionism; or
- Voyeurism.

## Exceptions – reasonable adjustments to premises

A person will not discriminate under Article 7A of the Discrimination Law if their contravention under the Discrimination Law arises from compliance with any provision of the Building Bye-laws (Jersey) 2007 or any guidance on compliance with those Bye-laws issued by the Minister and the contravention arises from failure to remove or alter or

otherwise change the physical feature of the premises. This is most likely to arise where planning rules prohibit changes to buildings. The original project to the regulations amending of the Discrimination Law gave the following example of when this exception may apply:

*[A] person wishes to install a wheelchair ramp but, in order to be built at an appropriate gradient, the length of the ramp would encroach on to a public highway; and so in order to comply with the Building Bye-laws, the person could not build the ramp..."*

## Age - retirement and unfair dismissal

When age discrimination became a protected characteristic under the Discrimination Law on 1 September 2016, a transitional period of 2 years (until September 2018) was included in respect of retirement age.

However, now that the transitional period has come to an end, any "forced" retirement will run the risk of direct age discrimination complaints being brought together with unfair dismissal claims.

Despite this, an employer will be able to retain a default retirement without incurring liability in respect of age discrimination if they are able to demonstrate that the retirement age is objectively justified as a proportionate means of achieving a legitimate aim.

Objective justification is difficult to achieve retrospectively, therefore employers wishing to rely on a default retirement age should revise their retirement policies and procedures as soon as possible to ensure that their reasoning for the policy meets the legal requirements for valid justification.

Examples of a **legitimate aim** in this context might include:

- economic factors such as business needs and efficiency (although cost alone is unlikely to be sufficient);
- workforce planning (the need for business to recruit, retain and provide promotion opportunities and effectively manage succession); or
- the health and safety of individual employees, their colleagues and the general public.

In order to demonstrate **proportionality**, employers must be able to show that:

- the default retirement age will actually contribute to the legitimate aim which has been identified e.g. if the aim is to encourage loyalty or facilitate the recruitment and retention of employees then the employer should be able to produce appropriate evidence;
- the discriminatory effect of the default retirement age should be outweighed by the importance and benefits of the legitimate aim; and
- there should be no reasonable alternative to the action you are taking i.e. if the legitimate aim can be achieved by less or non-discriminatory means then these must take precedence.

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## Positive action

'Positive action' means the steps that an employer is permitted to take to encourage people from groups with different needs or with a past track record of disadvantage or low participation to apply for jobs.

An employer can use positive action where they reasonably think (in other words, on the basis of some evidence) that:

- people who share a protected characteristic suffer a disadvantage connected to that characteristic;
- people who share a protected characteristic have needs that are different from the needs of people who do not share it; or
- participation in an activity by people who share a protected characteristic is disproportionately low.

To deal with the three situations, an employer can take proportionate action to:

- enable or encourage people to overcome or minimise disadvantage;
- meet different needs; or
- enable or encourage participation.

However, employers are not permitted to base recruitment or promotion decisions on the basis of positive action – this would be positive discrimination, which is not permitted under the Discrimination Law.

## Making a complaint – the Tribunal

If an employee (or former employee) considers that they have a complaint under the Discrimination Law, they can make a claim to the Discrimination & Employment Tribunal.

The claim must be made within 8 weeks of the last act occurring. If the Tribunal upholds the claim, it may:

- make a declaration of the rights of both sides;
- order a payment of compensation; or
- make a recommendation that the employer take action which will alleviate the adverse effect of the discrimination on the applicant.

Compensation may reflect both financial loss and a sum for hurt and distress up to a maximum of £10,000.

Within that overall limit, the amount awarded for hurt and distress must not exceed £5,000.

## Other laws

The Discrimination Law does not exist in a vacuum – it overlaps and interacts with other laws – in particular the Employment Law provides that a dismissal will be automatically unfair if the reason or principal reason for the dismissal constitutes an act of discrimination against the employee prohibited by the Discrimination Law.

You should ensure that you understand your obligations under the Employment Law as well as the Discrimination Law – looking at either in isolation is not advisable.

## Sources of help

The Discrimination Law is undeniably complex. More information is available from the following sources:

- Local information is available from Jersey Arbitration Conciliation Service ("JACS"): [www.jacs.org.je](http://www.jacs.org.je);
- The Discrimination Law is similar in many respects to the UK Equality Act 2010. This means that much of the UK guidance available from the Equality and Human Rights Commission can be very useful: [www.equalityhumanrights.com](http://www.equalityhumanrights.com); and
- Similarly, ACAS in the UK is an excellent source of guidance: [www.acas.org.uk](http://www.acas.org.uk).

The UK sources above should be treated with care – the law is similar in some respects but there are differences.

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