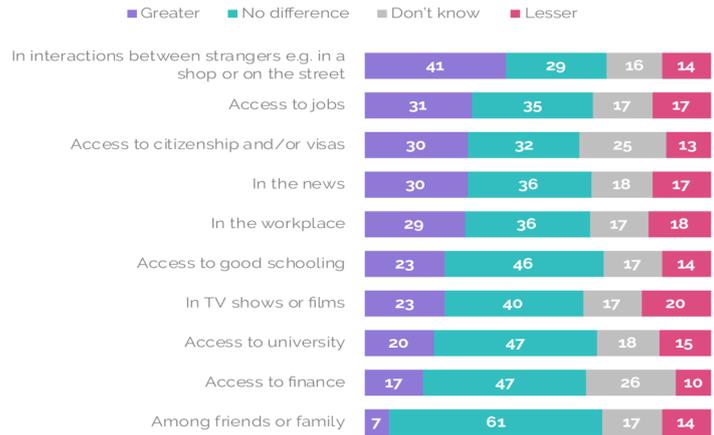




Day to day interactions are where Britons are most likely to believe people from ethnic minority backgrounds face greater discrimination

Thinking more specifically about race in the UK, do you think people from ethnic minority backgrounds in the UK face greater or lesser levels of discrimination than white people in the following areas of life, or no difference? %



A Review of the States of Guernsey Proposals on Anti-Discrimination



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Introduction

Whilst discussions about implementing discrimination legislation have been taking place in Guernsey for 50 or so years, it was not until 2003 that the States of Guernsey agreed principles for introducing multi-ground discrimination legislation to make discrimination unlawful and to promote diversity and equality of opportunity.

The Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 (which included the characteristics of discrimination against men and women, married persons, gender reassignment, and victimisation) came into force in September 2005. The Law was amended in 2016 to include the Maternity Leave and Adoption Leave (Guernsey) Ordinance. This remains the only current anti-discrimination Guernsey law.

The States of Guernsey put forward a proposal document for a new anti-discrimination ordinance dated March 2020, which was approved by the States in July 2020 (“the Proposals”) of which drafting is not yet complete.

These proposals relate to disability discrimination, carer status and race. The intention is to add further grounds at a later stage.

Whilst we agree that protection is required for those who are meaningfully discriminated against, any legislation needs to be proportionate, well drafted, relevant and fully costed; complete with a proper impact assessment.

The key issues with the proposed legislation are noted in the executive summary below, with more in-depth detail being provided in the full report attached. For anyone interested in supporting the Bailiwick on its journey to continued success on a global stage, the below report is well worth a read.

(See: <https://www.gpeg.org.gg/sources> “Proposals for a new discrimination ordinance”)

We particularly suggested that you do read some of the “softer” material in the Appendices. This is not a totally factual subject.



Executive Summary

We have focussed our review on the disability discrimination elements of the Proposals and have not fully reviewed the less impactful and less controversial race and carer status proposed provisions.

We concur that there is a strong moral case against most forms of discrimination and GPEG is in favour of measures (if need be legal measures), to that end. Our comments on the detail of the Proposals should be read in that context.

We have reviewed a substantial amount of material regarding the Proposals and an extensive volume of related materials. Our broad conclusions are:

- The scale of the issue in the Guernsey context is not large.
- The proposed definition of disability is woefully drafted and far too wide.
- The direct and indirect costs to the States are wildly understated. These are expensive Proposals.
- The direct costs to the private sector have not been considered in any structured manner. We believe they would be very considerable.
- Not enough thought or effort has been expended at trying to find non-legal remedies to the issue.
- The moral hazard (temptation to dishonesty) in these Proposals is a significant issue. Guernsey culture will suffer. We all want a healthy society which includes a co-operative approach rather than legalistic confrontation.

Is there a big enough problem?

It is surprising that such drastic Proposals could have been made without any significant evidence of the (a) potential problem and (b) the number of people who could stand to benefit from such legislation. Quite simply, the Government did not identify whether there was a significant problem nor did they attempt to sensibly quantify any such problem. The only clear winners will be employment lawyers.

Our research suggests that whilst there are a

number of disability focused charities (e.g. GROW, GET, GO etc) supporting those with disabilities on the island, the client numbers as a proportion of the total population are low (refer to our detailed research in Appendix 1.)

The Definition of Disability Is Too Wide in Scope

The currently proposed definition of disability describes someone who has an impairment (p37 of Proposals) and is largely lifted from Irish employment legislation. It says:

“Impairment” means:

1. *The total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,*
2. *The presence in the body of organisms or entities causing, or likely to cause, chronic disease or illness,*
3. *Malfunction, malformation, or disfigurement of a part of a person’s body,*
4. *A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*
5. *A condition, disease or illness which affects a person’s thought processes, perception or reality, social interactions, emotions or judgement or which results in disturbed behaviour.*

Everyone who reads and considers this, even briefly, comes to the same view. This definition is too wide reaching –essentially everyone qualifies!

This whole process is driven by the adoption of a **“Social Model”** definition of disability. Not many people know what this is. A definition of such can be found in the training materials provided by the UN staff in respect of the CRPD (Convention on the Rights of Persons with Disabilities) (not in the actual treaty itself).

“With the social model, disability is not a “mistake” of society but an element of its diversity. Disability is a social construct – the result of the interaction in society between personal factors and environmental factors. Disability is not an individual problem but the outcome of a wrong organisation of society. As a consequence, society should restructure policies, practices, attitudes, environmental accessibility, legal provisions and political organisations and therefore



dismantle the social and economic barriers that prevent full participation of persons with disabilities. It opposes the charity and medical approach by establishing that all policies and laws should be designed with involvement of persons with disabilities. The duty bearers under this system are the State – involving all ministries and branches of Government – as well as Society. Under this model, persons with disabilities are empowered, in control of their lives and enjoy full participation on an equal basis with others. The burden of disability is not on them but on Society”.

One might add regardless of costs and unintended consequences.

It is fair to say this definition is revolutionary in flavour, seriously idealistic and readily disputed.

Taken literally the proposed definition of disability for the proposed new Ordinance would have every Guernsey person defined as disabled. By contrast, the more conventional **Medical Model** tends to believe that curing or at least managing meaningful illness or disability revolves around identifying the illness or disability from an in-depth clinical perspective, understanding it, and learning to control and/or alter its course. Where improvement or cure cannot be affected then mitigation needs to be applied.

This legislation will be costly to all employers including the States of Guernsey

The cost to local employers, across the public, private and third sector will be significant. There is no doubt that this will hurt business. The States of Guernsey, the largest employer on the Island with an already large human resource department **does not have the capacity** to make the necessary adjustments to the various policies, contracts and handbook, let alone attempt to change the culture and provide regular and extensive training to all employees. A less substantial business or charity would struggle to comply, and a lot more smaller businesses will inevitably fail to comply. Given that our economy is largely made up of SME's, this is set to hurt, not help, our economic recovery.

Some jurisdictions (e.g. France) reduce the impact of disability law on smaller enterprises

by applying lighter touch regulation on them. This is worth serious consideration in Guernsey.

The legislation will be expensive for employers. From the viewpoints of: opportunity cost and lost management time; reputational risk; lost productivity (and thus profitability and therefore less tax paid); the cost of increased staff (human resource); spiralling legal costs; a decline in employer/employee relationships with a decline in overall wellbeing; and increased insurance costs; the proposed legislation lacks any sense of commercial reality.

We have estimated (conservatively) some of the costs to the States. Please refer to our detailed breakdown on page 10 but in summary we estimate that the costs to the public purse of the States of Guernsey in **year one to be in the region of £2.4m** followed by **annual costs of £1.9m**. This is compared to costs of £350,000 (page 83 of Proposals) as estimated in the States Proposals, a sixth of what we believe it will cost.

Private sector costs

With 64% of businesses in Guernsey being small businesses (those numbering 1 to 5 employees) this will have a huge and disproportionate effect on their bottom line. There will be costs to bear such as:

- First year and on-going training and cultural awareness (cost of training plus lost opportunity cost).
- Dispute resolution / ongoing cultural awareness / shift and support to all employees and service providers.
- Costs of making reasonable adjustments in the workplace for employees and service users.
- Re-writing contracts and policies including HR / management staff time and also advocates' fees.
- Changes to recruitment processes and performance management.
- Increase in insurance costs.
- Reputational risk, deterring potential investors.
- Inevitable increases in claims, significant loss of time and increased legal costs and potential awards.



It is estimated that for the average mid-sized organisation, the implementation of this legislation could easily cost up to **a first-year total of £250,000.**

Total annual and set up private sector costs will run into the millions.

How this will play out in practice – Moral Hazard

The impact of such legislation on the employer/employee relationship would also be significant and could lead to opportunities for the unscrupulous to benefit at the cost of the employer. (See page 12.)

The highly desirable element of trust between employer and employee will be badly affected.

Legal processes when started never really finish well

In addition to the above conclusions, we found weaknesses in the process that led to the current position.

Lack of effective consultation

Despite claiming to have carried out a series of extensive consultations with stakeholders, the evidence to support this being effective remains limited. Out of the 1600 or so employers on the island, most are small to medium in size (“SME”). It is these businesses, the lifeblood of our economy, that will be hit hardest when trying to comply with such legislation. **It appears that little consideration has been given to this.** Our discussions with organisations and individuals from both the private and public sectors showed, unsurprisingly given the huge pagination of the issue, that proper knowledge of the Proposals is extremely rare – despite the consultation efforts.

Experts used

In February 2018, following a competitive procurement process we are told, the Committee for Employment and Social Security (“the Committee”) appointed Dr Lucy-Ann Buckley and Dr Shivaun Quinlivan from the National University of Ireland, Galway’s supposedly “internationally acclaimed” Centre for Disability Law and Policy.

Our investigations highlighted that whilst both Irish “experts” had worked for the University neither was a full-time specialist in the area and neither had in recent times worked for the Centre which is a very small unit with two tenured posts and a very modest output. Efforts to see if the Centre is “internationally acclaimed” failed to find apparent support on the internet. Finally, at the time of appointment Galway was the last university (6=) of 7 of universities in Ireland not to have reached state minimum equality standards and had 4 discrimination lawsuits running against it!

Refer to the history section in Appendix 2 for more detailed information.

Right Priorities?

There is a lack of proportionality in the architecture of the legislation. It is also unclear why the various protected characteristics were ordered to be implemented in the way that they have been presented. Carers for example feature in phase one yet there is no good evidence that carers suffer from substantial discrimination in Guernsey. In any case, should such discrimination arise, as with Jersey legislation, depending on the circumstances, the carer may well be protected from direct discrimination and potentially under indirect direct sex discrimination. Refer to Appendix 1 for a little research on carers.

Age discrimination, probably the most prominent of all discrimination in Guernsey and other jurisdictions, features at a later stage without explanation.



Going legal?

It is not clear that the bulk of the aims of these Proposals could not be achieved by simply putting out a **best practice voluntary guide** on a non-legal footing and perhaps providing some level of mediation assistance for disputes.

This could be trialled for a year or two to enable the States to gather evidence and support to see if legislation is really needed.

Interestingly, the legal opinion sought by Guernsey employer organisations from Voisins in Jersey was holistically unsupportive of the proposals. See page 13 and appendix 7 for further information.

In Summary

Our prime recommendation to the current Government is clear – **pause and review**. There is most definitely a better pathway for Guernsey to protect those in need without impoverishing employer / employee relationships, forcing some small businesses and third sector organisations to close and placing a large additional burden on the taxpayer.



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Main Report

Is there a big enough problem?

Available data, prepared by the Citizens Advice Bureau (CAB), suggests that most complaints relating to discrimination whether they be based on sex discrimination, race or other characteristics arise in or from the workplace. There is little or no quantitative data available to show that there is discrimination happening in Guernsey in other areas of life (e.g., goods and services).

It should be noted, however, there is a general lack of relevant data available in Guernsey and as such the Committee for Employment and Social Security in their Proposal document has relied largely on data from other countries/communities and either made dubious assumptions or extrapolated numbers to represent a population the size of Guernsey to demonstrate the local situation. Crude extrapolation of numbers is also apparent in the other surveys used to demonstrate the situation in the island.

The data supporting the need for such legislation is limited. We were able to obtain statistics from the CAB from 2019 which showed 24 enquiries around discrimination, these included 11 in relation to race/ethnicity, 3 regarding gender/sexual orientation, 2 about age, 2 around disability, 2 around physical appearance, 2 on the grounds of religion and 2 other. It is quite finite. Refer to further detailed statistics in Appendix 1.

There is certainly no significant current evidence of a material number of situations that might merit a heavy legal intervention with its related cost level.

The Definition of Disability Is Too Wide in Scope

Protected Grounds of Disability

The Committee recognised that the ground of disability was the most challenging of all the protected grounds they wished to include in

the new legislation. In the draft technical Proposals, on which the Committee consulted in the summer of 2019, a working draft definition of disability was proposed which was based on the definition included in the Republic of Ireland's Employment Equality Acts and Equal Status Acts. This was a broad impairment-based definition which included no requirements in terms of actual or expected duration of the disability, or impact on a person's ability to carry out, engage or participate in normal day-to-day activities. Not surprisingly, the Committee received extremely diverse feedback on this Proposal from consultation in the business community and from disability groups.

The currently proposed definition of disability is someone who has an impairment (p37 of Proposals). It is largely lifted from Irish employment legislation.

It says "Impairment" means:

1. *The total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,*
2. *The presence in the body of organisms or entities causing, or likely to cause, chronic disease or illness,*
3. *Malfunxion, malformation or disfigurement of a part of a person's body,*
4. *A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*
5. *A condition, disease or illness which affects a person's thought processes, perception or reality, social interactions, emotions or judgement or which results in disturbed behaviour,*

Everyone who reads this comes to the same view. This definition is plain silly and contrary to any common sense. Piece by piece:

1. *Partial absence of function applies to everyone.*
2. *Anyone who uses a toilet will appreciate that humans are awash with potentially harmful bacteria (approx. 10 trillion), viruses and fungi. Quite likely a few parasites too. There will almost always be pre-cancerous cells and even a few cancer cells. Again, applies to everyone.*
3. *Clearly this test will be a matter of opinion. Is a prominent nose a disfigurement? A tattoo?*



4. *It is beyond doubt that everyone learns differently from others and a “condition” is perhaps a difference in a few brain cells. Again, applies to everyone.*
5. *This covers pretty well effectively everyone too. A condition which affects a person’s emotions is everything from being tired to hunger to brain trauma to ungratified and abnormal lust.*

Whatever goes forward, to put such dreadfully drafted nonsense into Guernsey law would be a very foolish thing to do.

In order to stay proportionate we cannot end up with 100% of the population being disabled. Logically if we do end up with such a ridiculous position, we would be better off binning any concept of disability and have some extraordinary and wide human rights legislation instead. Some of the proponents of these Proposals clearly have ambitions in that direction.

With the obvious push back from the business community following the consultation process, there was much discussion with stakeholders from both sides of the argument, surrounding whether Guernsey should adopt a model closer to the Jersey one which defines a requirement for the impairment to be “long term”, and also because it includes a requirement that the impairment “can adversely affect a person’s ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law”, (referred to as “the adverse effect test”).

The 2018 (which amended the 2013 original legislation) Jersey Definition is:

1. Disability is a protected characteristic.
2. A person has the protected characteristic if the person has one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect a person’s ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law.
3. For the purposes of paragraph (2), if a person has more than one impairment, the impairments may be taken together to determine whether they can have the adverse effect referred to in paragraph (2).
4. For the purposes of paragraph (2), a long-term impairment is an impairment which –
 - (a) has lasted, or is expected to last, for not less than 6 months; or

(b) is expected to last until the end of the person’s life.”

The Committee continues to argue that the Proposal document approved by the States in July last year had been much amended to take more notice of the Jersey Law at its time of approval. (Indeed they say it is now based on the Jersey Definition - which seems rather overstated.) The reason they gave for this was down to the fact that they have decided to accept business people’s comments that a totally wide definition would adversely affect employers. They therefore agreed to copy the Jersey wording in 4 (a) and (b) above and added:

“long-term” impairment is an impairment which has lasted, or is expected to last, for not less than six months; or is expected to last until the end of the person’s life”.

By comparison the UK has a 12-month period and. Perhaps surprisingly, the French have a “substantial, permanent condition” as their equivalent.

The Committee further argued that this wording came much closer to distinguishing between illness and long-term disability. It certainly helps, but GPEG’s opinion is that this is not sufficiently robust to show a clear distinction between people with short-term minor ailments and injuries, who would fall outside the scope of protection of the proposed Discrimination Ordinance, and people with longer-term impairments giving rise to “disabilities” who would be protected.

“Expected to last” is a vague criterion and it is not clear who makes the judgement. Also, as employees do not have to report impairments until they choose to, it is obviously possible for a degree of backdating to occur bringing the “has lasted” leg abruptly into play.

The Irish Disability Act (2005) uses a definition of disability a lot closer to what most people will expect.

“That definition of disability, in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.”



It is the Equality Acts (employment law) in Ireland which uses the definition in the current Guernsey Proposals. The Disability Act deals with the States' obligations to the disabled and is clearly much more restricted.

It is worth noting that many jurisdictions, like Ireland, have tighter definitions of disability for a test that results in the state being obliged to help disabled people. This obviously reduces cost whilst dealing with the most pressing cases. Guernsey should consider this.

The Committee decided, to adopt a much more liberal approach than other jurisdictions when they decided that there should be no level of requirement or threshold included within the definition of disability in Guernsey's new Ordinance which they considered would have an adverse effect on a person's ability to carry out, engage or participate in normal day-to-day activities. The Committee's view, informed by its advisers, was that this was in line with an opinion published by the UN Committee on the Rights of Persons with Disabilities which says:

"Persons victimized by disability-based discrimination seeking legal redress should not be burdened by proving that they are "disabled enough" in order to benefit from the protection of the law".

However, this is not to be found in the text of the UN treaty and is simply an opinion of UN staff. Sampling the signatories to the treaty shows little take-up of the staffs' wording.

You can take the argument further – you can clearly be discriminated against because of a wrongly held belief of your employer that you are disabled or have minority sexual habits. Disability-free discrimination is clearly potentially very unjust. There is a very clear issue here – heading for perfection of legislation comes at a larger cost as a larger proportion of daily life becomes subject to legal processes.

Small issues should not generate large consequences.

It is entirely reasonable that you would have to demonstrate being "disabled enough" to be able to pursue a claim about the absence or adequacy of access ramps and lifts. The same should apply to any requirement for any "appropriate adjustment" that is be put upon an

employer. Whilst there are defences in the Proposals for employers, cases could be run at considerable expense, if there is no real requirement to demonstrate there is a case deserving to be heard.

This legislation will be costly to all employers including the States of Guernsey

It is quite evident from the Proposal document that opinions remained polarised between the business community and the social community organisations throughout the period of consultation and despite the Committee having met on a number of occasions, more recently, with representatives of the GDA and business associations, both separately and together, to try to find common ground in relation to this key issue. Unfortunately, it was not possible to find a definition of disability that all stakeholders could support. This remained the position when the case for implementing this legislation was put before the States Assembly in July 2020.

The Proposals obviously need seriously careful re-drafting and additional debate.

In an effort to diminish criticism its position, the Committee recommended in its Proposals that a post-implementation review of the effectiveness of the legislation - specifically the definition of disability should take place no later than two years after the implementation of the final phase of the legislation (including changes to physical features coming into effect) or earlier if there were found to be significant issues with respect to the operation of the legislation. They have yet to bring to the States detailed Proposals for the implementation of phases 2 & 3. Any review would therefore be deferred for a decade or more. (Cans, long grass etc). **If there are lessons to be learnt and changes to be made they should not be left so long.**

It is quite obvious that the emphasis throughout this whole exercise was to ensure that Guernsey chose to more than conform with a particular view of UN Conventions largely regardless of the commercial



implications or the views of the majority and with a narrow view of the social effects.

Cost to the States

The costs to the States of implementing the legislation will be significant. Given the serious complexity of the proposed legislation merely the costs of drafting the legislation will clearly be some human-years of effort for expensive people. £300k perhaps? Certainly not nil.

The following table will be nearer reality than the estimates in the Proposals.

Direct costs to the States of the Proposed Discrimination Ordinance £000			
	Year 1	Annual cost thereafter	Note
Total costs per Proposals document (page 83)	245	350	
Costs not included in the Proposals document:			
Legislation preparation	300		
States direct costs as employer:			
Training and refreshing staff	440	220	
Increased settlements with staff	500	500	
Internal and external costs of settlements, complaints and associated products	500	500	
Costs of accessibility review (to end year 5)	100	100	1
Access to work funding	200	100	
Cost of non-property reasonable adjustments	100	100	
Total costs	2,385	1,870	

Note 1: The probably very substantial capital costs for accessibility are planned to start in year 6. Estimation is impossible but many millions seems likely. See Appendix 8 for a discussion on this.

In addition to these costs there is a potentially **larger** impact from reduction in jobs in the Bailiwick with associated loss of tax revenue to the States. There will clearly be a reduction in prosperity as employers become less likely to take on, or retain, Guernsey-based staff but the size of the impact is speculative – two hundred less private jobs would be of the order of **£4m per year in reduced revenue** for the States.

Precision is not possible and no claim to exactness is made. However, it is surprising that the finance function of the States did not intervene to provide better estimates.

Cost to Businesses

The costs to business of implementing the legislation will be significant. Grievance

procedures are expensive. The legal bill for the employer starts from the moment a grievance is expressed, and it can easily run into tens of thousands of pounds. Employment lawyers are expensive (between £200-750 per hour), not to mention the lost time costs, stress and reputational risk. According to Dr Atul. K Shah, it is estimated that the average legal costs of an employment tribunal are £90,000 per case in lost time, legal costs and award. Not only are there the direct costs, but there are also indirect costs such as loss of reputation, which often happens where cases attract publicity.

It is worth noting that the majority of costs for settlements and disputes will not fall to be recorded publicly. Only the costs of those completing the legal process will be visible.

With two thirds of businesses in Guernsey being small businesses this will have a huge effect on their bottom line. There will be costs to bear such as:



- First year and on-going training and cultural awareness (cost of training plus lost opportunity cost)
- Cultural awareness / shift and ongoing support to all employees and service providers
- Costs of making reasonable adjustments in the workplace for employees and service users
- Re-writing contracts and policies including HR / management staff time and also advocates fees
- Changes to recruitment processes and performance management
- Increase in insurance costs
- Reputational risk
- Increase in claims (lost time and legal costs or awards)

It is estimated that for the average mid-sized organisation, the implementation of this legislation could easily cost up to £250,000 in the first year.

The complexity of this kind of stuff is well illustrated by the Statutory Code of Conduct in the UK relating to the Equality Act 2010. It runs to 326 pages.....Guernsey will need similar. (See: <https://www.gpeg.org.gg/sources> "Employment Statutory Code of Practice")

Learning from the UK, The British Chamber of Commerce warned that the introduction of the Equalities Act would have a one-off cost of £189M. Equality Act researchers found that after 12 months of the Act being in place, 2/3 of respondents were completely unaware of its contents and 20% knew very little despite the costs which far exceeded the estimate.

Following a landmark UK ruling by the Supreme Court in July 2017, the fee to make an application to an employment tribunal was removed on the grounds that this "restricted access to justice". Guernsey is likely to follow suit. Expect a significantly increased number of applications. In the UK, post this ruling, claims increased by 80% in some areas. This level has been maintained.

Analysis by the UK law firm, Fox & Partners has revealed that the number of disability discrimination claims brought in the employment tribunal was 6550 in 2018 (a 37% increase on the previous year). Claims relating to disability discrimination were found to have risen eight times faster in comparison to the growth experienced by tribunal claims –

generally a 4% growth in total 178,990 in 2018.

Reflecting on some case law from the UK might highlight the reality of just how expensive this could be.

Why Is Age Left Out Then?

Much of the litigation, post the 2010 Equality Act was initially taken up with age discrimination. These cases established the nature of justification for direct discrimination (different from indirect discrimination) and the scope of the test for indirect discrimination. Most significant of all (ironically) has been the lengthy litigation on pensions for judges – see in particular, *O'Brien v Ministry of Justice*, where, importantly, budget considerations were held not to be sufficient to justify discrimination. Yet despite the plethora of litigation, ageism remains one of the most overt and prevalent forms of discrimination – headlines such as '[Age discrimination is rife in Britain, UCL study finds, as one in four over 50s report being unfairly treated](#)' (*Telegraph*, 4 April 2019) and '[Over a third of Britons admit to discriminating against people because of their age](#)' (*Independent*, 19 August 2019) remain common.

Ordering of the current proposals is bizarre – evidence suggests that age discrimination is the most overt and prevalent form of discrimination, it certainly generates much of the UK tribunal flow, yet age discrimination under the proposed Guernsey legislation is in phase 2. It is unclear why.

Reasonable Adjustments

This concept is that employers are obliged to make reasonable adjustments to physical features, or provide "auxiliary aids" (e.g., a special keyboard) to avoid disabled persons being put at a disadvantage compared to those who are not disabled.

In the context of disability, *FirstGroup Plc v Pauley*; saw the UK Supreme Court consider the importance for wheelchair users of access to the space on the bus that is (nominally) reserved for them. Though it did not afford disabled people the absolute priority sought, it was an important case in that it required bus companies to do more and highlighted the reasonable adjustment duty and its



anticipatory nature in the context of service provision (i.e. service providers must think in advance about the changes they need to make to their services so as to make them accessible).

The concept goes further than physical changes to premises. The UK code of practice extends to a requirement for the provision of a sign language interpreter for a disabled person.

Turning a lens to Guernsey with our strict planning restrictions and traditional high street; we need to radically consider re-facing our high street and access to some bars, restaurants and offices to accommodate a small number of wheelchair users. See the video made by ITV Channel Television with Gavin St Pier and Aindre Reece-Sheerin [here](#).

Again there is further material on “Reasonable Adjustments” in Appendix 8.

How This Will Play Out in Practice – Moral Hazard

Moral hazard is a situation in which someone has limited responsibility for the risks they take and the costs they create.

In the employment area the discrimination Proposals create a very clear risk. The Proposals do not discuss this at all.

Consider an employee whose performance at work is poor and a “performance plan” is being implemented. Frequently such plans fail and employees eventually get terminated. If an employee sees this coming, the opportunity is to take the matter into the discrimination world where he/she can potentially receive a substantial pay-off (up to 9 months pay) plus up to £10,000 for damage to feelings. Tax-free.

Now is the time for the less scrupulous to surface with a “longstanding depression” or perhaps overstate some existing musculoskeletal issue. The mere discussion of such may well be effective in obtaining an enhanced pay-out. But if the employer does not yield early it will be faced with a court/Tribunal process which works as follows:

- The employee makes a plausible case. He does not have to prove it.

- The employer then has to prove that this case is untrue.
- Such a disproof can be hard as evidence may be thin, oral and short on dispassionate witnesses.
- The employer has to follow complex procedural requirements – even if its behaviour is entirely reasonable, any breach of procedure will result in a lost case.
- Even if the employer succeeds, he/she will be left with the costs of the hearing which will include substantial senior management time, the costs of evidence gathering, hearing costs and legal representation. The theory is that the employer does not need legal advice but in practice given the complexity and oddity of this area of law together with the financial and reputational risks of such a case it will generally need representation.
- The employee’s downsides are slight and financial costs near negligible.

Employers are not all large and rich. Indeed, most businesses in Guernsey are small, employing a handful of employees and with little chance of mastering the new rules.

In Guernsey there is a 12-month initial period where a dismissed employee cannot claim unfair dismissal. (The UK has a 24-month period.) Clearly an abusive discrimination claim could be brought by a disgruntled employee to bring a claim in the 12-month window – provisions to reduce such abuse might include moving the onus of proof onto the employee during that period.

For those unacquainted with common processes the following is a not unusual account from a UK company of a recent case.

“Competence is one of the two grounds on which an employee may be fairly dismissed (conduct is the other). There was no doubt that he had failed competency and there was apparently no doubt according to legal advice that the company had dealt with it from a disciplinary perspective entirely procedurally correctly. Once the procedure was instituted, he invoked a grievance procedure (a very common tactic) alleging that his line manager had made homophobic remarks against him, which was rubbish. Again, legal advice was that the company had acted entirely correctly. He then went off work during the process with stress and claimed discrimination on disability



grounds (not having taken adequate account of the effect on him of the stress caused) with the process to which legal advice switched and became equivocal. We called it off and voted to pay him £12k to get rid of it for an entirely unmeritorious claim because of the costs and management time in otherwise fighting it for a potentially negative result.”

Actually, the rewards available under the Proposals will be greater than in the UK in many cases. Clearly most people are honest but there will be a level of dishonesty. Not dissimilar things already happen here with work related stress claims. And stress claims will be potentially more lucrative as the Proposals provide a route to bigger settlements via a disability claim.

The obvious potential for dishonest cases clearly exists. The Proposals will have a poisoning effect on employer/employee relationships where, for example, the potential for light-hearted banter about a Test Match to become a serious racial discrimination issue is all too apparent. The further intrusion of the law into relationships comes at a financial and interpersonal cost.

Remedies may cause more damage to the health of society, than the issues complained of.

Lack Of Effective Consultation

Whilst the Proposal document refers to the business community having been consulted at every turn it is uncertain to what extent they were **effectively** involved in this exercise. According to the Confederation of Guernsey Industry (CGI) a good percentage of their membership remain today unaware of the implications that this legislation will have on their businesses should it be implemented in its current form. It is also interesting to note that the business community was very much more engaged in the earlier Disability Legislation Group (DLG) investigations and reacted strongly against the Proposals for a Discrimination Legislation. However, just a few years later when the Committee had taken charge of proceedings the business community appear to have made very few protests against the Proposals. Whether this was because of different methods of communication, or exhaustion, one can only surmise.

Large volumes of papers with references to obscure and foreign laws and practices defeated most potential readers. There is a clear difference between notification and effective communication.

We note the considerable volume of ‘consultation’ that has taken place but the effectiveness was not great.

Legal opinion provided – not from Ireland

GPEG has reviewed a legal opinion (commissioned by the G4, being Guernsey Institute of Directors, Guernsey Chamber of Commerce, Guernsey International Business Association and the Confederation of Guernsey Industry) provided by Voisin’s Jersey and a QC in response to the Consultation circulated by the Committee. In their opinion the proposed legislation would significantly and adversely impact on small businesses. These form two thirds of all Guernsey employers. (The opinion is attached as Appendix 7).

They further noted that in their opinion the legal infrastructure of Guernsey would be unlikely to be able to support the consequences of the Proposed Legislation. It considered it to be too broad, too prescriptive and unwieldy. Given the difficulties with the law, as highlighted in part in the report, there was a significant danger that the legal system in Guernsey could be seriously challenged by applicants seeking, inter alia, clarification on wide and unclear aspects of the Proposed Legislation.

In their opinion submerging Guernsey with this plethora of laws could have a consequence of tying the Guernsey Royal Court in knots on points of appeal from the Tribunal (not only in determining definitions under the disability characteristic but all others too).

They further commented on the total disregard of the drafters of the Proposal document to the jurisprudence of Guernsey Law. Guernsey’s current employment and Sex Discrimination Law is based on English law. Guernsey can currently look to both the UK and Jersey case law and legal text books and commentaries in employment and Sex Discrimination matters and in fact does so frequently. In cases of



discrimination, given the introduction of this legislation, it will have to adopt the policies and practices of foreign jurisdictions unfamiliar to practitioners and judges in Guernsey, namely Ireland and Australia. This is wholly unsatisfactory and entirely unnecessary, and not in the interests of the public who will have to abide by those foreign laws.

We do not unnecessarily support this opinion – but include it to show the arguments that are put forward. In any case it predates the final Proposals.



Our Recommendations

1. Pause and review
2. Consider putting out a best practice guide on a non-legal footing and perhaps providing some level of mediation assistance for disputes. This could be trialled for a year or two to enable the States to gather evidence and support to see if legislation is really needed.
3. A review of the wording of the Proposals forwarded to the Crown Officers for drafting, followed by really careful drafting and ample time for debate about the Proposals being implemented.
4. “Disabled enough” should be in place for all complaints regarding “appropriate adjustments”.
5. Consideration be given to a narrower definition of disability in respect of the State’s own obligations.
6. A sensible definition of disability that does not capture a majority of the population would be more appropriate.
7. The States should carefully re-consider if they really wish to support an unconditional “social” definition as a conceptual policy basis.
8. Carefully consider lighter touch regulation for smaller employers.
9. Put in a much earlier review of whatever is enacted. Perhaps two years after the initial implementation.
10. Money would be better spent supporting the existing third sector organisations than in setting up this legal morass. Funding action against discrimination outside of the courts is clearly preferable.
11. This current Assembly should ensure that the project is fully costed and considered before moving forward on this Phase and the proposed Phase 2.
12. Do not waste time and money signing the CRPD. (See Appendix 3)
13. Any legal process should take account of the actions of the discriminator and the person subject to discrimination. Failure to self-help should be a mitigation of any Tribunal decision. (See Appendix 5)



Appendix 1 - Available Data

Whilst discussions about implementing discrimination legislation had been talked about in Guernsey for 50 or so years, it was not until 2003 that the States of Guernsey agreed the principles of introducing multi-ground discrimination legislation to make discrimination unlawful and to promote equality of opportunity and diversity.

The Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 ("The Enabling Law") (which included the characteristics of discrimination against, men and women, married persons, gender reassignment, and victimisation) came into force in September 2005. The Law was amended in 2016 to include the Maternity Leave and Adoption Leave (Guernsey) Ordinance. This remains the only current law governing any complaints under these characteristics.

GPEG has sought to evaluate the current situation in the island as it relates to discrimination and to the disabled. Available data, prepared by the Citizens Advice Bureau, which is the only source of information relating to the wider characteristics of discrimination, suggests that most complaints relating to discrimination whether they be based on sex discrimination, race or other characteristics arise in or from the workplace. There is little or no data available to show that there is discrimination happening in Guernsey in other areas of life.

It should be noted, however, there is a general lack of quantitative data available in Guernsey and as such the Committee for Employment and Social Security in their Proposal document has relied largely on data from other countries/communities and either made assumptions or extrapolated numbers to represent a population the size of Guernsey to demonstrate the local situation. There is certainly no clear current evidence of a material number of situations that might merit a heavy legal intervention.

In 2012 the Committee for Employment and Social Security commissioned the Disability Needs Survey undertaken by the Bostock Marketing Group Ltd (BMG) and the University of Nottingham who found that a significant minority had experienced some form of discrimination in the workplace as a result of

their caring roles and estimated that at least one in 5 people had a disability, (i.e., circa 13,000). The study methodology was poor and likely to overstate the level of disability somewhat. It did not really demonstrate a substantial level of major issues that needed addressing and certainly provided no needs driven basis for legislation. The levels of people believing that they had suffered some form of discrimination was really quite low except for persons with learning or mental health issues where around 30% of this sub-group believed that had been discriminated against. These are self-reported beliefs; reality will be that people will have failed to get jobs for reasons (doubtless including a very real level of discrimination) will naturally tend to attribute the lack of success to disability. Sample sizes were small but overall 71% of the disabled sampled either had retired or regarded themselves as incapable of work, and only 5% were seeking a job.

Protected Characteristic of Carer

The States of Guernsey does not openly provide detailed statistics relating to carers, and this is borne out by the lack of evidence offered in the States Proposal document. However, there was the Disability Needs Survey commissioned by the States in 2012 and prepared by BMG Research and Nottingham University from which GPEG has deduced the following information. It should be noted that whilst it is the intention of the legislation to widen the protected characteristics in Phase 2 to goods and services, we have concentrated only on Phase 1 and in particular on employment data.

Employment data of Carers – disability needs survey 2012

A total of 103 people were interviewed for the survey. 81% were aged 16-66 with 19% 67+. Women carers outnumbered men by 3 -1 and most looked after a family member.

Overall result:

- 67 out of 103 people were either in full or part time employment or were self-employed.
- 20 people were of retirement age.
- 16 people were either in education or unable to work due to ill health.



GPEG maintains that there is little or no evidence to suggest that this characteristic is in dire need of being protected legally and questions why it was should be included in the proposed legislation.

Other Sources of Data/Statistics to support the existing situation in the island.

The Citizens Advice Bureau (“CAB“)

Below are brief snapshots of the type of discrimination that is currently being complained about in Guernsey. As you will see, in the statistics captured by CAB, the vast majority of complaints occur in the workplace. Guernsey currently has an employment law which covers sex, gender reassignment, victimisation, and married persons discrimination etc.

The Tribunal records suggest that there are a very few cases brought under the Sex Discrimination part of the law. (There have been just 3 claims and only 2 successful ones in the last 30 months). We also note from the Tribunal records and the CAB statistics that there is very little evidence of racial or carer abuse in Guernsey.

CAB data on discrimination

Table 1

Significant Characteristics Contributing to Discrimination	% of all cases
Race/ethnicity (11) <ul style="list-style-type: none"> 1 case related to the client carrying out racial discrimination 	50%
Gender/Sexual orientation (3) <ul style="list-style-type: none"> 2 cases of sexual harassment 1 case of gender orientation 	10%
Age (2) <ul style="list-style-type: none"> Both occurred in the context of employment 	8%
Disability (2) <ul style="list-style-type: none"> 1 case mental health 1 case physical disability 	8%
Physical Appearance (2) <ul style="list-style-type: none"> 1 case combined with race 	8%
Religion (2) <ul style="list-style-type: none"> 1 case combined with race 	8%
Other (2)	8%

NB: Two cases in the above table included enquires about two types of discrimination therefore the figures are based on 24 enquiries in total.



Table 2

Context of Discrimination Cases	% of all cases
Workplace /employment (18)	81%
Home context (2)	9%
Bullying & discrimination from neighbours, boundary disputes, complaints about excessive noise and other antisocial behaviour	
Rental Properties (1)	5%
Tenant felt discriminated against by landlord's behaviour	
Retail & Services (1)	5%
Client trying to obtain a refund	

Table 3

Source of Discrimination	% Number of Cases
Employer or Manager (11)	50%
Colleagues & Management (4)	18%
Colleagues alone (3)	13%
Neighbours (2)	9%
Landlords (1)	5%
Retail (1)	5%



Further data from organisations which are currently supporting Disabled People in the Community

GPEG has sought feedback from some of the other organisations currently helping disabled people. These admirable organisations provide support and training to individuals who need their help. They are the Guernsey Employment Trust, Grow Limited and GO.

1. The Guernsey Employment Trust (“GET”)

GET was set up six years ago to assist the disabled with finding employment, to build relationships with employers and to provide disabled people with life skills to enable them to integrate into the local workforce. It is an organisation which is largely financed by the

States of Guernsey, however, some of the individuals assisting this organisation to operate are volunteers. The below grid represents the numbers of individuals who have been supported in finding employment in the island across a number of professions/institutions, divided into their type of disability and the age and sex of individuals. Along with the support for these individuals, GET personnel also provide training sessions for employers and in the last six years they have built up a very good rapport with many institutions to secure future positions for disabled islanders.

Guernsey Employment Trust – Key Performance Results 2012 – 2020

Activity	Average						
	2012-2014	2015	2016	2017	2018	2019	2020
Referrals	28	60	86	90	74	88	118
New Starts	21	53	80	52	53	65	43
Work Experience/Voluntary Placements	47	82	97	112	56	76	45
Job Outcomes	18	31	69	91	84	103	82

Guernsey Employment Trust – Key Performance Results 2020, by month

2020	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Referrals	10	16	6	3	4	13	17	11	14	12	6	6
New Starters	3	2	2	4	0	2	5	13	5	3	3	1
Work Exp/Vol	9	5	4	0	0	2	6	5	3	5	4	2
Job Outcomes	4	12	7	3	1	11	3	4	19	8	5	5

NB: GET office was closed 20/3/20 to 22/6/20 due to COVID 19 lockdown.



Employment Secured 2020

Primary Reason for Support	Mental Health	33	
	Learning Difficulties	24	
	Autism Spectrum Disorder	11	
	Health Concern	9	
	LAC	2	
	Sensory	1	
	Physical Disability	1	
	ADHD/ADD	1	
Gender	Male	58	
	Female	24	
Age	Over 25	50	
	Under 25	32	
Primary Reason for Support by Gender/Age	Female	<25	>25
	Mental Health Condition	2	6
	Learning Difficulty	6	2
	Health concern		4
	Learning Disability		1
	Autistic Spectrum Disorder	1	1
	Sensory Disability		1
	Male	<25	>25
	Mental Health Condition	6	19
	Learning Difficulty	7	4
	Autism Spectrum Disorder	6	3
	Health Concern		5
	Learning Disability		4
	Physical Disability	1	
	LAC	2	
	ADHD/ADD	1	

States of Guernsey Referrals breakdown

ESS	19
HSC	18
Education	10
Youth Justice	2

for the learning disabled. It is the only 5 day/52 week facility on the island – enabling adults with learning disabilities to develop the confidence and skills necessary to progress to full-time work. The flowers and vegetables they produce are of a very high standard and the number of islanders who now purchase their produce is rapidly growing.

Having been founded by the Guernsey Society for the Mentally Handicapped (now called Mencap LBG) it has been in operation for the last 36 years and provides the island's learning-disabled with the opportunity to gain valuable skills (primarily in horticulture, but also in woodworking and retail) for around 25 adults and young people. The aim is to build their confidence and self-esteem with training and mentoring in order to provided them with the relevant skills so that they can, wherever

2. GROW Ltd

Grow Ltd is a social enterprise working as a fully functioning garden centre, which provides training, mentoring and occupational activity



possible, move on to employment opportunities in the open market.

GROW Ltd is currently in the process of a fundraising effort to re-develop the premises from which they operate in the hope that they will be able to help more deserving individuals needing their dedicated support. They estimate that there are currently around 500 individuals suffering from various forms of disability who could benefit from their help.

3. GO

GO's primary objective is to train individuals to be work ready in as close a true business environment as is practical. They provide training and support to disadvantaged (not the purely physically disabled) people in Guernsey, accepting referrals from other enterprises such as GET and ESS, The Guernsey Probation Service, and Autism Guernsey to name but a few. GO also aims to give their attendees the skills and confidence and experience to be able to manage their own lives and to enter mainstream employment if possible.

In the past 24 months GO has had 46 trainees referred to them, 27 of which completed a programme of training and left for permanent employment in the wider work force, 8 remain with GO and 11 did not complete the training programme (generally not being suitable, or capable of work). They are confident that taking on larger premises in which to operate will present them with greater opportunities to help more people. Although they did not provide us with a breakdown of types of disability, they did confirm that disability ranged from mental health issues, anxiety, actual physical disability, obesity, disfigurement to learning disabilities. This list is not exhaustive, but it does provide a snap-shot view of attendees and appears to cover a wide spectrum of disability.

GO provides structure and support to attendees, in a safe and secure social and physical environment. They are another social enterprise solely created to help and train individuals supported by volunteers.

They aim to be totally financially self-sustaining. They are set to turnover £300,000 this year. They have a new retail outlet at the old KDP glass site on the Bridge at St Sampson's and they manage the recycling at

Longue Hougue, retrieving items they can upcycle and resell at affordable prices to the local population who need a more affordable product. They are growing from strength to strength.

Their training programme covers retail selling, interpersonal skills, the value of recycling, deliveries, working with tills, administration, woodwork, bicycle repair and they are intending to broaden the skills as time and opportunity presents itself. They are just about to embark in a working arrangement with the Guernsey Repair Café and talking to GROW about working more closely together going forward.

There is ample evidence in Guernsey of the good work that is being done by the third sector which is inclusive and bringing disabled individuals, volunteers, and trainers together in a positive environment. This of course goes against the grain of people who oppose the charitable approach to helping the disabled.



Appendix 2 - History

In November 2013, the States unanimously approved the Disability and Inclusion Strategy. In giving their approval, they agreed that a number of specific work streams should be undertaken as part of the Strategy and a timetable for this work was included in the Strategy document.

The States resolved, amongst other things:

1. To approve, in principle, the enactment of legislation under the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law 2004 to prevent discrimination against disabled persons and carers and provide for equality of opportunity, and direct the then Policy Council (now Policy and Resources) to revert to the States with detailed proposals for such legislation following consultation with other States Departments, and representatives of the business sector, disabled people and carers, before the end of 2019.
2. To extend the UN Convention of the Rights of People with Disabilities.
3. To approve in principle the establishment of an Equality and Rights Organisation.

Soon after the 2013 debate, the Policy Council established a Disability Legislation Group (DLG), under the then Chief Minister, Deputy Peter Harwood, to draw up proposals for legislation appropriate for Guernsey.

In November 2015, the Policy Council reported to the States on progress made on the implementation of the Strategy. It became obvious that although the DLG had met frequently, during which different and often conflicting views were aired, agreement had not been met despite a consensus having been reached in a number of areas. However, the deliberations of the DLG had been instructive in determining what matters should be considered for public and stakeholder consultation, and in identifying areas where policy decisions still needed to be made.

The discussions within the DLG had highlighted the complexities of the issues and shown that more time would be required to enable informed consultation to occur and to enable all views to be considered before the

legislative proposals could be finalised. It was noted that the decision to base the definition of disability on a social model was proving to be challenging. The DLG further agreed that the proposals for establishing an Equality and Rights Organisation might prove too difficult.

In reality, there were multiple reasons for the delay in this work coming forward due to complexity of the subject matter. Undoubtedly, however, it was also linked to the fact that there were polarised and strongly held views within the island community such as the way disability should be defined. Whilst most people believed that discrimination legislation should be introduced, the objectives of our civil society groups and our business community differed (this was particularly in relation to the definition of disability).

On 1 May 2016, the decision was taken to transfer responsibility for implementing the Disability and Inclusion Strategy from the Policy Council to the Committee for Employment and Social Security (“the Committee”). Work on the development of policy proposals for disability discrimination legislation recommenced in February 2017 following the allocation of a Policy Officer from within the Committee’s existing policy team to lead the workstream. A Project Team was established in April 2017 to discuss policy issues and to provide input in relation to draft briefing papers prior to consideration by the Committee. The Project Team included representatives of the Guernsey Disability Alliance, the Chamber of Commerce and St James Chambers, in addition to one political member and officers of the Committee.

Parallel to the development of the legislation, from late 2017 into 2018 work was commenced on developing a business plan for an Equality and Rights Organisation (ERO). Civil society organisations with an interest in equality and human rights were engaged with and workshops were held regarding what the scope of an organisation might be. However, a decision was made in 2019 to suspend plans to develop this as it was recognised that it was necessary to understand how it would interact with the Tribunal and the Employment Relations Service. In Autumn 2019 the Committee undertook an option appraisal exercise and considered other service developments would be required and they came up with a short list of the Employment and Discrimination Tribunal



(beefed up with legally trained personnel) and a future Employment Relations Service.

It soon became clear to the Committee that the scope of the discrimination legislation project was so large and technically complex that an alternative approach was required in order to accelerate progress towards finalising proposals for the new legislation. The Committee decided to appoint experts to assist in the selection of an appropriate model on which to base the discrimination legislation which could be tailored to the Guernsey context.

In February 2018, following a competitive procurement process (we are told), the Committee appointed Dr Lucy-Ann Buckley and Dr Shivaun Quinlivan from the National University of Ireland, Galway's supposedly "internationally acclaimed" Centre for Disability Law and Policy.

The two appointed academics facilitated face-to-face dialogue with representatives of disabled people's organisations, the business community, politicians and civil servants in order to develop a clear understanding of the policy and legislative needs of Guernsey when developing the proposed assessment criteria. They were also asked to undertake a comparative analysis of the equality/disability discrimination legislation in force in the following six English speaking, common law jurisdictions, against agreed assessment criteria. The six countries chosen were:

- United Kingdom
- Republic of Ireland
- Canada
- Australia
- New Zealand
- Hong Kong

Agreed assessments criteria were prepared and a comparative analysis involving desk-based research undertaken and the results put into a written report which was presented to the members of the Project Team and other key stakeholders. Following consideration of the report the Committee decided to use the Republic of Ireland's Employment Acts 1998-2018, and Equality Status Acts 2000-2015 together with the Australian Disability Discrimination Act 1992 models. This was a foregone conclusion given the 13 fixed selection criteria including the critical "social model" approach and the hiring of Irish

consultants with known views. Only the addition of "available in Gaelic" seems to have been missed from the selection criteria.

With the best stretch of the imagination one can hardly agree that any one of these jurisdictions bears any comparison to an island with a population of 63,000 with only a low level of discrimination apparent. In particular the Island has a low level of racial diversity and very few issues arising in that area. We have no analogues to the Aborigine issues in Australia or the Tinker issues in Ireland.

Following the comparative analysis of the agreed assessment criteria the results were documented in a written report and presented to "key stakeholders" however, the majority of those key stakeholders listed in the Proposal document appear to have been government representatives and representatives of social groups with only the Chamber of Commerce listed as representing the business community. The Proposal document makes no reference to any feedback received from the stakeholders.

However, the document states that following consideration of the analysis the Committee decided to use the Republic of Ireland's Employment Equality Acts 1998-2018 and Equal Status Acts 2000-2015 Acts and the Australian Disability Discrimination Act 1992 in order to ensure that a social definition of disability was used.

Our investigations highlighted that whilst both Irish "experts" had worked for the University neither was a full-time specialist in the area and neither had in recent times worked for the Centre which is a very small unit with two tenured posts and a very modest output. Efforts to see if the Centre is "internationally acclaimed" failed to find apparent support on the internet. Finally, at the time of appointment Galway was on the last (6=) 7 of universities in Ireland not to have reached state minimum equality standards and had 4 discrimination lawsuits running against it!

In June 2018 States members unanimously agreed to direct the Committee to expand the scope of existing work to develop detailed policy proposals for disability discrimination legislation into a wider project which developed proposals for multiple grounds of protection. The Project Team was expanded to



include people who represented other protected grounds.

A Straw Man which was essentially an amalgamation of key provisions from the Irish and Australian models was prepared and circulated. During 2019 the Committee sought to translate the Straw Man into a set of draft policy proposals for consultation. It was during this process the Committee moved away from the Irish/Australian model in several respects, meaning that the draft policy proposals on which the Committee consulted were based largely on equality legislation in force in the Republic of Ireland and the United Kingdom.

The Committee published its draft policy proposals for multi-ground discrimination legislation in July 2019. The consultation period ran for 12 weeks until September 2019. In January 2020, the Committee published a report setting out the key findings of the consultation. As can be seen from the consultation report the results highlighted the same polarised view that the DLA had come across some years earlier with the civil society (largely the disability lobby) groups on the one hand and the business community on the other having opposed views. In response to the consultation the Committee agreed to make significant changes to the draft policy proposals on which it consulted in the summer of 2019.

After seven years of trying to find a solution the Committee for Employment and Social Security looking to find a compromise, admitted that this was not possible and decided that it could no longer wait for all parties to agree so forged ahead with the Proposals which it put to the States in July 2020.

As we know those Proposals were unanimously approved by a States which was “out of time” and in a period when the date of the next election had just been announced, the world was in a moral dilemma over the death of George Floyd and the Black Lives Matter campaign was starting.



Appendix 3 - A Brief Note on the Convention on the Rights of Persons with Disabilities

There are 9 United Nations (UN) Conventions and 2 Optional Protocols dealing broadly with human rights issues.

Most member states of the UN have ratified most of these. A detailed knowledge of all of these documents and their operation is only held by a tiny minority of the global population.

The following main UN human rights conventions and protocols have already been extended to the Bailiwick of Guernsey:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) –Guernsey entered 1969!
- International Covenant on Civil and Political Rights (ICCPR).
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP2)- Guernsey entered 1976.
- International Covenant on Economic, Social and Cultural Rights (ICESCR) – Guernsey entered 1976.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) – Guernsey entered 1992.

One of the unsigned conventions has been particularly focussed on in the context of the proposed Guernsey legislation. That is the Convention on the Rights of Persons with Disabilities or UNCRPD, often cited as just the CRPD. The first signatures on the CRPD were in 2007.

182 Countries have ratified the main CRPD and 164 have ratified the attached Protocol (which allows complainants to complain to the (near toothless) UN). Many jurisdictions have not ratified the CRPD – notably the USA.

Some of signatories are not countries with stellar Human Rights records – e.g. Suriname (Burma), Belarus and Iran. Many of the ratifications come with Declarations,

Reservations and Objections. For example (much summarised):

- Brunei – only to the extent it matches Muslim law;
- Cyprus - excludes the military completely;
- EU – characteristically, many pages of goggling complexity;
- Iran – our Laws come first;
- and Mauritius – we can't afford a lot of this.

Once a State has signed the Convention it is supposed to put in an initial Report on compliance within 2 years and updates every 4 years. These reports go to a committee of 18 souls elected by the signatories to be discussed at semi-annual meetings in Geneva. At present something over 30% of the signatories are significantly in arrears in providing these Reports. Some signatories seem never to have submitted a Report. Being late with a Report does not prevent attendance at the Geneva meetings.

- The Convention is mostly fairly uncontroversial in its content and actually covers a lot of the same ground as other UN Conventions, but the following issues are, perhaps, worthy of note.

- It lacks a clear definition of disability. *"...disability results from the interaction between impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."* This is not easily read. But it does clearly seem to require the presence of an impairment for disability to be present. It assumes that impairments cannot of themselves result in disability – for example someone born blind will have issues that are not caused by "barriers" – that person needs help to participate as fully as possible in life, and should be given such help, but there is no reason to require this barrier concept. (It is, of course, likely that barriers will exist for such a person and that those require attention. But nothing in society or its structure can cure the loss of sight.)

- It does contain a concept of "reasonable accommodation" 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 all



human rights and fundamental freedoms;" this applies to education and equality and to work and employment.

- The word "reasonable" is not otherwise much seen.
- It describes "...the family as the natural and fundamental group unit of society...". Not a universally held view in Guernsey.
- Signatories are required to "undertake or promote research and development of universally designed goods ...which should require the minimum possible adaption at least cost ...to meet the needs of a person with disabilities". Clearly not readily done from a Guernsey base.
- Without limit of cost there are unqualified obligations to provide disabled persons with assistance necessary to support living in the community. (Presumably as an alternative to institutions, or perhaps, care homes. This could sometimes be a very onerous obligation.)

It has been put forward that the absence of Guernsey from this Convention is an international issue.

This really does not stand up to any analysis; Googling the "UNCRPD Guernsey" leads you to the Guernsey Disability Alliance (GDA) website. No-one outside the islands is visible or seems much concerned at Guernsey's absence. The GDA seem to say on their website that they welcome the (as yet undone) decision by the last States to sign up to the CRPD on the grounds that it would cause greater communication with our government. It seems to us that this linkage is fallacious – there is nothing in the CPRD that gives that communication. And even if there was; domestic legislation could enforce such much more readily.

It does seem likely that most people would agree with the majority of the content of the CRPD but there is no necessity of joining it; domestic law will generate ample complexity without adding in some loss of sovereignty and still further complexity.

Ratification would lead to ongoing costs in monitoring compliance and changes - doubtless involving off-island consultants, trips

to the Geneva meetings by high level civil servants and politicians and in preparing and reacting to the required report writing.

The States in 2013 decided to go for entry to the CRPD. The only certainty to entry that would follow on the long- delayed signature is the costs (Guess £250k pa?). Everything reasonably desired (which could include full compliance) can be accomplished without ratification.

Our simple recommendation is not to bother signing up.



Appendix 4 - Things to Ponder – from UK equivalent law

“Asking a person to attach a photo of themselves to an application constitutes asking about protected grounds.”

This is on the basis that you could discriminate on racial or other grounds. There is however no intention to prevent you discriminating on grounds of weird dressing or extensive body piercing which clearly could be a business issue. It seems rather naïve given the likelihood that the name and cv of an applicant would also likely give racial clues. And at some stage there will have to be a face-to-face interview.

Try coming up with the right answer about asking what a candidate’s smoking habits are. Smokers have an increased illness likelihood. Should you be able to discriminate?

“4.2.8 Dismissal

Nothing in these proposals would prevent an employer from dismissing a staff member for reasons such as competency, conduct or not being available to work. However, employers should not dismiss staff on the basis of any of the protected grounds and a person with a disability cannot be regarded as incompetent if they would be competent on provision of a reasonable adjustment.”

Example – disclosing a need for a [reasonable] adjustment. At a job interview for a research post, a disabled applicant volunteers the information that as a reasonable adjustment he will need to use voice activated computer software. The employer responds by asking: “Why can’t you use a keyboard? What’s wrong with you?” This would be an unlawful disability-related question, because it does not relate to a requirement that is intrinsic to the job – that is, the ability to produce research reports and briefings, not the requirement to use a keyboard. UK EHRC

(2011) Equality Act 2010: Employment - Statutory Code of Practice, p.130”

This is the legal position in the UK as this example is of legal effect. The fact that voice activated software might be slower or impractical in a busy office is to be disregarded.

Example – equal pay

“An employer offers a pay package which is not quite as generous (pro-rata) for part time employees. It so happens that the part time employees are more likely to have carer status. The employer may not have intended to discriminate, but the effect of this policy is discriminatory.”

You might think flexible part-time work is a good thing and perhaps sometimes deserves less pay. But again, this is UK law.

Example – indirect discrimination and pay

An employer awards a substantial financial bonus to employees who have worked for the firm for ten years continuously. Fewer people with carer status claim this bonus because they are more likely to have needed to take a career break. While the aim of rewarding long service and promoting staff retention may be legitimate, a Tribunal may find that this is indirectly discriminatory against people with care responsibilities. In this case the employer may need to consider whether they could provide a financial bonus at a shorter interval or find a way to take into account career breaks taken by employees for the purpose of providing care for disabled people.

Again UK law.



Example

“A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker’s disability, namely her loss of temper. There is a connection between the “something” (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

UK EHRC (2011) Equality Act 2010:
Employment - Statutory Code of Practice,
p.74”

Again, UK law but you cannot help but wonder. The coincidence of cancer and bad temper does not prove cause and effect. Experience is that most cancer patients are not ill-tempered, but the employer is left with three options.

- *One of a disorderly, tense and unproductive workplace with potentially other workers pleading workplace stress.*
- *An expensive, probably illegal, termination*
- *Writing a large settlement cheque.*

In practice the latter will likely happen. As the only real witness to the reason for the ill-temper is the cancer patient, the possible opportunity to take some advantage is all too obvious.



Appendix 5 - Rights and Self-Reliance

Rights are not things which are intrinsic – in a democracy they are things that a majority of the population decide are basic.

Some rights carry little obvious cost and are primarily of a social nature – things like entrenching the vote for everyone and outlawing torture.

Others however come at a cost that is substantial relative to the economy. Health and education are the two obvious categories. Support for the provision of these two things being basic rights is near universal. However, both categories are capable of absorbing unaffordable amounts of resource and much political time is spent trying to decide what the right level of expenditure is to be. The nature of these expenditures is that as you extend the scope of the spending you tend to get progressively less benefit for the incremental spend.

Issues near the cut-off point for expenditure being acceptable are things like cosmetic surgery, fertility treatments for those who already have children, super expensive and marginally helpful cancer drugs and funding overseas or postgraduate education.

Discrimination is an area with both low cost and high cost components.

Banning discrimination on racial grounds is a low cost measure of a social nature with wide support.

But disability is a higher cost area of discrimination action. No-one likes defining a boundary but the provision of accessibility is a good example of where a line is needed. A pavement ramp is obviously a lot cheaper than putting a lift into a four storey Victorian office building and the Proposals somewhat recognise that with the rather judgemental test that the costs should not be

“disproportionate”. The meaning of this will doubtless provide profitable debate for the legal profession.

However, given that the States are pursuing a “social model” of disability it seems odd that the costs of dealing with disability in respect of “reasonable adjustments” are expected to be borne by individual employers rather than from States tax revenues. See the bold words in this extract on social models from the UN CRPD training manual (our emphasis) :-

“Disability is a social construct—the result of the interaction in society between personal factors and environmental factors. Disability is not an individual problem but the outcome of a wrong organization of society. As a consequence, society should restructure policies, practices, attitudes, environmental accessibility, legal provision and political organizations and therefore dismantle the social and economic barriers that prevent full participation of persons with disabilities. It opposes the charity and medical approach by establishing that all policies and laws should be designed with the involvement of persons with disabilities. The duty bearers under this model are the State—involving all ministries and branches of Government—as well as society. Under this model, persons with disabilities are empowered, in control of their lives and enjoy full participation on an equal basis with others. **The burden of disability is not on them but on society.**”

The needs of persons with disability remain the same whether the mitigation or remedy is

We find it hard to believe that the Guernsey taxpayers would like to see a transfer in the costs of improving the lot of disabled persons from benevolent donors to taxpayers generally.

funded through charity or through society.



You may have noticed the reference to a medical approach. Broadly this is to try to rectify impairments/disability. Why this should be opposed is far from clear – in general a cure or an improvement is surely to be welcomed. Obviously, this should stop well short of compulsory treatment or stigmatisation.

**John F. Kennedy's
inaugural address - "Ask
not what your country
can do for you – ask
what you can do for
your country."**

This then brings up another issue. The Proposals deal with disabled persons rights to receive assistance from society. Does not society have a reasonable right to expect disabled people to mitigate their own position when this is reasonably possible? Take an example of someone who will not take a medicine which controls their mental disorder well and without side-effects– is it appropriate that society should support such a person for disability? Obesity-related disability will be a borderline and contentious issue too. Smoking-related illness?

This is difficult territory as it deals with trying to assess what is an illness or condition as opposed to just anti-social or selfish behaviour. There is something important here – we should be helping each other.

Failure to self-help should at bare minimum be considered as a mitigating factor in any Tribunal decision.

We should have a responsibility to one another.



Appendix 6 - Social and individual effects

We should not underestimate the social and individual effects of implementing the Proposals.

Whilst we acknowledge the justification for positive discrimination in a work environment, it is certain that there will often be resentment from other staff members. Fairness is open to different views. The less obvious the disability or need is the more likely there will be accusations of improperly obtained benefits, indeed assertions of stress may well be made from the staff not getting the benefit. Sometimes the transfer of tasks to other staff members, who are not disabled, will result in a very poor interpersonal atmosphere.

Probably much worse will be the effect of issues, especially employment ones, that get into the legal process. Whilst many complaints will be resolved outside the full legal process it is unlikely that anything that has gone legal will be totally forgotten by either side of the issue. Most subsequent annual performance reviews, pay rises, promotions or even changes in office layout will be subject to suspicion about getting even. This suspicion (or reality) may well generate fresh legal or disciplinary actions. Some complainants will be unpopular with other staff members and/or viewed with caution by senior management – and vice versa.

Trust will often be lost as a result of invoking legal activity and as a result it will often be the case that complainants will move job, likely with acrimony or further complaint, shortly after the initial complaint was apparently resolved. This will be an unintended consequence of the Proposals.

Actually, even the threat of going legal may suffice to cause all the same issues.

Even more pervasive there will be a regrettable change of attitude with employers and employees seeing each other more as potential litigants. This will result in actions such as getting things in writing and ensuring there are witnesses to discussions becoming more important. Openness will be reduced.

Smaller employers, and employees in small businesses, may well be disproportionately affected by the proposed legislation – the employer will likely not appreciate the rules fully and the closer proprietor/employee relationship will be more easily fractured.

GPEG does not have the scales necessary to balance these effects on human happiness, but it is certainly possible that the numbers of people benefitting from the Proposals will be exceeded by those who suffer distress from the effects of bringing the legal process into this area of life.

Our recommendation to the current Government is clear – pause and review. There is most definitely a better pathway for Guernsey to protect those in need without impoverishing employer / employee relationships, forcing some small businesses and third sector organisations to close and placing a large additional burden on the taxpayer.



Appendix 7 - Voisin report



**RESPONSE TO THE STATES OF GUERNSEY PUBLIC
CONSULTATION ON THE DISCRIMINATION LEGISLATION
TECHNICAL DRAFT PROPOSALS**

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The full text can be found here: <https://www.gpeg.org.gg/sources>
“Voisin Law Discrimination legislation technical draft proposals – Executive Summary”



Executive Summary

Concerns regarding the Proposed Legislation are as follows:-

1. The authors of this report are not suggesting in any way that the proposal to introduce discrimination legislation in Guernsey should be scrapped. Far from it. However, the introduction of discrimination protection by way of the Proposed Legislation is extraordinary for an Island the size of Guernsey and it needs to be reconsidered in the context of an Island with a population of 62,000 odd.
2. The law will significantly impact on small businesses (those numbering 1 to 5 employees). These form 64% of all Guernsey employers.
3. The legal infrastructure of Guernsey is unlikely to be able to support the consequences of the Proposed Legislation. It is too broad, too prescriptive and unwieldy. Given the difficulties with the law, as highlighted in part in the report, there is a significant danger that the legal system in Guernsey could be seriously challenged by applicants seeking, inter alia, clarification on wide and unclear aspects of the Proposed Legislation. Submerging Guernsey with this plethora of laws could have a consequence of tying the Guernsey Royal Court in knots on points of appeal from the Tribunal (not only in determining definitions under the disability characteristic but all others too). The drafters have given no thought to this.
4. The Proposed Legislation has no regard *at all* to the jurisprudence of Guernsey law. Guernsey employment law is based on the English law. Guernsey can look to both Jersey and the UK case law and legal text books and commentaries in employment matters. It does so. In cases of discrimination, it will have to adopt the policies and practices of foreign jurisdictions unfamiliar to practitioners and judges in Guernsey, namely Ireland and Australia. This is wholly unsatisfactory and entirely unnecessary, and not in the interests of the public who will have to abide by those foreign laws.
5. In terms of the workplace, the impact of the legislation will be broad, intrusive and divisive. This is cradle to the grave legislation in the sense that obligations are placed on the employer from the point of job advertising to dismissal and thereafter. The cost to business in implementing policies in order to meet the requirements under the Proposed Legislation will be significant and invariably oppressive. Employers will see an increase in the cost of employment dispute settlements once a discrimination claim has been added on top.



6. The results of the Disability Needs Survey 2012 have no meaningful application to what the position would be were the disability definition to be confined to "*long term condition*" be at 12 months (UK) or 6 months (Jersey) (subject to deemed disabilities).
7. The disability definition has "*no required impact level on the ability of the affected person to function*¹". Nor does it have to have any duration. So, feeling faint for a matter of a few seconds when standing up from a desk in the office would clearly constitute a disability within this definition. It would cover the most minor incidents in the human ailment lexicon, from a tummy upset to a headache to mild toothache and however the condition was brought about, whether by self-abuse or otherwise. It would include alcoholics, drug addicts, pyromaniacs, kleptomaniacs, and psychopaths. Such people would be "disabled" within the proposed meaning and entitled to protected status under the law. It also has the potential to be largely self-certifying, because there is no requirement for an underlying medical condition.
8. The extended definition would, in effect, largely dispense with the need for what we may loosely call "*a sick certificate*" from a medical practitioner because it removes the need for any underlying medical condition, short or long term. It becomes, in large part, a subjective exercise by the employee. Disability absence may, in effect, become self-certifying, as would be its duration.
9. Accordingly, there is no warrant in law for the bare statement at page 66 of the Technical Draft Proposals that, "*this would not prevent them from dismissing someone if, even with adjustments, a person who would not be capable of doing their job*". This is wrong. Under the objective test, the mere fact that someone cannot do their job, for 1 day or 6 months or 12 months, with or without adjustments does not, as a matter of law, satisfy the objective test. The employer has to go further and show that dismissal of the disabled person is a proportionate means of achieving a legitimate aim. It cannot be stated enough times that reasonableness does not enter into the equation.
10. Generally the concept of appropriate adjustments is broadly in line with the duty to make a "*reasonable adjustment*" which exists under Jersey law. However, the duty under the Jersey law only applies in the following circumstances:

¹ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.21



- (a) where a provision, criterion or practice causes a substantial disadvantage (e.g. a parking policy or a sickness absence policy);
- (b) where the absence of an auxiliary aid causes a substantial disadvantage (e.g. wearing a hearing induction loop or information in an alternative format); and/or
- (c) where a physical feature of a premises causes a substantial disadvantage (e.g. the entrance to or exit from a building, stairs or bathroom facilities)².

"Substantial" is defined in the Jersey law as more than minor or trivial. Guernsey has no such threshold.

11. As yet, no decision has yet been made as to whether the States of Guernsey will offer any funding grants for adjustments. This should be addressed before the expiration of the consultation period in order that stakeholders can submit informed responses.
12. The new duties regarding adjustments to buildings by accommodation providers will see an increase in civil litigation and thus an additional burden on the courts. For example, remedial works to place a property back into its previous condition at the end of a tenancy. Who will determine whether a landlord has been unreasonable in denying an adjustment requested by their tenant?
13. Rather than imposing the separate anticipatory accessibility duty, perhaps, when determining whether a person has taken reasonable steps to avoid discrimination caused by the failure to make an appropriate adjustment, consideration should be given to the extent to which the need for a particular adjustment could have been anticipated and the extent to which it would have been reasonable to have made the adjustment in advance of any person having need of it.
14. The introduction of age as a protected ground will have an impact on retirement provisions, in particular fixed retirement ages for employees which will be unlawful unless they can be objectively justified by the employer. Employers will need to review their contracts and policies in this regard. The experience in Jersey is that this has led to a significant cost to businesses in reviewing their human resource

² A grace period has been applied to this duty which will come into force in September 2020 giving employers, service providers and business a chance to review premises and make appropriate enquiries regarding adjustments and their implementation.



documentation. Moreover, the indication from the JEDT statistics suggest that this is an area of ever increasing litigation³.

15. The Proposed Legislation includes equal pay and equal treatment provisions akin to the English law. It is understood that under the Equality Act a claim regarding the terms and conditions of employment based on sex cannot be brought as a direct or indirect discrimination claim. Instead, the claim is brought as an equal pay claim which has a higher burden to evidence and establish the claim. The Equality Act is complicated and litigation can be lengthy. Jersey has not seen the need to implement such a complicated and time consuming process and that pay inequality between the sexes could be dealt with as a discrimination claim i.e. direct or indirect discrimination. The Jersey approach means that there is no need to establish whether two very different jobs are actually "equal" avoiding the need for independent expert assessments.
16. The options for the definition of sex to be adopted under the Proposed Legislation take trans status into account. There is a separate provision within the Jersey discrimination law making it unlawful to discriminate against a person who is proposing to undergo, is undergoing or has undergone a process for the purpose of reassigning gender. Gender reassignment was included as a protected characteristic under the Jersey law to remove uncertainty about the extent to which a transgender person would be protected by the characteristic of sex. It is contended that the inclusion of trans status within the definition of sex make the options confusing. There is already a separate protected ground for those with trans status which would prohibit discrimination against them on the basis that they intend to undergo, are undergoing, or have undergone a transition.
17. Unlike in Jersey, big (and small) businesses operating in Guernsey cannot simply "Guernsify" their existing policies. There will have to be a thorough HR review for big business as well as small businesses who will not have the resources to meet requirements imposed by the Proposed Legislation.
18. Essentially each protected ground will have its own associated exceptions that businesses will need to understand. Many of these exceptions are similar to those introduced in Jersey. However, Jersey introduced each protected characteristic (and each of its associated exceptions separately) over the course of 4 years enabling the

³ 24 claims of age discrimination have been made to the JEDT since 2016



public to get to grips with the law and the relevant exceptions before all of the protected characteristics were in force. By introducing the entirety of the law at once, Guernsey will not have this advantage.

19. It is not an exaggeration to say the Proposed legislation will be a tsunami on business of cost and resource. In Jersey, the staged introduction of the various characteristics allowed local businesses to adapt, not only to the introduction of the concept of discrimination law but to each particular characteristic.
20. In Jersey, the introduction of more difficult grounds such as sex, age and disability discrimination have been "eased in". This was to ensure that society and, in particular, business had an opportunity to prepare. The Proposed Legislation, for no good or sufficient reason, denies Guernsey business this opportunity to "bed" in. It is to be imposed on Day 1.
21. Concern has been raised over the possibility that discrimination claims may attract unlimited compensation awards.
22. The proposal for unlimited damages/compensation is entirely inappropriate in a jurisdiction the size of Guernsey. There is also no recourse to the rogue employee who will not be liable for any compensation arising from their discriminatory acts. Their employer is left holding the buck. How does this deter against discrimination in the workplace?
23. The impact of, the Proposed Legislation will have far reaching consequences. Employers and employees need time to consider issues that arise as a result. There has been no regard to this.
24. There is an imbalance between the rights afforded to employers and employees. The introduction of equal pay seems wholly unnecessary given existing legislation. Appropriate adjustments adds an unnecessary layer of protection which is already in place. The concept of Anticipatory Breach is unnecessary. What does it add, other than another layer of bureaucracy? The Proposed Legislation may have the opposite impact to that which is intended, making business more risk averse in their employment of those with the protected grounds and less likely to positively differentiate between performance awards.



25. The population of Guernsey has not been consulted in relation to each individual ground. In Jersey each individual characteristic was introduced with evidence and statistics to support why a particular characteristic was required. This is not the case under the Proposed Legislation.
26. No regard appears to have been had to the interests of clubs, societies and education. Why?
27. How is this being resourced? Given the Jersey experience, the much wider application of the Proposed Legislation will require hundreds of thousands of pounds of public money to be spent to support the implementation and enforcement of the Proposed Legislation.



Appendix 8 - Reasonable Adjustments – A Big Cost?

On 10th May this year Deputy Roffey wrote a “Memorandum” to all States Members which has been passed to us. It says:

ESS response: Section 5.10 of the Committee’s Policy Letter (see pages 54 to 58) provides a comprehensive explanation about the duty to provide reasonable adjustments for disabled people. In particular, I draw your attention to paragraphs 5.10.9 to 5.10.11 that provide ‘proof’, as requested by GPEG:

“5.10.9

More often than not, reasonable adjustments are inexpensive. The Job Accommodation Network⁶ (JAN) in the United States has been monitoring reasonable accommodation (the US equivalent of reasonable adjustment) in the employment context since 2004 through the use of employer surveys. These surveys indicate that workplace accommodations not only are low cost, but also positively impact the workplace in many ways.

5.10.10

The 2018 survey⁷ showed that of the 776 employers who were able to provide cost information related to accommodations they had provided, 453 (58%) said the accommodations needed by their employee cost absolutely nothing. Another 289 (37%) experienced a one-off cost. Only 25 (3%) said the accommodation resulted in an ongoing, annual cost to the company and 9 (1%) said the accommodations required a combination of one-off and annual costs. Of those accommodations that did have a one-off cost, the median one-off expenditure as reported by the employer was \$5008.

5.10.11

The survey results consistently have shown the benefits employers receive from making workplace accommodations far outweigh the associated costs. The most frequently mentioned direct benefits were: (1) the accommodation allowed the company to retain a valued employee, (2) the accommodation increased the employee’s productivity, and (3) the accommodation eliminated the costs of training a new employee. The most widely mentioned indirect benefits employers received were: (1) the accommodation ultimately improved interactions with co-workers, (2) the accommodation increased overall company morale, and (3) the accommodation increased overall company productivity.”

⁶ Job Accommodation Network website: <https://askjan.org/about-us/index.cfm> [accessed 29th February,2020].

⁷ Job Accommodation Network (Updated 9/30/2019). Workplace accommodations: Low cost, high impact. Available at: <https://askjan.org/topics/costs.cfm> [accessed 1st March 2020].

On a quick read this is reassuring. However, Mr Roffey is not being entirely upfront about the costs of “Reasonable Adjustments”. According to the US Bureau of Labour Statistics — there are 10.75 million employers in the USA. Mr Roffey uses statistics from 2018 (odd as 2019 was published some time back) for 776 employers who chose to submit data on the costs of their “reasonable accommodations” to a tiny university unit grandly called the Job Accommodation Network which is firmly an advocate of disability legislation. Any extrapolation to Guernsey (or even the USA!) is clearly utterly ludicrous.

The reality is that the cost of “Reasonable Adjustments” to employers and property owners is simply not known.



Factual References

Dr. Atul K. Shah is a consultant and founder of www.diverseethics.com. Diverse Ethics has developed many innovative training and advisory concepts around equality in the workplace.

<https://www.bailii.org/uk/cases/UKSC/2017/4.html>

<https://route2.com/news/workplace-discrimination>