



VOISIN LAW

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

PREPARED BY

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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.