



States of
Guernsey

Discrimination Legislation Project:

Sex Discrimination Ordinance

Summary of Consultation Findings

December 2018

Executive Summary

Consultation responses contained a significant number of instances where people felt they had experienced or witnessed discrimination. It may have been possible to raise many of these instances under the Sex Discrimination Ordinance. However, the majority of these instances were not addressed through the Tribunal process, or even through the internal processes within the organisations in which they occurred – instead consultation respondents felt unable to, or chose not to, take action.

A number of factors were identified to explain this including a lack of awareness of rights and duties under the legislation; organisational culture and lack of senior leadership modelling inclusive behaviour within employing organisations; concerns about the impact of raising a concern on future employment prospects; concerns about credibility or not feeling the issue was important; lack of support from HR and lack of finances to obtain legal advice.

Enabling people to feel that they are able to address discrimination will require leadership from within the private sector as well as from the States, alongside improvements in awareness of rights and duties, and good access to advice. The Committee intends to address some of these points whilst considering structures to enforce any new legislation, including via a business plan for an Equality and Rights Organisation, which will have a role in education and information for both employees and employers.

Whilst some respondents felt that the awards under the existing Sex Discrimination Ordinance were appropriate; there were others who were concerned that the awards were not high enough to act as a deterrent, and were not proportionate. There were significant concerns about reputational risk affecting employees' and employers' decisions in relation to alleged discriminatory behaviour – with employees avoiding making complaints for fear of the impact of making a formal complaint on their future employment prospects and employers being willing to 'pay off' individuals before reaching a hearing in order to avoid bad publicity. A number of respondents also felt that financial awards should be supplemented by additional measures aimed at changing attitudes, practices and culture, such as via the adjudicator being able to order compulsory training.

A number of useful points for consideration were also raised by professionals with a working knowledge of the law. These included suggestions to include specific provisions on equal pay and harassment in any new legislation, and the possibility of including someone legally qualified on the Tribunal Panel when hearing cases.

The Committee will consider these responses as part of the development of a set of draft proposals for new discrimination legislation which it aims to issue for public consultation during 2019.

The consultation

The Committee *for* Employment & Social Security is developing proposals for multi-ground discrimination legislation. It is likely that the Committee will recommend repealing the existing Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, as amended ('the Sex Discrimination Ordinance') and incorporate relevant provisions in to the new multi-ground legislation. A consultation was issued in September 2018 to ascertain views on the existing legislation.

Two versions of the consultation were released. One aimed at businesses and individuals who had experienced discrimination, to which 57 responses were received. Another more technical consultation was intended for lawyers and others who had a working knowledge of the law – this received 18 responses.

Summary of key findings

Key findings are summarised into five sections: experience of discrimination at work; awards; non-discrimination notices; points on the legislation raised by professionals with a working knowledge of the legislation and other comments received.

1. Experience of discrimination at work

42 people reported that they had experienced or witnessed discrimination at work. Most of these instances were sex discrimination (including some cases against men). This included cases where people felt they had been discriminated against as a result of having childcare responsibilities (both men and women); incidents of sexual harassment at work and cases where people felt disadvantaged by stereotypes which challenged their ability to maintain credibility in a male or female dominated team or profession.

Most of these individuals said they had taken no action in relation to the incident; some had raised an issue internally (e.g. through HR); only a few had sought legal advice or registered a complaint under the Sex Discrimination Ordinance. Consultation respondents' levels of satisfaction with the services available to support them in raising a concern were low. Similarly, respondents' levels of satisfaction that their situations were given appropriate consideration and that they had access to justice were low.

Employers proactively addressing issues, supportive managers and HR, and acknowledgement of issues when they arose were all mentioned as important in supporting people to address concerns.

A number of issues were raised which deterred people from making formal complaints which included: the culture of the workplace; the behaviour of senior leaders with regard to inclusion; availability of support from HR; concerns about risks to reputation and future employment prospects (i.e. being considered a ‘troublemaker’ if they raised an issue); lack of confidence or feeling intimidated; attitudes towards childcare and flexible working in the organisation; lack of financial support to gain legal advice on an issue; their own lack of awareness of their rights and the stress associated with managing a conflict situation.

Some comments were made about the lack of recourse to justice for individuals who were discriminated against outside of work, or on grounds not covered in the Sex Discrimination Ordinance.

More than half of the employers who responded said that they had equality, diversity and inclusion policies in place. Some undertook training and others had mechanisms for handling complaints through other policies. Only a small number had sought advice from the Employment Relations Service. Proactively addressing sources of indirect discrimination related to working culture and managing clients who behaved in discriminatory ways were felt to be particular challenges.

2. Awards

Some consultation respondents felt that the awards available under the Sex Discrimination Ordinance were appropriate to a context where there was high employment. The fixed awards gave some reassurance to employers that there would not be unlimited claims made against them.

A number of concerns were also raised about whether the awards were high enough to act as a deterrent; whether the link to pay was fair for lower earners; and whether the awards offered compensation for potential damage to reputation and employment prospects for a claimant. Some people explicitly mentioned a preference for compensatory awards as used in Jersey and the UK, though one person felt that these would be complex to administer for a Tribunal Panel without legal training.

The addition of alternative remedies was suggested by a significant number of respondents. The most popular of these was a requirement for an individual who had discriminated to undertake training to prevent a re-occurrence. Orders for reinstatement, apologies, references, reasonable adjustments and changes to policies were also mentioned.

3. Non-discrimination notices

Very few respondents to the consultation were aware of non-discrimination notices or had witnessed their use. Those who had been aware of a situation where a person had been advised that a non-discrimination notice would be issued if they did not take action to correct a discriminatory practice felt that this had been effective.

Specific points to consider for change included whether the appeal period for non-discrimination notices (one month) should be lengthened, and whether it was appropriate for it to be a States of Guernsey employee that issued these notices, given that the States was the largest employer on the island.

Non-compliance with a non-discrimination notice could result in a fine. A person who knowingly or recklessly provided false information when that information was requested in relation to a non-discrimination notice could be liable to a prison sentence. A couple of respondents felt that prison sentences were inappropriate in this context.

4. Comments on the specifics of the legislation

Some comments were received on the specifics of the legislation as part of the technical consultation which was aimed at professionals with a working knowledge of the Sex Discrimination Ordinance.

Whilst there were some who thought that the current legislation did not require amendment, others suggested changes.

It was suggested that sections be added about harassment, equal pay and personal offices (as in s.48 of the UK Equality Act, 2010). Improved framing of indirect discrimination was felt to be needed including greater clarity around the defence of objective justification. It was mentioned that the legislation would need modification to allow people to make claims about multiple or intersectional discrimination. Explicit clarification that suspending or reducing pay during maternity leave did not constitute discrimination would assist interpretation. With regard to victimisation, it was considered sufficient to show detriment (i.e. it was felt that a comparator was not required). The expansion of the grounds to include civil partners, people who are not married, gender identity and sexual orientation was proposed. Some of the exceptions were felt to be out of date and required updating (particularly where they referenced marriage).

On the enforcement process, some comments were given on conciliation. In particular that conciliation officers should not be directly employed by the States of Guernsey; that

there should be an opportunity for ‘protected conversations’ in order to allow parties to negotiate exit terms before a hearing; and some suggestions were made about the timing of the conciliation process in relation to the Tribunal hearings. With regard to the Tribunal itself, it was suggested that there be a legally qualified chair, as is the practice in Jersey and the UK; one respondent felt that a full review of the Tribunal (along the lines of the Syson Review¹) would be beneficial; another respondent considered that it would be helpful for the Tribunal to have the power to strike out all or part of a claim and give a summary judgement on all or part of a claim; and finally, when seeking to establish a *prima facie* case of discrimination, it was felt that it would be beneficial to admit evidence from sources other than the claimant themselves. On the recovery of costs, there were mixed views. Some felt the awarding of costs would be beneficial, others felt it could deter people from bringing cases.

General points were made by a couple of consultation respondents about legal professionals and employers in Guernsey being more familiar with UK and Jersey legislation, so it was suggested that it may be beneficial to follow the UK with regard to definitions etc. and to avoid change from what was already familiar to people where possible. It was also noted that increased capacity would be required to hear an increase in the number of cases when the new legislation was introduced.

5. Other comments

There were some concerns about the current legislation not being effective in deterring discrimination. Though one person felt the legislation worked well and did not want change, a number of consultation respondents felt that the legislation should cover further grounds and go beyond the field of employment. A number of people explicitly said they supported repealing the Sex Discrimination Ordinance and introducing multi-ground legislation, though one person was concerned about the level of change if the new legislation introduced several new grounds at once. One respondent suggested streamlining the legislation along the lines of the Canadian legislation.

Specific suggestions about the development of proposals for the new legislation included investigating co-operation with Jersey around enforcement and advice; the possibility of bringing cases to the Tribunal anonymously to avoid publicity; providing witness support for Tribunal claimants²; and making the format of information provided by the Employment Relations Service more ‘friendly’.

¹ Billet XVIII of 2004

² We assume that this means an appropriate equivalent to the Bailiwick of Guernsey Victim Support and Witness Service to support people bringing claims of discrimination.

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There were general concerns about the difficulties of providing evidence that discrimination had occurred. There was also reference to a discussion underway in the UK around Non-Disclosure agreements in discrimination cases. Flexible working legislation, such as the right to request flexible working in the UK was also mentioned (the development of proposals for legislation like this was agreed by the States in February 2018 as part of the Longer Working Lives proposals).