



VOISIN LAW

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

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Discrimination (Bailiwick of Guernsey) Law 201- (the “Proposed Legislation”)

Introduction

There is no evidence of a discrimination problem in Guernsey, and certainly none which justifies this sweeping Proposed Legislation. These proposals are ideologically driven, as the authors admit (see paragraph 7 herein). As such, the drafters openly acknowledge the absence of evidence justifying the proposed introduction of laws, modelled, as they are, on quite different and much larger socio-economic societies. The proposals are not advanced on the basis of what is desirable or reasonable for Guernsey.

This report will review the Proposed Legislation and in particular address what seems to us the most business adverse aspect of the proposals, namely the proposed definition of disability, in particular the absence of any time limit, and its impact on the ability to dismiss staff.

The greatest concern highlighted within this report is the extensive scope of the Proposed Legislation with intentionally wide definitions and application which this report will show render the proposals unworkable in practice. The ‘reach’ of the legislation is intentionally wide and includes:

- a) Job advertising;
- b) Recruitment/Access to Employment;
- c) Terms and Conditions of Employment;
- d) Equal Pay – for all 10 protected characteristics (usually this would be limited to gender in the first instance or introduced at a much later stage)
- e) Vocational training and work experience;
- f) Promotion and/or regrading;
- g) Classification of posts;
- h) Dismissal; and
- i) Contract workers

Importantly, the Proposed Legislation will capture ‘workers’ who are not ‘employees’ e.g. Non-Executive Directors will have protection from discrimination in relation to their appointment, terms, opportunities and termination of their position.

In addition to a definition of ‘employment’ in the broadest sense, the Proposed Legislation will apply to goods, services, education, property management, and clubs and associations.

The Proposed Legislation has intentionally prescribed that there should be **no** qualifying period for any of the protected characteristics nor is there any de minimus level of impact. This is a highly significant change to the position of the UK and Jersey which this report will show would have significant ramifications for Guernsey businesses, providers of goods and services and education.

The UK and Jersey Laws reflect a policy decision that balances the needs of their societies, both individuals and employers' and represents a careful balance between their respective interests. This report highlights that the Proposed Legislation does not afford an *equivalent* balance of interests for Guernsey businesses. More fundamentally, this significant shift in balance will impact on whether or not new business will be attracted to Guernsey.

The Employment and Social Security Committee ("**ESS**") did not enter into consultation about the choice of the 10 protected characteristics that have been selected to be protected by the Proposed Legislation nor critically was there any public consultation about the ESS decision to follow the legislation in Ireland and Australia. This represented a critical point of failure by the project sponsors who missed a valuable opportunity to understand from businesses why it was so important to follow the UK and/or Jersey in drafting the proposals.

Brief Facts about Guernsey

1. As at March 2018, there were 31,062 people working in Guernsey, of whom 10% were self employed. There were 2,155 employers, of whom 1,379, that is 64% of the total (2,155), employed 1-5 employees. The population was 62,109. The total employment rate was 59.4%, with females at 54.2% and males at 64.7%. GDP was £3,050m. Finance accounts for £1,298,000,000 of that- 43%¹.

A Need for Further Discrimination Laws?

2. Guernsey legislated against sex discrimination (including pregnancy), gender reassignment and marriage in the Sex Discrimination (Employment) (Guernsey) Ordinance 2005 (the "**Sex Discrimination Ordinance**"), 14 years ago.

3. In the Forward at page 4 of the 160 page Technical Draft Proposals ("**TDP**") is stated;

"Although the detail of these draft proposals may seem complicated, at its heart what we are proposing is simple".

4. It *seems* complicated because it *is* complicated. The Code of Practice on Employment (2011) published in the UK² has 19 chapters and 3 appendices (and does not include equal pay guidance or the guidance in determining disability, both of which are separate). It is unhelpful to conflate the aim with the achievement of the aim; they are not one and the same thing. It is akin to saying, "*We are simply travelling to the Moon*",

¹ Guernsey Facts and Figures, 2018

² <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

which is a simple aim, but without dwelling on the complication, cost and difficulty of travelling and landing there.

5. It also disingenuous to imply, as is the case at paragraph 6 of page 10, that a claim may be successfully brought or resisted in person more cheaply and easily in person, and without becoming “*unnecessarily legalistic*”. The fact is discrimination law is probably the most legally complex area of employment law. Those who can afford experienced discrimination lawyers will have a distinct advantage over the unrepresented, as any experienced practitioner say, in the employment tribunals in England and Wales will readily confirm. Such a deficit will not be remedied by a state body giving out advice.
6. At page 8 of TDP, it is stated that it was a combination of the Irish and Australian legislation which was thought to be the best “*model*” to work from.

7. At pages 14 and 15, at 3.2.1, it is stated:

“...We do not have data on the prevalence of discrimination yet, and while there is some evidence of discrimination occurring³, we do not intend to justify the selection of these grounds by how many people experience discrimination should be prohibited on these grounds even if the occurrence of some forms of discrimination are infrequent because they represent individual’s fundamental civil rights”.

8. It follows, therefore, that the Proposed Legislation is not evidentially based, either in the prevalence or absence of discrimination, but is openly asserted to be advanced purely on ideological grounds. Confirmation that it is ideologically based, if any were needed, comes also from the fact that there is no rationale advanced as to why forms of legislation based on countries with populations of 4.7m and 24.6m were selected, as opposed to those with populations and economies of similar size, such as Jersey. In some respects (such as the extended definition of disability and the extension of carers to protected status), this proposed legislation is much wider ranging than the UK, which is more than a 1,000 times larger in population than Guernsey.
9. This narrow ideological approach is particularly evident in the failure to comprehend the potentially serious consequences for businesses, particularly small businesses of 5 employees and under. This is examined below in the context of employee termination.

The evidence as to the incidence of sex discrimination in Guernsey

10. It is quite simply *wrong* to assert that there is “*no data on the prevalence of discrimination occurring*”. Perhaps it should be noted that it may have been more neutral, and less loaded, to use the word “*incidence*”.

³ Stage two of the 2012 Disability Needs Survey is cited, as well as the feedback from responses to a consultation on the Sex Discrimination Ordinance.

11. There is, in fact, fairly good evidence of the incidence of what may be thought to be the most likely form of discrimination, i.e. sex discrimination. There is also data on disability discrimination, such as it is.
12. In the first 5 years following the enactment of the Sex Discrimination Ordinance, 30 sex claims were brought, of which only 6 resulted in a tribunal hearing.
13. A visit to the Guernsey Employment Tribunal website discloses that in 2016 there were 13 reported decisions (2 of which could not be displayed). This is 11 years since the legislation was passed. It can therefore safely be assumed that it has had time to permeate the consciousness of the Guernsey employed public.
14. In 2016, there was 1 successful claim for sex discrimination and 1 unsuccessful one.
15. In 2017, there were 8 reported decisions (one could not be displayed). Only 1 was a claim for sex discrimination (successful).
16. In 2018, there were 6 reported decisions. No sex discrimination cases.
17. In 2019, there are 4 reported decisions. 1 was for sex discrimination, which was dismissed.
18. So in the last 31 months, there have been just 2 proved cases of sex discrimination, and only 3 claims in all.
19. There is undoubtedly a paucity of claims for sex discrimination, which strongly suggests it does not rank high in the calendar of employee concerns.
20. The response to the Sex Ordinance Questionnaire "*aimed at businesses and individuals who had experienced discrimination*" referred to in paragraph 7 above was published in December 2018 produced just 57 responses. The potential sample size, or pool, of the working population was therefore a minimum of 31,062 ("minimum" because the number of businesses is 2,155, and it was a survey of both). The response rate was therefore of 0.18%. Of those 57, only 42 (0.14%) reported they had experienced or witnessed discrimination at work, most of which was sex discrimination.
21. Stage 2 of the Disability Needs Survey 2012 (the "**Survey**"), to which paragraph 7 above also refers, is similarly an inadequate evidential foundation for the Proposed Legislation. For it consisted of interviews "*with around 300 individuals who identified themselves as disabled*" (page 4 of the Survey). In fact, it was 271 (see Table 2, page 7).
22. A survey of 271 self-selecting "disabled" persons out of a population of 62,000 odd, and any conclusions drawn therefrom, cannot plausibly be claimed to be a rational platform to justify the proposed introduction of wide-ranging disability discrimination. Which is no doubt why the drafters do not make that claim.
23. If it is critically examined, as it could have been, and as it should be, the combined data in Guernsey demonstrates that there is no "prevalence" of sex discrimination, or indeed,

disability discrimination. On the contrary, the objective evidence demonstrates that either barely exists, which, of course, is a good thing. It does not form a springboard for more, and more wide ranging discrimination laws. Which no doubt is the reason why this proposal has to be openly asserted to be ideologically driven, and not evidence based. It cannot be justified on the evidence. Whether this really is a proper basis to carry forward and impose the all-encompassing gold-plated legislation proposed is no doubt a question the States will consider in due course.

24. It may also be that because the Proposed Legislation is openly advanced on purely ideological grounds, that the individual component parts, and their consequences, need to be scrutinised very carefully indeed, so as to decide whether they are necessary and fair and reasonable, given that they are proposed to be imposed on the entire population. In this regard we propose focusing on the ground of disability to highlight the problems with an ideological legislation.

The proposed definition of disability

25. The working draft definition is at 3.2.10 of the TDP. It is modelled on the UN Convention on the Rights of Persons with Disabilities and includes but is not limited to-

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

26. It is an all encompassing, extraordinarily wide definition. Much wider than the definition adopted by the UK under the 2010 Equality Act, for example.

27. The disability definition has "*no required impact level on the ability of the affected person to function*⁴". 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.

⁴ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.21

28. The important point from a public policy and democratic perspective, is that none of this is consonant with what the ordinary member of the public in Guernsey would consider as a disability. Most normal people readily see a distinction between sickness and disability, and key elements in that perception must be whether there is an impairment, which is not self-induced, and which has persisted, or is likely to persist, for more than a few hours or days.
29. The Survey to which the TDP refers conducted its research with the UN definition (see para 1.1 “Background” at page 3)⁵. Having said that, as we will see, the learned authors, expert in academic disability studies as well as marketing, no doubt, displayed a misunderstanding of the UN definition.
30. The definition they quote is:

*“Persons with disabilities **include** those with long term-term physical, mental, sensory or intellectual impairments which **in interaction with various barriers** may hinder their full and effective participation in society on an equal basis with others.”*

Why they elected to highlight the two sections is unclear. They go on to say;

“This means that having a long term-term condition is a necessary pre-condition to being disabled, but the presence of exclusionary attitudes is equally important”.

31. It is plain from the definition itself that it is not a necessary pre-condition to be being disabled that a condition is “long-term”; it “includes” such conditions which must mean it does not exclude conditions that are transient. This necessarily means such transient conditions fall within the definition. Further, the definition makes no reference to “attitudes”, which the authors, for reasons best known to themselves, impermissibly interpolate. Such a (meaningless) gloss is outwith the definition. This muddled and barely comprehensible observation immediately shows that the authors fail to understand the ambit of the definition, which was the cornerstone and launch point of the entire Survey. Neither did the States Committee alight on, or address, this threshold error.
32. It follows from this, that the Survey results 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).

What the 2011 Survey purported to find

33. Having surveyed 2,055 households in Guernsey and Alderney, representing 4,894 people (2.1 page 6) in Stage 1 of its report, the Survey, by extrapolation, concluded that there is an estimated 13,742 people with a disability on the islands (21%, or one in five in Guernsey and 19% in Alderney), (page 4).
34. At 4.2 (page 128) is stated:

⁵ <http://www.signpost.gg/CHttpHandler.ashx?id=98915&p=0>

“Section 2.3 shows that third of those who had been in some form of work believe that their employment ended because of their condition and in some cases believe that this will have been due to disability discrimination. Furthermore, 15 per cent believe that they have not obtained a job and 8 per cent have been denied a promotion because of an impairment or long term health condition”

35. These statistics are relied on by the Survey authors as evidence of direct disability discrimination.
36. Turning to 2.3.2 (page 28), it would appear that the number surveyed from which the above percentages were abstracted was 288.
37. Evidence of indirect discrimination (4.2 and Section 2.2) was similarly a mere 271 (page 8) and the conclusion drawn by the survey was merely that *“23 per cent of people who live in social housing and 20 per cent of people under 16 feel that their housing does not meet their needs”* (our emphasis). Of course, what people feel is not evidence of discrimination, whether by unstated provisions, criteria or practices, or at all. The sample at Section 2.9 is a mere 145 (page 91). Time does not permit delving further into section 4.2 of the Survey but one gets the gist.

In short, the actual numbers surveyed (many of whom will be self-selecting and also feature in each sample) are not statistically significant because they are infinitesimal when set against the pool of 62,000. Accordingly, they are not meaningful evidence of any direct or indirect disability discrimination, even on the all-encompassing definition.

What the statistics in paragraph 34 above mean when applied to the workforce

38. Leaving aside the key definition misunderstanding already identified, and without a painstaking analysis of the whether such an extrapolation is warranted, what it means, if it is correct, is that one in five of every Guernsey employee is disabled, if the proposed definition is adopted. So 64% of Guernsey firms, those with 1-5 employees, will, if they have 5 employees, have one disabled employee. This 21% statistic has grave implications for employee attendance at work and the performing of the work that the employee is employed and paid to do. Implications for the operation, profitability and sustainability of employers and, so continued employment of employees. Implications which are, it will be shown, not appreciated.

Attendance at Work

39. Businesses can only operate through their employees. People are employed to do work which it is necessary to be done, otherwise they would not be employed. Attending work and performing the tasks which it comprises are a core part of any business operation. Absence goes to the heart of the profitability and so viability of any business.
40. Any absence of an employee from work means that employee's work must be performed by someone else. That involves management taking steps to cover that work, either by asking a fellow employee to cover it, usually by the payment of additional pay,

or by employing a temporary replacement, also at a cost. In a small firm, it may be the owner has to do the work because a substitute is too costly. At all events, sickness absence is disruptive to the business, it requires management time and costs real money. The more so, if the business has 5 or fewer employees.

41. The extended definition means that anyone absent from work because of a disability would have protected status. This includes any kind of sickness, ailment or discomfort of whatever kind, and however transient.
42. The extended definition would, in effect, largely dispense with the need for what we may here 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.

Sickness Absence v Disability Absence

43. At 4.2.6 (page 66), TDP correctly states:

"...any period of sickness could potentially give rise to a complaint of disability discrimination..." and then, with masterly understatement, "*This could impact employers' sickness management procedures*"

What it would require is a complete rewrite of every sickness absence, capability and redundancy policy and procedure in every business and employing organization in Guernsey. The cost of which, at best, will be significant particularly for those businesses with 5 or less employees.

44. The main effect in law concerning employment termination is that it would render dismissals for capability by reason of ill-health under the existing unfair dismissal legislation otiose. Quite possibly also dismissals other forms of capability dismissals, or some other substantial reason. Where, for example it was said by the employer that the sales person had persistently not met sales targets, and that it was said by the employee that a large number of absences for divers sickness was a, or the, reason why the targets were not met.
45. It would also unquestionably have an effect on redundancy dismissals.
46. Currently many employers do not provide PHI (permanent health insurance) to employees over a certain age on cost grounds. No consideration has been given to consideration of allowing a 'cut off' age to be permitted due to the cost of the provision.

Ill-Health Terminations

47. At present, if a person is incapable of performing his job because of ill-health, that is a potentially fair reason for dismissal. The question becomes, is it it fair in all the circumstances to dismiss for that reason? Essentially, one may say the question is: is dismissal a reasonable outcome on the facts? It is important to immediately grasp that

this will not be the legal test under the proposed definition of disability for anyone who is dismissed for absence for short repeated periods or an extended period of weeks or months. Inevitably, capability proceedings will dominate. These proceedings are labour intensive and will thus have a significant impact on business.

48. A dismissal on the grounds of disability would be discriminatory, because dismissal would be something unfavourable arising out of the disability, that is, absence from work (see page 66, second paragraph). The fact that it would, or may be, reasonable to dismiss the employee in those circumstances under the unfair dismissal legislation would be entirely irrelevant.
49. Instead, the employer would have to show that dismissal was a proportionate means of achieving a legitimate aim. The mere fact that the employee was absent repeatedly or for an extended period, at great cost and inconvenience to the business and fellow employees, does not and would not satisfy that test.

50. On this aspect at page 66 it continues:

“... They would need to show that they had acted in a proportionate way to achieve a legitimate aim. They would need to show they had considered appropriate adjustments. However, this would not prevent them from dismissing someone, even with adjustments, a person would not be capable of doing their job”

51. This paragraph demonstrates a fundamental confusion and misunderstanding of the two referenced strands of discrimination, discrimination arising from disability and the denial of an appropriate adjustment for a disabled person. It shows that the authors simply do not understand the ambit or the consequences for employers and business of what is proposed.
52. If a claim was only brought under discrimination arising, whether or not an adjustment was considered or applied or not is entirely irrelevant. The only test is whether the employer can show dismissal was a proportionate means of achieving a legitimate aim adjustments have nothing whatever to do with either of those limbs.
53. Accordingly, there is no warrant in law for the bare statement at page 66 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.

Redundancy Dismissals

54. Changing circumstances frequently mean businesses have to shrink or adjust their employment establishment and make employees redundant.

55. One long established way that employees in a pool of employees identified as being at risk of redundancy are assessed for potential redundancy is by selection criteria. Since attendance at work is a core duty and function, the employee's attendance record is always an important (and non-subjective) measure of an employee's diligence and contribution to the success of the business. Because the fact is that some employees are more committed, and more diligent in carrying out their duties than others, and this can often be reflected in levels and quality of attendance, including timeous attendance (arriving and leaving on time). This is why attendance at work always forms part of a redundancy matrix from which decisions on redundancy (and therefore retention) are based. Another might well be achievement (or not) of agreed or set targets.
56. It is further well understood that any disability (or pregnancy) related absence is to be discounted in such a redundancy because it would be unfair and discriminatory to hold such a disability caused absence against the employee.
57. However, if every sickness absence for whatever reason offered by the employee (upset tummy, headache etc) is a disabled absence, it means that attendance could not in practice be used as a measure of employee's utility to the business. Secondly, the non-achievement of targets the employee was employed to attain e.g. sales targets.

The Proposed Legislation

58. At page 66, the authors therefore say;

".....We are suggesting that employers should not take into account sickness absence in recruitment decisions. We would recommend employers should not use attendance as a criteria in redundancy decisions either."

59. With all due respect, this approach flies in the face of business reality, which is that employers do not want to engage people who are often absence because of transient sicknesses. Why should they be forced to? They are not a part of the social welfare system.
60. It is also unfair to diligent employees that they should be treated on an equal footing with those who willingly take the opportunity for a day off, here and there.
61. It is noted that the Committee have been assured that *"there have not been problems with spurious complaints where a similar wide definition is used in Ireland"*⁶.
62. What is the evidential basis and worth of this assurance? It is hardly surprising that if you include every snuffle as a disability, it cannot be shown to be spurious.
63. It is the common experience of mankind that some attend work more willingly than others, that some are more willing to take advantage of their employers and indeed, fellow employees, than others. It simply adds to the air of unreality in the proposed definition to claim otherwise. The fact is that the vast majority of such everyday incidents

⁶ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.22

in business do not feature or result in court proceedings, or reach the attention of academics pouring over their papers in their university or college faculties.

64. Moreover, the problem is unlikely to be spurious claims. It is likely to be the fact and expense of meeting and dealing with claims that fall within the catch all definition.
65. The success rate of sex discrimination claims shows that what many lay people may regard in their own minds as discrimination is not discrimination in law. That perception mismatch is likely to be a serious issue.
66. Our proposal of a clear and workable demarcation line between disability and sickness, in part based on the duration of the same disability (and not a congeries of disparate elements), would retain the essential balance in employment terminations and employment relations which this Proposed Legislation will undermine destroy in the ways set out in this paper.

The model of disability prescribed by the Proposed Legislation

67. The Proposed Legislation's shift away from the medical model of disability (the same as in Jersey) as adopted under the Equality Act 2010 has not been an issue to date in Jersey. The medical model of disability is deemed to focus on the medical effect of a condition and what is inherently wrong with an individual. In contrast, the social model concentrates on the role of societal barriers in creating an impairment recognised as disability.
68. Such an approach looks at what a person needs rather than what is 'wrong' with the person. As indicated, Jersey has based its definition of disability upon the social model of disability as opposed to the medical model in line with the UN Convention of Rights of People with Disabilities. However, Jersey's definition curtails what can be deemed to be a disability to a practical extent with use of a requirement regarding the duration of an impairment and specific exclusions. This is where Jersey and Guernsey's paths diverge.
69. Jersey's definition of disability requires the individual to have a long-term impairment (whether physical, mental, intellectual or sensory). An impairment is deemed to be long term if it has lasted for 6 months, is expected to last for at least 6 months, or is expected to last for the rest of the individual's life if that is expected to be less than 6 months. The definition does not require a detailed examination of the individual's ability to undertake day to day activities. Instead, the focus is placed on the role of societal barriers. This creates an impairment. These barriers adversely affect the individual's ability to engage or participate in an activity such as employment or use of a service.
70. The requirement for an impairment to be "long term" strikes a balance between protection and practicality. The application of the definition of disability is yet to be tested in the Jersey Employment and Discrimination Tribunal (the "JEDT") however it is anticipated that medical evidence will inevitably be considered by the JEDT in determining whether or not a complainant is disabled within the meaning of the law. This is an example where the Royal Court of Jersey may well be deployed in order to assist the JEDT in its understanding of particular provisions within the Discrimination Law. By

adopting a phased approach, Jersey has sought to lessen the burden on the use of the Royal Court to spend time analysing these provisions.

Appropriate adjustments

71. The Proposed Legislation includes a duty to provide an appropriate adjustment to a disabled person where “*necessary and appropriate*”⁷ provided that it does not impose a disproportionate burden on the person providing the adjustment. Non-compliance with the duty will amount to discrimination.
72. Generally such a concept 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:
- (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)⁸.

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

73. Under the Proposed Legislation, appropriate adjustments are to be made in order for disabled people to have “*equal access and opportunity or for them to be included*”⁹. There is no trigger point/threshold as to when an adjustment is to be made. The Proposed Legislation provides no guidance as to when an adjustment would be “*necessary and appropriate*”. It only applies in response to the need of a specific individual when they request an adjustment, or if the employer or service provider otherwise becomes aware that an adjustment is needed¹⁰. The onus is on employers and service providers to ask if they can do anything to assist an individual who has not requested an adjustment but who appears to be experiencing difficulties. It can instantly be seen that this places the employer in a very difficult, if not impossible, position. It is likely to place the employment relationship under strain, for the employee may well resent intrusive and impertinent questioning or inquiry (as he or she may well perceive it).
74. Whilst it is accepted that it would be unacceptable to require anyone to disclose the fact that they have a disability, say, at any stage in the recruitment process, it is obviously

⁷ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.104

⁸ 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.

⁹ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.105

¹⁰ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.105

unfair to the non-ideologue to expect employers and service providers to make adjustments where the disability is not disclosed and to leave them exposed to claims regarding appropriate adjustments where they may not know of a disability but where their employees or agents do¹¹. For example, those with a disability may disclose the existence of a disability to a friend (who is also an employee) in strict confidence. The person suffering the disability does not want their employer to be made aware of it. Notwithstanding, under the Proposed Legislation, the employer will be deemed to have knowledge of the disability¹². Frankly, this is absurd in practical terms.

Making Adjustments

75. The advice of occupational health advisers may be sought to determine what adjustments to make. Of course, the securing of such professional opinions will have cost implications which will be felt by all organisations and particularly those of a medium and small size. Once again, it is surprising that the States of Guernsey have not done their homework. What is business to do? Where are all these occupational health experts? Perhaps another example of ideology driving the Proposed Legislation rather than practicality.
76. Under Jersey law, *inter alia*, the cost and the financial and administrative resources of the business are taken into account when considering whether an adjustment is “reasonable”. Consideration will also be had 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. The cost of OH referral and assessment will be a heavy burden on small business.
77. Similarly, the Proposed Legislation will not place an obligation on employers and service providers to make an adjustment where the same would be disproportionate as determined by considering 3 factors:
 - a) how the adjustment might benefit or be detrimental to any person concerned (not just the person who has requested it);
 - b) the financial circumstances of the employer or service provider and the cost of the appropriate adjustment, and
 - c) the availability of financial and other assistance to the employer or service provider.
78. The consideration of the above factors is welcomed. However, the potential for appropriate adjustments could be vast given the lack of clarity as to what would be considered “*necessary and appropriate*”. This will be onerous particularly for the small business. The TDP promoted by the States of Guernsey gives no information as to the likely costs facing employers and service providers who will be liable to make the “*necessary and appropriate*” adjustments. It is accepted that some adjustments can be made with little cost. But care is needed here, because what looks like a cost neutral adjustment is not. An example of this is where a phased return to work with reduced but

¹¹ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.108

¹² States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.108

increasing hours is implemented. The returnee's work that is not done by he or she in the unworked hours has to be done by someone else, and that is a real cost. However, there will be instances where adjustments to buildings will have to be made at a substantial cost to businesses. Business is therefore in the dark.

79. 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.

Accommodation providers

80. The Proposed Legislation places a duty on accommodation providers (including commercial property providers) to not unreasonably refuse to allow a tenant to make a change to the physical features of a building for accessibility purposes. The provider may specify that the alteration should be at the tenant's expense who must have the resources available and agree to return the building to its original condition at the end of the tenancy.

81. Where a commercial accommodation provider unreasonably refuses to allow a tenant to make an appropriate or accessibility adjustment and a claim is made against the tenant for failing to provide these adjustments then the provider could be liable for any compensation owed to the claimant.

82. These new duties 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?

Anticipatory Accessibility duty

83. This is new to Guernsey. This provision does nothing more than double down on the obligation to make appropriate adjustments. Why? It is confusing and places a larger burden on the education providers and providers of goods and services. It appears wholly unnecessary and another exercise in bureaucracy.

84. Under the Jersey discrimination law, a duty to make reasonable adjustments only arises when the employer or service provider knows or ought reasonably to have known of both the individual's particular disability and the disadvantage that is being caused to them. This means that a business cannot be taken to the Tribunal for failing to make an adjustment to premises in advance of any actual disadvantage suffered by a disabled person. There can be no failure to make a reasonable adjustment unless a disabled person is actually disadvantaged. However, in deciding whether or not an adjustment was "reasonable" the Tribunal can take into account the extent to which the need for the adjustment could have been anticipated and how reasonable it would be to expect the employer or service provider to make the adjustment in advance of it actually being needed.

85. Perhaps a similar approach could be adopted in Guernsey to replace the anticipatory accessibility duty which may see businesses issued with compliance notices and

potentially a fine for not having an appropriate, up to date access plan in place regardless of whether any complaints regarding accessibility have been made or not.

86. The Jersey approach is more balanced and proportionate than a separate provision in the law that places a duty on these sectors to audit their services and premises and prepare an action plan for accessibility ahead of any need for an adjustment. It eliminates what would be a further window of opportunity for litigation which consumes valuable management time.
87. Regardless of whether any adjustments are actually implemented, the creation and continual review of access plans will incur time and management costs.
88. It is noted that when determining what is "*appropriate and proportionate*" action for an education or goods and services provider to take regard will be had to certain factors. One such factor is the feasibility of making certain changes based on what planning permission is available. This is relevant given Guernsey businesses who operate from listed buildings and may therefore be prohibited from making certain adjustments. Jersey has a specific exception to cover such situations under which there will be no contravention of the law if the discriminatory act complained of arises from compliance with any provision of the Building Bye-laws (Jersey) 2007. Perhaps for the sake of certainty, Guernsey should adopt a similar exception in relation to the anticipatory accessibility duty and duty to make appropriate adjustments.

Conclusion on the Protected Ground of Disability

If one simply critiques the Proposed Legislation on the ground of disability then in our view it fails immediately given the impacts highlighted above. The cost to business will be considerable. The pressure on the courts will be heightened. The cost to the public will be significant albeit like with the reasons for the law no evidence has been adduced to assess such consequences.

Notwithstanding this assessment, the following points are pertinent when considering the introduction of the Proposed Legislation.

What is discrimination?

89. Defined by the Oxford dictionary as, "*the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex.*"
90. The Proposed Legislation seeks to address the alleged occurrence of discrimination in Guernsey by introducing protected grounds and prohibited conduct with the aim of effectively describing an individual's experience of arbitrary disadvantage. This is not dissimilar to the approach taken in Jersey which also legislated against types of discrimination and prohibited conduct in relation to "*protected characteristics*" (akin to Guernsey's protected grounds) which were introduced in a staged fashion i.e. generally one characteristic each year. This gave Jersey businesses an opportunity and time to adjust to these complex areas of law. Guernsey is being deprived of this.

91. Looking at Guernsey's sister Island, the definition of discrimination incorporates direct discrimination (including discrimination arising from a disability), indirect discrimination (which encompasses the failure to make reasonable adjustments regarding disability) together with harassment and victimisation. Jersey's discrimination legislation is based on the UK's Equality Act 2010 which Jersey effectively "*parachuted*" in.
92. Such an approach complimented Jersey's existing employment legislation which is also based on English employment law and has allowed the JEDT to draw upon an abundance of English case law to assist in the determination of discrimination claims. Given the close relationship between the jurisprudence in Jersey and Guernsey it is most surprising that the States of Guernsey are now looking to Ireland and Australia. Why? It is not in keeping with the tradition of the Guernsey courts and more importantly will create a significant cost burden on businesses seeking advice under the Proposed Legislation. Consideration of jurisprudence in unfamiliar jurisdictions will only increase costs of lawyers and add further strain to the Guernsey judicial system. The Guernsey Employment and Discrimination Tribunal (the "**Tribunal**") will suffer this burden the greatest. It will cause even more difficulty for the litigant in person and small business owner.
93. The types of discrimination and prohibited conduct under the Proposed Legislation are:

Direct discrimination – *where a person is treated less favourably than another person is, has been or would be treated a because of any of the grounds of protection, or a combination of the grounds of protection*¹³. A real or hypothetical comparator is to be used to demonstrate that discrimination has taken place unless the act complained of is racial segregation on the basis of colour which will always be deemed to be unfavourable treatment.

Discrimination by association – covered separately within the Proposed Legislation to prohibit someone being treated less favourably than another person (or people) in a similar situation or circumstances because of the characteristic (protected ground) of someone they are associated with. The inclusion of this distinct provision is different to the Jersey law direct discrimination provision which is drafted broadly enough to cover discrimination based on association and perception.

Discrimination arising from a disability – as stated this occurs where a person "*treats a disabled person unfavourably because of something arising in consequence of their disability*"¹⁴ and is subject to objective justification or the defence that the person could not reasonably be expected to know of the disability. Issues relating to this ground have been discussed above.

Anticipatory accessibility duty – applies in the context of education and the provision of goods and services. It imposes a "*pro-active*" rather than reactive duty to make

¹³ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.31

¹⁴ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.37

appropriate adjustments to access to premises as well as the services provided. Rather than having to make immediate changes, those affected should have “*action plans*” in place that consider how accessible the service is to those with disabilities and how changes could be made that are proportionate to the education/service providers. Issues relating to this ground have been discussed above.

Indirect discrimination – where a provision (which includes a practice, policy, process, condition or requirement) “*would put a person at a disadvantage compared with other persons because of any of the protected grounds or a combination of the protected grounds, unless the employer or service provider can show that it is objectively justified*”¹⁵.

Failure to make an appropriate adjustment for a disabled person – as stated this provision is akin to the UK and Jersey’s duty to make reasonable adjustments for those with a disability except where it would be disproportionate to do so. Under the Jersey provision the duty to make a reasonable adjustment constitutes indirect discrimination. In contrast, the Proposed Legislation makes a distinction between the denial of an appropriate adjustment for a person and the provisions regarding indirect discrimination, thereby creating the possibility that someone who has been unsuccessful in making a claim for indirect discrimination regarding the application of a working practice, a policy, environment or circumstance to a group may use the same facts and be successful in claiming that there should be an exception for them as an individual i.e. that they require an appropriate adjustment even if determined that the working practice, a policy, environment or circumstance complained of is generally justifiable. Arguably this is broader than the Jersey/UK approach. Why?

94. Harassment – “*unwanted conduct relevant to any of the protected grounds which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment*”¹⁶. This provision bites regardless of whether the unwanted conduct was intended to have the effect complained of or not. Employers will be liable for the actions of their employees who harass colleagues and will be held to have discriminated against the victim of harassment. The proposals differ from the UK and Jersey in that the employer’s defence could involve steps taken both before and *after* the alleged incident. The UK and Jersey are only interested in the steps taken by the employer prior to the alleged harassment. It is also proposed that employer’s liability is extended to include the actions of third parties e.g. clients or customers with whom the employees come into contact. This creates a significant potential for additional liability.

Victimisation – where a person is “*dismissed, penalised or subjected to or threatened with any detriment on the grounds that they have sought to enforce their right under the legislation or helped someone else to do so*”¹⁷.

In addition to the above, the Proposed legislation will also prohibit the following:

¹⁵ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.35

¹⁶ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.46

¹⁷ States of Guernsey Public Consultation, Discrimination Legislation Technical Draft Proposals July 2019, p.51

- a) sexual harassment;
- b) permitting the harassment or sexual harassment of a person;
- c) publication of discriminatory adverts (liable to a fine regardless of whether or not someone makes a complaint about the ad);
- d) causing, instructing or inducing another person to undertake an act prohibited in the Proposed Legislation;
- e) Failing to provide equal pay (in employment only); and
- f) Failing to provide a benefit to a person in accordance with an equality clause (in employment only).

Evaluation of what constitutes a protected ground

The Proposed Legislation	Jersey Discrimination Law	Equality Act 2010
a) Age	Y	Y
b) Marital status	N	N
c) Pregnancy or maternity status	Y	Y
d) Race	Y	Y
e) Religious belief	N	Y
f) Sex	Y	Y
g) Sexual orientation	Y	Y
h) Trans status	(gender reassignment)	(gender reassignment)
i) Carer status	N	N
j) Disability	Y	Y

Age

95. This ground protects against discrimination based on numerical ages (i.e. 61) and age groups (i.e. pensioners). For those under 18, they will be protected from discrimination on the basis of carer status, disability, marital status, pregnancy and maternity, race, religious belief, sex, sexual orientation and trans status. There are exceptions such as, employment and membership of clubs and associations. In those circumstances, people below the age of 18 (or below school leaving age (currently 16) in respect of employment) will not be able to make complaints of age discrimination.
96. The introduction of this 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. The use of fixed contracts after retirement to continue the employment of 'retired' employees will have to be objectively justified going forward e.g. because of health and safety considerations. This would make arrangements very difficult in practice. 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 documentation. Moreover, the indication from the JEDT statistics suggest that this is an area of ever increasing litigation¹⁸.

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

Marital status

97. Married people already have protection against discrimination under the Sex Discrimination Ordinance. The inclusion of marital status as a protected ground extends protection to those who are single, married, separated, divorced, widowed, in a civil partnership or who were previously in a civil partnership.
98. There is no evidence of discrimination in respect of this ground. There is no evidence that this is an issue that anyone has any concerns about. It seems overzealous and again is consistent with an ideological approach to legislation. It is a ground which is not protected in under the Equality Act or Jersey legislation. It is unclear what authorities Guernsey law can look to for assistance.

Pregnancy or maternity status

99. This protected ground protects those who are pregnant, breastfeeding or who are taking, have taken or intend to take a period of maternity, maternity support or adoption leave. Protection on such ground is already provided under the Sex Discrimination Ordinance. It is understood that the existing law will be repealed.

Equal work, equal pay and equal treatment

100. In Jersey, no specific measures have been introduced relating to equal pay. This differed from the approach taken in the Equality Act which deals with the equality of terms and conditions of employment under a separate chapter.
101. 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.
102. Equal Value is proposed to be defined as equal skills and effort of the employee within the Proposed Legislation not the perceived value brought to the employer. This represents another highly onerous policy imbalance for employers.
103. The existing provisions of the Sex Discrimination Ordinance protect against sex discrimination in relation to terms and conditions including pay. Given the inclusion of sex as a protected ground under the Proposed Legislation this protection will remain. However, the States of Guernsey have now elected to include equal work, equal pay and equal treatment provisions. The inclusion of sex as a protected ground appears to achieve the desire for say equal pay. Are such complicated provisions required when Guernsey has dealt with so few complaints of sex discrimination? Once again is the

Guernsey court system sufficiently equipped to deal with complaints of this type? Instinctively this ground will place further pressure on employers (particularly small business) to conduct non-profit making HR exercises such as pay audits thereby creating a further level of unrecoverable cost.

104. The States of Guernsey are seeking public opinion as to whether the equal pay provisions should come into force at the same time as the rest of the discrimination legislation or whether its implementation should be delayed. Importantly, the Proposed Legislation seeks equal pay provisions in relation all 10 protected characteristics which represents a highly onerous first step in the introduction of equal pay. Businesses will need time to undertake audits on pay, undertake job evaluations to identify areas that may fall foul of the law and then take appropriate steps to rectify these. The recommendation is therefore **not** to introduce this ground. If it is to be introduced, it should be delayed.

Race

105. Under the definition of race in the Proposed Legislation, the following would be protected:

- a) colour;
- b) descent;
- c) nationality;
- d) ethnic origins; and
- e) national origins.

This mirrors the definition in the Jersey discrimination law save for the addition of descent.

The statistics in Jersey show that the protected characteristic of race has not translated into a significant number of claims (35 since the law came into force 5 years ago). There does not appear to be any evidence that there are race discrimination issues within the Guernsey community. Notwithstanding, it is recognised that anti-race discrimination legislation is required in an ever-diversifying culture. However, the legislation affording the protection should be appropriate and proportionate.

Religious belief

106. This protected ground outlaws discrimination on the basis of a person's religion (or lack of religious belief).
107. The definition has a broad application in that it would apply to views held that are linked to a religion rather than just being restricted to having a particular religion. A person does not need to practice a particular religion to be protected. It is enough that they may have been brought up in that religion.
108. What evidence is there of religious bias in Guernsey? What evidence is there religious bias is a concern within the community? Is this just introducing a ground of discrimination for the sake of discrimination?

Sex & Trans status

109. A definition of “sex” has not been decided upon in the TDP albeit 3 options have been put forward which include:
- a) being a “man or a woman” (with the Tribunal deciding which is the most appropriate in the particular circumstances if there is a dispute);
 - b) based on biological sex at birth; or
 - c) based on the gender that someone identifies as.
110. The approach taken in Jersey focuses on being a man or a woman or a person with intersex status from a biological perspective. The States of Guernsey have recognised that those with intersex status are protected by other discrimination legislation but intend to revisit its inclusion in the Guernsey discrimination law at a later stage.
111. 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.
112. It is important to note that a person does not need to undergo any procedure or process in order to trigger the protection of the trans status. It is sufficient that they identify as being of one sex or the other.
113. There has not been any consideration given in relation to on what basis trans people should have access to single sex spaces and services, in short the highly important practicalities of the proposals in a small community and island the size of Guernsey.
114. There is nothing more to add at this stage until Guernsey determines what definition it wishes to apply. Perhaps given the current uncertainty with regard to this ground it gives further support to the concept of introducing grounds of discrimination on a phased basis rather than as a collective.
115. The experience in Jersey, particularly in relation to sex discrimination, is that businesses have needed time to explain and advise staff as to the potential severe consequences of being in breach of this aspect of the law in the work environment. There is no doubt that the office culture around Jersey has changed since the introduction of this characteristic in 2015. The initial cost of educating the workforce has been primarily met by business.

Carer Status

116. The Proposed Legislation states that carer status should cover people who provide care or support in a non-professional capacity on a continuing, regular or frequent basis for a dependent child or for a person aged 18 or over with a disability which gives rise to the need for care and support. This is an extraordinarily wide definition which is at odds with the new EU Work- Life Balance Directive which provides the following definition for carer status:

“...A carer for these purposes means a worker providing personal care or support to a relative or person living in the same household and who is in need of significant care or support for a serious medical reason to be defined in more detail by Member States.....”¹⁹

117. It is not recommended that carer status becomes a protected ground simply because it is unnecessary and could be covered adequately by other legislation at a later date e.g. 'Right to Request Flexible Working. However, if it is included the definition should be redrawn to align to the more restricted EU Work -Life Balance Directive above. We note that the Irish legislation requires the dependent to reside in the same place of residence as the primary carer and can find no rationale why this was extended to such an intentionally wide and burdensome definition by the project sponsors without seemingly any consideration for the impact on businesses.
118. Moreover, the inclusion of carers as a protected ground is onerous and of concern to local business due to its scope given the breadth of the definition of “disability” under the Proposed Legislation. Who determines whether a person with a disability requires care and support from a carer and how is this determination to be made?
119. Jersey introduced family friendly rights including maternity, paternity and adoption rights under an amendment to the existing employment law. The amendment provided for flexible working requests to be made by employees and a statutory framework as to how an employer may respond to the requests. Under the amendment, all employees regardless of caring responsibilities are able to make Flexible Working requests. As such these provisions offer protection to carers (whether for children, the elderly or disabled) seeking flexible working arrangements but give the employer the ability to determine whether or not such a request can be granted and prescribed reasons for not doing so. The right to request flexible working has the potential to deliver the type of workplace adjustments needed by carers. Such provisions mirror the approach taken by the UK Equality Act 2010.
120. It is therefore the employment legislation that protects against detriment and dismissal on the grounds relating to the above rights in the context of employment. However, the prohibition against discrimination by association and harassment covered by the Jersey discrimination law also affords protection from direct discrimination (by association and

¹⁹ <https://data.consilium.europa.eu/doc/document/PE-20-2019-INIT/en/pdf>

perception) and harassment to those with a caring responsibility for disabled or elderly individuals in the employment sphere and in the provision of goods and services.

121. The approach taken by the Jersey legislation and that of the Equality Act offers sufficient protection to those with caring responsibilities without being overly onerous on businesses. As mentioned above, the definition of “disability” in the Proposed Legislation is vast and it is this definition coupled with the carer status provision which has created concern that the Proposed Legislation is disproportionate and will lead to a myriad of unmanageable situations.

Exceptions/Permitted forms of discrimination

Positive action

122. This includes the use of measures which treat someone with a protected ground more favourably to address the ongoing disadvantage of a group and to promote a more inclusive society. This preferential treatment is not discriminatory so long as the use of quotas is not introduced. For example, a recruitment process may seek to attract applications from an underrepresented group but a decision to employ cannot be made on the basis that a person has a protected ground (unless having the protected ground is a genuine and determining occupational requirement).
123. In the areas where discrimination is prohibited (employment, goods and services, education, accommodation and clubs and associations) positive action policies will need to be put in place and updated regularly to evidence that any positive action taken is still up to date and necessary. If a positive action is in operation that is no longer reasonable, a claim for direct discrimination could be made. This adds to the administrative burden for businesses.

Objective justification

124. The objective justification defence may apply in instances of:
- a) direct age discrimination (in limited circumstances);
 - b) indirect discrimination; and
 - c) discrimination arising from a disability.
125. The respondent to one of the above claims would have to show that the discriminatory act complained of was carried out in line with a legitimate aim and that the means of achieving that aim are appropriate and necessary. This is broadly in line with Jersey’s discrimination legislation and provides balance to the rights granted by the legislation.

Genuine and determining occupational requirement

126. The defence gives the employer the ability to defend what would otherwise be an act of discrimination by demonstrating that there is a genuine and determining occupational requirement for it. Jersey also has this defence in relation to work.
127. The employer would have to show that the occupational requirement is a proportionate (i.e. “*appropriate and necessary*”) means of achieving a legitimate aim.

Guernsey specific exceptions

128. There are numerous Guernsey specific exceptions in the Proposed Legislation under which certain acts of discrimination are not unlawful. Some apply to particular protected grounds only, others only apply in certain fields i.e. employment and goods and services.
129. 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 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.

How the Proposed Legislation will be enforced

130. It will not just be the Tribunal that will be able to enforce the discrimination legislation.

Employment Relations Service

131. Whilst the Tribunal will hear claims that have been brought by individuals, the existing Employment Relations Service will continue to have the power to undertake investigations and issue compliance notices, referred to as “non-discrimination notices”.

Equality and Rights Organisation

132. An Equality and Rights Organisation is proposed (the “Organisation”). The Organisation will consider equality and non-discrimination in the wider range of human rights. Its existence is not solely for the purpose of enforcing the proposed legislation. It will be there to improve Guernsey’s compliance with international human rights treaties and its accountability. However, as well as advising, administering and researching responsibilities, the Organisation would have a separate power of enforcement in relation to the accessibility duty where by it could issue enforcement notices to businesses, clubs and associations even where a complaint of discrimination has not been made. Non-compliance with an enforcement notice may result in a fine.
133. It will also be able to investigate, gather evidence and make recommendations where it has reason to believe that the discrimination legislation has been broken or there has been a human rights violation.
134. Is such an organisation required for a relatively small jurisdiction like Guernsey? What are the manpower and financial implications of operating such an organisation? Given the States’ of Guernsey drive to ensure self-funding of States bodies to the extent possible, there is plainly a risk, therefore, that the cost of the Organisation will ultimately fall on business either through levies, registration or fines, The role, remit and funding are fundamental matters which still need to be addressed.
135. The Tribunal will continue to hear discrimination cases with panel members being trained on the new law. No details have yet been provided as to how else the Tribunal may be

modified but one assumes that additional panel members will be needed to handle the influx of discrimination claims. The new regime would involve a mixture of approaches and concepts from different jurisdictions which are untested and for which there will be limited legal precedent. Is it truly fair to impose such lack of clarity on the current configuration of the Tribunal panel?

136. The Royal Court will handle appeals from the Tribunal on points of law.
137. Something that is not addressed by the proposals put forward for consultation is who will provide advice to the public on the Proposed Legislation once in force. Jersey has the Jersey Advisory and Conciliation Service that offers free advice to employers and employees on their duties and rights under the discrimination law. Those affected by discrimination in all other fields can seek advice from the Citizen's Advice Bureau. How can the Proposed Legislation have the desired affect if people are unaware of their rights?

Time Limits

138. The time limit in which a person must make a complaint to the Tribunal for an act of discrimination under the Proposed Legislation is 6 months from the date that the alleged discrimination took place. Coupled with the scope of Proposed Legislation, this creates the perfect environment for vexatious litigants and a prolonged period of uncertainty for potential respondents. In the UK it is 3 months. In Jersey it is 8 weeks. A shorter limitation period of 2 months would be sufficient.
139. The Proposed Legislation provides that if the person making a complaint has only recently found out new information about their circumstances due to a misrepresentation by the employer or service provider that they are complaining about, then they will have six months to register a complaint from the time that they become aware of the relevant information. Arguably this may encourage "fishing expeditions" for information by litigants who wish to prolong the period in which may bring their claim.

Remedies available under the proposed discrimination legislation

140. The following remedies will be available:
- a) Informal resolution between the parties (still takes up time and resources)
 - b) Recommendations which may include:
 - o Order for equal treatment;
 - o Order for specific action to be taken;
 - o Reinstatement; and/or
 - o Re-engagement.
 - c) Compensation to be set in bands similar to the Vento scale used in the UK. However, as yet no decision has been made as to whether there will be an upper limit on the compensation that may be awarded. Compensation will be awarded in respect of the following:

- Financial loss;
- Injury to feelings; and
- Increase in pay in cases of equal pay claims.

d) Equal pay:

- order that a person's pay is increased so it is the same as their comparator;
- cost arrears (not retrospective).

141. Concern has been raised over the possibility that discrimination claims may attract unlimited compensation awards.

Comments & Conclusions

142. The use of English law as a basis to the Jersey discrimination legislation meant that businesses with UK law compliant policies and procedures could adapt these for their Jersey offices rather than drafting bespoke policies and procedures from scratch. Jersey also had regard to the international obligations and the practices of other jurisdictions cited by the States of Guernsey in support of the Proposed Legislation.
143. A significant claim with the Proposed Legislation is the implementation of all 10 protected grounds at once. It is simply too much too soon. The UK Equality Act was introduced to consolidate the anti-discrimination laws that had previously been in force for decades. Whilst Guernsey currently prohibits sex discrimination, the Proposed Legislation will introduce a large raft of laws that businesses, educators and clubs will have to get to grips with all at once in a short period of time. There is no real "bedding in" period. Tribunal and conciliation officers will be "learning the ropes" for each protected ground at the same time as what one anticipates will be an increased work load due to the added scope for claims to be brought. How will this increased workload impact on the resources of the Tribunal and conciliation services? Will the number of Tribunal panel members and conciliation officers be increased? If so, at what cost?
144. Another advantage of basing legislation on a UK counterpart is the plethora of case law that can assist the Tribunal in determining discrimination claims. Guernsey's employment law is based on UK provisions therefore it seems bizarre that the same approach was not taken with the discrimination law. Some individuals may already have experience of the UK discrimination law, be it law practitioners who are English qualified or employees and service providers who have lived and breathed the legislation in the UK. One assumes that it is less likely that people will have experience of the Irish and Australian provisions.
145. Jersey is a similar jurisdiction in terms of its size, population and economy. Consequently, it would have made sense to consider the approach that Jersey has adopted which is more appropriate and proportionate.
146. Despite the number of claims reaching the JEDT being relatively low, vexatious claims have been brought. There may of course be many more that did not reach the Tribunal that have gone unreported but which have still cost businesses in legal fees and

management time. There are no cost consequences in the Tribunal to create a deterrent.

147. Aristotle said: the law is reason, free from passion. The Proposed Legislation is without reason and full of passion. It is ideological and not practical.
148. The Proposed Legislation, has, at its heart, a fundamental democratic disconnect with the public. This is spelled out in the section herein on disability, for what is proposed is not merely not consonant with, but contrary to, the ordinary right thinking persons understanding of a clear demarcation line between sickness and disability.
149. This is not to say that, in 2019, Guernsey should not have legislation. Clearly, Guernsey has obligations under a number of international conventions to protect its citizens from discriminatory behaviour. As a player on the world financial stage Guernsey needs to have in place laws to protect people against discrimination. Banking and financial services provide 42% of GDP. But it needs to be proportionate, well balanced and rational. Fit for Guernsey business, employees and the general populace.
150. In our view, the Proposed Legislation is unreasonable and unnecessary in its aims and extent, being modelled on completely different and much larger associated economic societies.
151. The impact of the Proposed Legislation on Guernsey business will be significant and harmful. In terms of international window shopping such legislation is unlikely to be attractive to prospective new businesses in the Island. International businesses come to Guernsey because of lower taxes and lighter regulation, translating, as they do, into lower operational costs. Staff cost is a major cost of many businesses, often the predominant cost. There is no doubt that what is proposed is unduly burdensome on business, and that having to comply with it, were it to be enacted as proposed, will be a deterring factor in any assessment of whether financial operators (and such like) locate here and whether, on review, they decide to remain.
152. If Guernsey is to go head to head with other jurisdictions as a place to do business the Proposed Legislation will be the tipping point to persuade new business to look elsewhere to nearby jurisdictions that do not have such business averse laws.