THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

PROPOSALS FOR A NEW DISCRIMINATION ORDINANCE

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled "Proposals for a New Discrimination Ordinance" (dated 2nd March, 2020), they are of the opinion:-

1. To agree to the preparation of an Ordinance, under the provisions of section 1 of the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 in relation to the prevention of discrimination on the grounds of disability, carer status and race in accordance with the policy proposals set out in this Policy Letter.

2. To agree that:

   a. with the exception of the provisions referred to in paragraphs b. and c. below, the Ordinance referred to in Proposition 1 ("the Ordinance") shall come into force six months after its approval by the States,
   b. the provisions in the Ordinance relating to discrimination complaints in the field of education shall come into force on a date to be appointed by regulations made by the Committee *for* Employment & Social Security, which date shall be after the date on which the Ordinance comes into force pursuant to paragraph a. above, and
   c. the provisions in the Ordinance relating to a duty to make changes to physical features shall come into force on a date to be appointed by regulations made by the Committee *for* Employment & Social Security, which date shall be at least five years after the date on which the Ordinance comes into force pursuant to paragraph a. above.

3. To direct the Committee *for* Employment & Social Security to bring detailed policy proposals to expand the grounds covered in the Ordinance referred to in Proposition 1 to the States for consideration. This should be in accordance with the proposals and timeline set out in section 8.

4. To note the Committee *for* Employment & Social Security's intention to recommend, in phase 3 of the development of the Ordinance, the introduction of the right to equal pay for work of equal value in respect of sex, in accordance with the International Covenant on Economic, Social and Cultural Rights and in

order to support the extension of the Convention on the Elimination of All Forms of Discrimination Against Women.

5. To direct the Committee *for* Education, Sport & Culture and the Committee *for* Employment & Social Security to work together to develop an appropriate adjudication mechanism for complaints with respect to disability discrimination in schools and preschools and for any discrimination complaints relating to States' school admissions and to note that any request for additional funding for this purpose will be submitted through the appropriate budget setting process.

6. To approve the transfer from the Budget Reserve to the 2020 revenue expenditure budget of the Committee *for* Employment & Social Security:

   a. of £90,000 to fund an increase in the capacity of the Employment Relations Service, developing Rules of Procedure and a rolling training programme for the Employment and Discrimination Tribunal, programme management, and beginning to develop guidance and a code of practice, and
   b. of £40,000 for conducting a survey on prejudice and discrimination and beginning to develop an approach to address issues identified through the survey (noting that the request for b. stands, even if the preparation of the Ordinance is not approved, in order to promote equality and prevent discrimination via cultural change).

7. To direct the Policy & Resources Committee to include specific additional funding in the recommended Cash Limits of the Committee *for* Employment & Social Security:

   a. to fund the Employment and Equal Opportunities Service and the Employment and Discrimination Tribunal, estimated at £200,000 in 2021; £305,000 in 2022; and £325,000 from 2023 onwards, and
   b. to fund proactive work to raise awareness and change attitudes in relation to prejudice and discrimination in the community, estimated at £45,000 per annum (noting that the request for b. stands even if the preparation of the Ordinance is not approved in order to promote equality and prevent discrimination via cultural change).

8. To approve the allocation from the Transformation and Transition Fund, or other source deemed appropriate by the Policy & Resources Committee, of £395,000 to fund project set-up costs and awareness raising about the legislative changes between 2021 and 2023.

9. To instruct Property Services to find suitable office accommodation for the Employment and Equal Opportunities Service to move to.

10. To amend the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 to require Tribunal Chairs to be legally qualified, as set out in section 7.4.3 and appendix 6.

11. To prepare legislation outlining the powers and functions of the statutory official who will lead the Employment and Equal Opportunities Service and to amend existing employment and discrimination legislation in order to transfer any relevant powers to that statutory official (as outlined in section 7.4.2 and appendix 6).

12. To amend existing employment and discrimination legislation to ensure that a consistent approach is taken to offering pre-complaint conciliation with regards its effect on suspending the time limit for registering complaints and to enable other relevant time limits to be amended as may be considered appropriate.

13. To note the Committee *for* Employment & Social Security's intention to introduce Rules of Procedure for the Employment and Discrimination Tribunal by Order under the provisions of paragraph 3 of the Schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005.

14. To amend the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 to ensure, so far as appropriate, that the limits for financial compensation in that Ordinance are consistent with the limits set out in this Policy Letter and, so far as may be appropriate, to ensure consistency between the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 and the Ordinance with respect to civil penalties and criminal offences, as set out in section 10 and appendix 4.

15. To note that the Committee *for* Employment & Social Security shall have the power to prescribe by Regulation, inter alia:

    a. exceptions to the Ordinance,
    b. what is and is not a "physical feature" for the purposes of the Ordinance, and
    c. when tenants can request improvements to accommodation in relation to the rights of tenants in residential accommodation.

16. To note that the Committee *for* Employment & Social Security will bring proposals to the States for the establishment, operation and funding of an "Access to Work Scheme" by the end of 2021 (see section 7).

17. To agree that policy work on the outdated legislation and the policy and legislation gaps identified in section 9 should be considered for prioritisation through the Future Guernsey Plan in the next States' term.

18. To repeal the discriminatory provisions relating to women in the following legislation, as set out in section 9.5:

- Loi ayant rapport á L'emploi de femmes, de jeunes personnes et d'enfants, 1926,
- The Quarries (Safety) Ordinance, 1954,
- The Safety of Employees (Growing Properties) Ordinance, 1954,
- The Safety of Employees (Miscellaneous Provisions) Ordinance, 1952.

19. To direct the preparation of such legislation as may be necessary to give effect to these Propositions, including consequential amendments to other legislation.

20. To direct the Committee *for* Employment & Social Security to conduct a post-implementation review of the effectiveness of the legislation for individuals, employers and service providers no later than two years after the implementation of the final phase of the legislation (including changes to physical features coming into effect), or earlier if there are significant issues with respect to the operation of the legislation.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

PROPOSALS FOR A NEW DISCRIMINATION ORDINANCE

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

2nd March, 2020

Dear Sir

1. EXECUTIVE SUMMARY

1.1 The States is being asked, through this Policy Letter, to substantiate and give effect to their aspiration that Guernsey will be an "inclusive community" "where everyone has equal opportunity"[1].

1.2 This Policy Letter brings forward detailed proposals for the island's first discrimination legislation on the basis of disability, carer status and race. It also proposes the future development of proposals for discrimination legislation on the grounds of age, religious belief and sexual orientation. It proposes further work is undertaken to extend existing protection on the grounds of sex (including in relation to pregnancy and maternity), marriage and gender reassignment beyond employment.

1.3 The proposals align with common international concepts of discrimination that are covered in European law and with concepts that are described by the United Nations ("UN"). The proposals would bring the island on par with other advanced economies and the duties on employers and service providers would be similar to those in other jurisdictions.

1.4 As part of this work, it has been necessary to review the structure of our existing services and Tribunal managing employment and discrimination complaints. £370,000 per annum is requested as an annual recurring budget increase once the changes are fully implemented. There would also be transitionary costs

[1] States of Guernsey (2016) Future Guernsey: Policy & Resource Plan, Phase One. Available at: https://gov.gg/CHttpHandler.ashx?id=105052&p=0 [accessed 17th February, 2020].

(outlined in section 7). This would not only allow for the implementation of this legislation but would improve the standard of complaints handling for existing employment and discrimination legislation. The resulting structure would be more comparable to what is in place in Jersey and the UK. It would improve the opportunities for early resolution, raise awareness and promote attitude change – taking a more preventative approach. This is likely to save time and cost in the long-run.

1.5 While there has been widespread agreement on the principle of equal opportunity, views diverge when it comes to the detail. The Committee has considered and responded to the feedback that it has received as part of its public consultation in the summer of 2019[2]. The proposals attempt to take into account the most significant points made from all perspectives – but in this process compromises will have been made on all sides.

1.6 The Committee considers it unlikely that it would be possible to find a set of proposals which everyone fully agrees with. Delaying implementation is unacceptable for those islanders whose rights remain unprotected. The Committee is of the view that change is needed and asks the States to support the progression of this work. A post-implementation review is proposed and the legislation can be amended if necessary.

1.7 The attached detailed proposals (in appendix 4) outline the policy position only, and St James' Chambers will retain discretion in how to draft the legislation. The timing for the legislation to come into force will depend on the prioritisation of the work for legal drafting. The Committee hopes that, if the legislation is treated as a high priority, it would come into force in Q2 2022.

2. INTRODUCTION

2.1 In response to States Resolutions 3, 4 and 6 from the Disability and Inclusion Strategy, 2013 (see appendix 1), this Policy Letter outlines proposals for new discrimination legislation. The Policy Letter is structured in the following sections:

Section 3	Case for change	Explaining the need for new legislation and the Committee's objectives in introducing it.

[2] States of Guernsey (January 2020) Consultation Findings: Draft Policy Proposals for Discrimination Legislation. Available at: https://www.gov.gg/CHttpHandler.ashx?id=123084&p=0 [accessed 29th February, 2020].

Section 4	Legislative context and history of the project	Explaining the local legislative context and the policy making process the Committee has adopted.
Section 5	Summary of proposals	Outlining the key features of the Committee's proposals.
Section 6	Response to consultation	Explaining how the Committee has altered its proposals in response to feedback.
Section 7	Service developments	Outlining what is required to implement the legislation, including financial and legal implications.
Section 8	Future phases	Plans how the remaining protected grounds and fields could be introduced.
Section 9	Potentially discriminatory legislation	Outlines how any legislation with discriminatory provisions would be dealt with.
Section 10	Revisions to Sex Discrimination legislation	Explains what changes are required to the existing sex discrimination legislation to ensure alignment with the proposed new Discrimination Ordinance.
Section 11	Alderney and Sark	Outlines the results of consultation with Alderney and Sark.
Section 12	Conclusion	
Section 13	Compliance with Rule 4	

2.2 For further information, there is also appended to this document:

- Appendix 1 - The States Resolutions which led to the development of these proposals.
- Appendix 2 - An equality and human rights policy timeline for Guernsey.
- Appendix 3 - Information on which Human Rights Instruments have been extended to Guernsey and their requirements and Human Rights Instruments

likely to be extended to Guernsey in future.

- Appendix 4 - The Technical Proposals - detail of the proposals for new legislation.
- Appendix 5 – The Committee's views on using the Discrimination (Jersey) Law 2013 as a model.
- Appendix 6 - Further detail on service developments.
- Appendix 7 - Service developments options appraisal.
- Appendix 8 – Relevant extracts from Statements made by the President.

3. THE CASE FOR CHANGE

3.1 Widespread support for new legislation

3.1.1 The principle that all people should be free and equal is at the heart of our democracy. The reputation, legitimacy and credibility of our government is partially based on our visible commitment to ensuring that all of our citizens (and visitors to our island) have a fair and equal chance to participate in our society. It is widely agreed that nobody should be left behind or systematically excluded. No one should be denied opportunities to have somewhere to live, a job or an education just because of personal characteristics that should be irrelevant. Since the 1960s and 1970s, a standard way of governments ensuring this commitment has been through the enactment of discrimination legislation.

3.1.2 Indeed, in 2003 (Billet d'État XXI of 2003, Article XIV[3]) the States of Guernsey discussed the principle of introducing multi-ground discrimination legislation. The first tranche of this legislation, prohibiting discrimination on the grounds of sex, marriage and gender reassignment in employment, was introduced in 2006[4]. In 2013 (Billet d'État XXII of 2013, Article IX[5]) the States of Guernsey unanimously agreed to develop proposals for discrimination legislation to protect disabled people and carers. In 2018[6], the States of Guernsey unanimously agreed to extend this to the development of proposals for a piece of legislation to cover multiple grounds of protection.

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[3] States Advisory and Finance Committee – Proposals for Comprehensive Equal Status and Fair Treatment Legislation (Billet d'État XXI of 2003, Article XIV). Available at: https://www.gov.gg/CHttpHandler.ashx?id=3754&p=0 [accessed 29th February, 2020].

[4] Maternity leave and adoption leave were added to the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 with effect from 1 April, 2016.

[5] Policy Council - Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX). Available at: https://www.gov.gg/article/150421/States-Meeting-on-27th-November-2013-Billet-XXII [accessed 1st March, 2020].

[6] https://gov.gg/article/163879/States-Meeting-on-5-June-2018-Billet-dtat-XV [accessed 1st March, 2020].

3.1.3 The States Strategic Plan for this term of government had the overarching aim for Guernsey to "be among the happiest and healthiest places in the world, where everyone has **equal opportunity to achieve their potential**. We will be a safe and **inclusive** community…"[7]. The Disability and Inclusion Strategy, including the project to develop proposals for new disability discrimination legislation, has been consistently prioritised throughout this term of government under the theme "our community" in order to achieve the outcome "inclusive and equal".

3.1.4 There is clearly widespread support for and desire to introduce, further discrimination legislation in the States.

3.2 Disability, carer status and race

3.2.1 In line with the Resolution from June 2018, the Committee consulted in the summer of 2019 on draft proposals for multi-ground discrimination legislation. The quantity of feedback on the details of these proposals, and the desire from some key stakeholders (who supported the principle of introducing new discrimination legislation) for a phased approach to implementing the legislation, has meant that it has not been possible to return proposals for the full range of grounds to the States at this time. A plan for future phases of work to cover the grounds not included here has been included in section 8. In the explanatory note to the Le Clerc and Langlois amendment[8] it was noted that:

> "Should it not be feasible for any reason, including resourcing, to deliver proposals for multi-ground non-discrimination legislation during this political term, the Committee intends to revert to returning proposals for disability discrimination legislation to the States this political term with a view to adding other grounds of protection at the earliest opportunity."

3.2.2 The Committee regrets that it has been necessary to revert to this position. However, both carer status and disability are included in the proposals as a priority, aligning with Resolution 3 of the 2013 Disability and Inclusion Strategy. There were few additional policy considerations raised in the public consultation in relation to the draft proposals on racial discrimination. So, the Committee is bringing forward the protected ground of race at this time also.

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[7] States of Guernsey (2016) "Future Guernsey" p.6, Billet d'État XXVIII of 2016. Available at: https://gov.gg/policyandresourceplan [accessed 1st March, 2020].

[8] P.2018/45 Le Clerc and Langlois Amendment 2 to the Policy & Resources Plan (2017 Review and 2018 Update), Billet d'État XV of 2018, Article I (Resolution set out in full in appendix 1). Available at: https://www.gov.gg/CHttpHandler.ashx?id=113327&p=0 [accessed 1st March, 2020].

3.3 Why now, why not delay?

3.3.1 Larger advanced economies have often had race and sex discrimination legislation in place for 40 or 50 years and disability discrimination legislation for 20 or 30 years. Small island jurisdictions are catching up. The Isle of Man and Jersey now both have multi-ground discrimination legislation in force. The Committee is not aware of another jurisdiction (other than Alderney and Sark) in Europe that does not offer protection on the basis of race, nationality or ethnicity in their discrimination legislation[9]. This applies even when considering smaller jurisdictions like Malta, Luxembourg and Cyprus.

3.3.2 Guernsey may not just be behind the curve on our discrimination legislation, we may, in some respects - such as racial discrimination - be in last place. As well as potential reputational ramifications, this denies citizens the opportunity to challenge instances of discrimination that they experience. It makes Guernsey a less attractive place to live and work. Legislation is also a driver of cultural change - a process which takes some time. Delaying the introduction of the legislation arguably delays the pace at which cultural change will happen.

3.3.3 Commitments have also been made. In 1969 the UN's International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was extended to Guernsey. It is a requirement of this Convention that people should be legally protected from racial discrimination. The UK's 2003 report to the UN on compliance with CERD suggested that the States of Guernsey were actively developing race relations legislation, following a letter being laid before the States in 2000[10] (this letter was in response to feedback from the UN regarding the importance of domestic law for compliance with the International Covenant on Civil and Political Rights (ICCPR)). Twenty years later, no race discrimination legislation has been enacted[11].

3.3.4 In November 2013, the States of Guernsey resolved that the Policy Council should return proposals on discrimination legislation covering disability and

[9] European Commission (2018) A comparative analysis of non-discrimination law in Europe. Available at: https://www.equalitylaw.eu/publications/comparative-analyses [accessed 17th February, 2020].
[10] States Advisory and Finance Committee (2000) International Covenant on Civil and Political Rights, Appendix II to Billet d'État XX of 2000. Available at: https://gov.gg/CHttpHandler.ashx?id=3630&p=0 [accessed 17th February, 2020].
[11] United Nations, Committee on the Elimination of Racial Discrimination, *Reports submitted by States Parties under Article 9 of the Convention: Seventeenth periodic reports of States parties due in 2002, Addendum, United Kingdom of Great Britain and Northern Ireland,* CERD/C/430/Add.313 March 2003. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2f430%2fAdd.3&Lang=en [accessed 17th February, 2020].

carers to the States before the end of 2015[12]. There have been multiple reasons for the delay in this work coming forward including resourcing, a restructure of government and the complexity of the subject matter. Undoubtedly, however, it is also linked to the fact that there are polarised and strongly held views within our community (as illustrated in the Committee's public consultation findings[13]) on certain issues, such as the way disability should be defined. While the vast majority of people agree that discrimination legislation should be introduced, the objectives of our civil society groups and our business community differ (particularly with regards disability discrimination) and, while both the former Policy Council and the Committee *for* Employment & Social Security ("the Committee") have sought a compromise that representatives of both perspectives would support, after seven years this has not been possible. The Committee considers it unlikely that agreement will be reached. There are some aspects of the proposals that our civil society groups will object to, and other aspects that the business community will. The Committee believes that the States must not and cannot wait until all parties agree - there is a need to introduce legislation and difficult decisions must be made.

3.3.5 The current lack of protection must not continue. There is an imperative to act. Legislation can be reviewed and adjusted once in place if necessary, but the Committee considers that change is not only necessary but urgent.

3.4 Experience of discrimination in Guernsey

3.4.1 The Committee maintains that the case for protecting basic rights is strong even if the caseload were small – as outlined above, a guarantee of equal status, treatment and opportunity is a core democratic principle. However, there is also evidence that discrimination is happening in our community.

Disability

3.4.2 The Committee knows that instances of disability discrimination are occurring which could form the basis for complaints under any new law. The 2012 Disability Needs Survey[14] estimated that around one in five people (around 14,000) in Guernsey have a disability.

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[12] Resolution 3, Disability and Inclusion Strategy, Billet d'État XXII of 2013, Article IX. Available at https://www.gov.gg/article/150421/States-Meeting-on-27th-November-2013-Billet-XXII [accessed 29th February, 2020].

[13] States of Guernsey (January 2020) Consultation Findings: Draft Policy Proposals for Discrimination Legislation. Available at: https://www.gov.gg/CHttpHandler.ashx?id=123084&p=0 [accessed 29th February, 2020].

[14] BMG Research and the University of Nottingham (2012) Disability Needs Survey: Review of the prevalence across Guernsey and Alderney. Available at: https://www.gov.gg/article/154882/Disability-Needs-Survey [accessed 17th February, 2020].

3.4.3. The Committee has been told of instances of discriminatory behaviour during the course of this work. As well as more recent reports of cases where guide dogs are being refused access to public buildings, there were already documented cases from the 2013 Guernsey Disability Alliance report "*Islands of equality or oceans of exclusion?",* for example:

> "I was amazed and appalled to be met with a blank refusal by the owner of the sports facility who said that he was not interested in having children with special needs on his premises."
>
> "My doctor suggested that the continual change from day to night work wasn't helping and that I should ask if I could permanently work either days or nights. My employer refused to change the shifts for me and said he didn't believe I had [the condition]."
>
> "A stroke left me with one arm paralysed. I found it difficult to get work but eventually was given a job as a telephone receptionist. At the interview I pointed out that I'd need a headset so that I'd be able to take messages whilst using the phone. When I arrived at work there was no headset, so, if I needed to take a message, I had to grip the phone between my shoulder and ear which was very uncomfortable. They then said I should be more productive."

3.4.4 A survey of 1,300 people across the Channel Islands undertaken by ITV for the International Day of Persons with Disabilities in 2018 showed that 36% of islanders with disabilities felt that their condition meant they were unfairly treated by others[15].

3.4.5 In 2012, researchers from BMG and the University of Nottingham commissioned to undertake a Disability Needs Survey recommended the introduction of disability discrimination legislation. In part two of their report they wrote that:

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

[15] ITV news, ITV Channel Survey: key facts and figures, International Day of People with Disabilities, 3rd December 2018. Available at: https://www.itv.com/news/channel/2018-12-03/itv-channel-survey-key-facts-and-figures/ [accessed 17th February, 2020].

3.4.6 That disabled people are more likely to experience difficulties at work aligns with international evidence. For example, the UK 2008 Fair Treatment at Work Report found that 44% of people with a disability or longstanding illness reported that they had had problems with an employment right in the last 5 years compared to 27% who did not have a disability or longstanding illness[16].

Carer status

3.4.7 Estimates of the number of informal carers in Guernsey range from 2,000-4,000. Of these, there were an average of 518 active claims for Carer's Allowance per month in 2019 (noting that this requires 35+ hours of caring per week to qualify). The Committee is well aware that care responsibilities can significantly impact people's ability to undertake work with 70% of the respondents to the consultation on the Carers' Action Plan agreeing that caring had negatively impacted their work, study or income. Caring responsibilities can also affect a wide range of people – including those under 18, whose study might be impacted.

3.4.8 While the sample size was small, part two of the Disability Needs Survey in 2012 undertaken by BMG and the University of Nottingham found with regards to carers that "a significant minority have experienced some form of discrimination in the workplace as a result of their caring roles". This included 17% of respondents who believed they had lost their job because of a caring role and 7% who had experienced bullying or harassment due to being a carer.

Race

3.4.9 In 2018, the Citizen's Advice Bureau reported receiving 22 enquiries relating to racial discrimination or racial harassment at work. This is likely to be the tip of the iceberg - it is possible that individuals experiencing racial discrimination may not turn to, or be aware of, the Citizen's Advice Bureau. Concerns have been raised that a significant proportion of guest workers feel that they have experienced discrimination, but may not raise the issue. The fact that there is no legal protection may also make it less likely that people will come forward or seek advice.

3.4.10 Assuming some cultural similarity to Jersey and the UK, in 2017 the National Centre for Social Research reported that between 1983 and 2013 "the proportion of the public who described themselves as either "very" or "a little" racially prejudiced varied between a quarter and over a third of the population.

[16] UK Department for Business, Innovation and Skills (2009) Fair Treatment at Work Report, p.199. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192191/09-P85-fair-treatment-at-work-report-2008-survey-errs-103.pdf [accessed 19th February, 2020].

It has never fallen below 25%"[17]. The Jersey Opinions and Lifestyle Survey 2017 reported that 8% of respondents considered that they had been discriminated against on the basis of race or nationality in the past 12 months[18]. Even if the figure in Guernsey were slightly lower than the reported proportion for Jersey, it would still indicate very many people a year experiencing (what they perceive to be) racial discrimination in Guernsey.

Conclusion

3.4.11 The evidence suggests that Guernsey is not, as some would suggest, a place where discrimination does not happen. In common with the rest of Europe, islanders are affected by discrimination.

3.5 Strategic objectives

3.5.1 The aim of discrimination legislation is to allow all individuals an equal and fair prospect to access opportunities available in a society, be that employment, education, access to goods or services, etc. Discrimination legislation applies where people are exercising functions that place them in a position of authority or allow them to take decisions that may have a direct impact on others' lives. It does not interfere in personal contexts (e.g. interactions between family members, friends or acquaintances).

3.5.2 Discrimination legislation identifies acts and behaviours which are counter to the principles of equality and non-discrimination, establishes mechanisms to hold people to account if they are found to have acted in a discriminatory way, and provides remedies for people who have been discriminated against. As discussed later in this report, while softer approaches such as education and awareness raising initiatives around the principles of equality and non-discrimination should be part of any strategy to create a more fair and inclusive society, this approach will only go so far. Quite apart from being necessary to meet our international obligations, effective discrimination legislation is also necessary to dissuade some people from doing certain things and to persuade them to do certain things that they might prefer not to for some reason or another.

3.5.3 The following objectives have guided the development of proposals for new discrimination legislation (note that there are also separate objectives for service development should the legislation be introduced – see section 7):

[17] NatCen Social Research (2017) Racial Prejudice in Britain today, p.6 Available at: http://natcen.ac.uk/media/1488132/racial-prejudice-report_v4.pdf [accessed 17th February, 2020].
[18] States of Jersey, Statistics Unit (2017) Jersey Opinions & Lifestyle Survey Report, p.35. Available at: https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Opinions%20and%20Lifestyle%20Survey%202017%20report%2020171130%20SU.pdf [accessed 17th February, 2020].

i. People in Guernsey have their fundamental **rights protected and upheld** by legislation that protects disabled people and carers as a minimum, and is scalable, so that it is capable of being expanded to cover other protected grounds.

ii. People in Guernsey have **better access to and enjoyment of employment, goods, services and education.**

iii. The value of **equality, diversity and inclusion is well understood** by employers, service providers and the wider community and issues are identified and addressed.

iv. Disputes are **resolved early and informally where possible**, aiming to keep the number of cases requiring adjudication by a Tribunal low, while upholding people's rights.

v. To secure **economic benefit** for the island by introducing proportionate legislation that aligns with that seen in other advanced economies, securing Guernsey's reputation on the world stage.

vi. To respond to **States Resolutions 3, 4 and 6 from the Disability and Inclusion Strategy** (Billet d'État XXII of 2013, Article IX) and act in accordance with Resolution 4 (from Billet d'État XV of 2018, Article I) - see appendix 1 for the full text of these Resolutions.

vii. To improve compliance with our existing **international obligations** under human rights conventions, and improve our situation with regards seeking extension of the Convention on the Elimination of All Forms of Discrimination Against Women[19] (CEDAW) and the Convention of the Rights of Persons with Disabilities[20] (CRPD) (see Appendix 3).

3.5.4 If the legislation is introduced, the Committee would propose that its performance against these objectives be reviewed using the following performance indicators (this could be as part of the post-implementation review, see section 8.5 below). Note that there are separate objectives for service development (see section 7). The below indicators incorporate the measures from those objectives also.

[19] Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979. Available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx [accessed 29th February, 2020].

[20] Convention on the Rights of Persons with Disabilities. Available at: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html [accessed 29th February, 2020].

Indicator	Data source
Reduced levels of perceived discrimination.	Proposed attitudes survey.
Reduced levels of reported prejudice.	Proposed attitudes survey.
Improvements in proportion of people who feel they have experienced discrimination taking action to address situation (including informally).	Proposed attitudes survey.
Higher workforce participation for disabled people.	Lower incapacity benefit claims (once change related to population demographics are adjusted for).
Extension of CRPD.	n/a
Employment and Discrimination Tribunal wait time does not increase.	Operational caseload statistics - average time between complaint being registered and hearing should not significantly exceed 6 months or have a long-term increasing trend.
Proportion of complaints being resolved informally is maintained or improved.	Operational caseload statistics recorded by the Employment and Discrimination Tribunal and Employment and Equal Opportunities Service - at least 70% of cases resolved at conciliation stage.
Wait time for advice does not increase.	Response to enquiries at the Employment and Equal Opportunities Service is ordinarily within 3 working days.
Adequate uptake of voluntary pre-complaint conciliation.	Operational caseload statistics recorded by Employment and Equal Opportunities Service (at least 20 per year on average).
Customer satisfaction with, and confidence in, Employment and Equal Opportunities Service is high, with employers, service providers and individuals.	User feedback would need to be collected by Employment and Equal Opportunities Service (under development).

3.6 How the Committee's proposals are designed to meet these objectives

3.6.1 This section provides some explanation of how the Committee's objectives have shaped the proposals being brought forward.

People in Guernsey have their fundamental **rights protected and upheld** by legislation that protects disabled people and carers as a minimum, is scalable, and is capable of being expanded to cover other protected grounds.

3.6.2 While the Committee had hoped to bring forward proposals for multi-ground discrimination legislation, a number of factors have meant that the scope of these proposals is now narrower. These factors include the quantity of feedback received in response to the Committee's public consultation in 2019 and calls from some parties to phase the introduction of the legislation to make it easier to adapt to for employers and service providers.

3.6.3 The Committee considers that the extension of the legislation to cover other grounds is vital, but that it is important to take forward what change is feasible now, even if this means that not all grounds of protection are covered immediately. The Committee has outlined a plan for future work in section 8. It would be possible to add grounds of protection to the proposed Ordinance. The Committee's end vision is still to move towards a single piece of discrimination legislation covering multiple protected grounds.

People in Guernsey have **better access to and enjoyment of employment, goods, services and education.**

3.6.4 Protection from discrimination in education, accommodation provision and goods and services provision is vital. It is unacceptable that someone might encounter barriers to finding a house, gaining vital skills or having access to significant services (such as access to food, medical services or social activities) just because of a personal characteristic.

3.6.5. The Committee's proposals would be the first discrimination legislation in Guernsey to extend beyond employment. They cover the provision of goods and services, membership of clubs and associations and accommodation provision immediately. Protection in the field of education will also be written in for later enactment due to the need for harmonisation of the adjudication mechanism with any changes arising from the proposed new Education Law.

3.6.6 Expansion to provide protection in service provision as well as employment entails operational change - the Employment and Discrimination Tribunal Panel will need additional training and will need to be expanded so that sufficient capacity exists and wider skill sets are represented in order to manage non-employment cases in an appropriately expert way (the current Panel Members' expertise lies in employment). Officers who provide advice and conciliation will also require training. See section 7 for further discussion of service developments.

The value of **equality, diversity and inclusion is well understood** by employers, service providers and the wider community and issues are identified and addressed.

3.6.7 While legislation is a key part of cultural change, and can provide motivation for people to inform themselves of equality issues, legislation alone will not be effective in delivering the change that is needed. People's understanding of equality varies and it is possible to have positive conversations about equality without addressing key issues or generating change. The Committee is keen that proactive efforts to address prejudice are targeted and evidence based so that they have maximum impact. To this end, the Committee is proposing that an attitudes survey be undertaken on perceived discrimination and prejudice levels and that action is taken to address the most pressing issues that this survey reveals. Education and awareness raising activity should be developed in consultation with groups affected by the prejudice or discrimination in question. Addressing prejudice can help to prevent discrimination from occurring to start with. As well as reducing the potential complaints that might come forward (and the associated cost of these), it is much better for those who might be affected by prejudice if this is addressed early on. This work could be taken forward independently of the new legislation and there is no reason to wait for the legislation to be implemented to begin.

3.6.8 Guidance and education about employers' and service providers' responsibilities under the new legislation would also be provided and promoted. This should ensure that employers are not 'caught out' by failing to understand new requirements. Guidance would be available as soon as possible, after the States' decision to support employers to prepare for changes. In most cases, where a formal complaint is registered this is a last resort. If employers have good advice about how to handle their employees' concerns and complaints well to start with, this will help employees to resolve their issues faster and reduce the costs associated with escalating the complaint that the employer might otherwise experience.

Disputes are **resolved early and informally where possible**, aiming to keep the number of cases requiring adjudication by a Tribunal low, while upholding people's rights.

3.6.9 Previous States' Committees have suggested that our employment legislation should be "light-touch" and "non-adversarial". The Committee questions the extent to which rights violations can be handled in a non-adversarial way in all cases. However, the Committee also accepts that early and informal resolution is often likely to be preferable for parties where the behaviour complained of was unintentional or misinterpreted. Taking a case to Tribunal (or Court) can be complex, stressful, time-consuming and (even without Tribunal fees) will likely

have costs attached. As well as ensuring that free advice and post-complaint conciliation are offered, the Committee is proposing the introduction of a pre-complaint conciliation offering (something already used in the UK and Jersey) that would allow people to seek assistance to resolve a dispute before they even register a complaint. This should help to keep Tribunal case numbers low. The Committee has also sought to ensure that, where possible, sanctions included in the legislation are civil penalties and not criminal in nature.

3.6.10 The Committee's proposals include the possibility of using "non-discrimination notices" (as is currently the case under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 ("the Sex Discrimination Ordinance")). The process for issuing non-discrimination notices ensures that there are opportunities for employers or service providers to be advised of any concerns and take correctional action before a notice is issued (this might be used, for example, to address discriminatory advertising). The focus for using these notices is intended to be educational and to promote informal resolution where possible. This mechanism should help to resolve issues early and minimise the risk of conflict and litigation that might arise if issues are left unaddressed. The Committee is not proposing the development of an Equality and Rights Organisation that has extensive litigation powers.

To secure **economic benefit** for the island by introducing proportionate legislation that aligns with that seen in other advanced economies, securing Guernsey's reputation on the world stage.

3.6.11 The Committee's proposals are largely based on best practice in other jurisdictions. In some respects they do not go as far as proposals in the UK (for example, the Committee is not proposing that an Equality and Rights Commission is established that has strategic litigation powers, as the UK Commission does[21]) or Jersey (where volunteers are protected from discrimination as well as people in work contexts[22]). In other respects they contain provisions not included in the UK or Jersey (for example a "carer status" ground). Where this happens, proposals are similar to provisions in other jurisdictions, such as the Republic of Ireland. The Committee intends that where extra provisions are included that these help to offer greater clarity - it is not necessarily the case that these will hold employers to a higher standard than the UK or Jersey legislation does (for example, the fact that the Committee is proposing "discrimination by association" is included in the Ordinance simply provides greater transparency because although this form of discrimination does not appear in the text of the UK legislation, it is effectively read into it based on

[21] See UK Equality Act 2006, available at: http://www.legislation.gov.uk/ukpga/2006/3/contents [accessed 1st March, 2020].
[22] See Part 4 of the Discrimination (Jersey) Law 2013, available at: https://www.jerseylaw.je/laws/revised/Pages/15.260.aspx [accessed 1st March, 2020].

case law and statutory guidance. This makes the actual legislation harder to interpret to an inexperienced reader). Appendix 5 discusses the Jersey legislation in further detail.

3.6.12 The Committee is proposing investing in education and guidance ahead of the introduction of new legislation. This will make sure that it is not too costly for employers to be well informed about their responsibilities and best practice. This will be particularly important for small businesses who may have less access to human resources specialists and legal advice.

3.6.13 There would also be positive economic outcomes from introducing discrimination legislation - this could include higher workforce participation rates, increased ability to attract talented workers, and it may make Guernsey businesses more attractive to a more diverse customer base. Some studies have also suggested that better diversity in teams and boards can increase effectiveness and accrue benefits for businesses - though it is important not to oversimplify this picture: business benefits may arise from managing equality and diversity well in an organisation's particular context[23].

3.6.14 It is important to recognise the changing economic picture as our population ages and an increased proportion of our local customers will have access needs. As well as this being a consideration for businesses, it is potentially important from a social care perspective: accessible environments can enable people to stay independent for longer (for example, if shops are accessible, an older person with a mobility impairment may be able to go out shopping where they would otherwise require a family member or support worker to do shopping for them).

Respond to **States Resolutions 3, 4 and 6 from the Disability and Inclusion Strategy** (Billet d'État XXII of 2013, Article IX) and act in accordance with Resolution 4 (from Billet d'État XV of 2018, Article I) – see appendix 1 for the full text of these Resolutions.

3.6.15 Key points to comply with the existing States Resolutions include:

- Resolution 4 requires that extension of CRPD is sought at the earliest opportunity. This has been foremost in Committee Members' minds during the development of these proposals. This was a key factor in the Committee's decision to undertake a comparative analysis of different legislative models in early 2018 (see section 4.3). The publication of the UN Committee on the

[23] UK Department for Business, Innovation & Skills and Government Equalities Office (2013) The Business Case for Equality and Diversity: A survey of the academic literature. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/49638/the_business_case_for_equality_and_diversity.pdf [accessed 17th February, 2020].

Rights of Persons with Disabilities General Comment no. 6 (2018) on equality and non-discrimination[24] also influenced the development of the Committee's proposals - particularly with regards the definition of disability.

- In line with the Resolution from June 2018, the Committee consulted in the summer of 2019 on draft proposals for multi-ground discrimination legislation. As outlined in section 3.2, the quantity of feedback on these proposals, and the desire from some key stakeholders for a staged approach, has meant that it has not been possible to return proposals for the full range of grounds to the States at this time. A plan for future phases of work to cover the grounds not included here has been included in section 8.

- In line with the agreement from the States in 2018, the "straw man" developed was based on Irish and Australian legislation. However, by the time this was published in summer 2019 it had already been modified to move it closer to the UK position and in response to feedback from that consultation process the proposals now have considerable similarity to UK provisions in many areas.

- The States Resolutions required that the process for developing proposals incorporate consultation with disabled people, carers and business representatives. There has been extensive consultation at different stages and a three month public consultation period during 2019. Full details of this process are included in section 4.

- The Committee believe that it was the intention of the States that the Disability and Inclusion Strategy (2013) should be based on the social model of disability. This has been a key consideration of the Committee when undertaking the comparative analysis of different legislation.

- While the Committee has explored options for developing a Paris Principles compliant equality and rights organisation (see section 7 and appendix 7), the Committee considers a staged approach is required and believe that the service developments outlined in section 7 would meet the immediate requirements of the introduction of the legislation.

[24] United Nations, Committee on the Rights of Persons with Disabilities, General comment no. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (26th April 2018) Available at: https://digitallibrary.un.org/record/1626976?ln=en [accessed 17th February, 2020].

To improve compliance with our existing **international obligations** under human rights conventions, and improve our situation with regards seeking extension of CEDAW and CRPD (see Appendix 3).

3.6.16 Having discrimination legislation in place is a pre-requisite for extending the CRPD. Expanding the scope of our discrimination legislation to cover disability, carer status and race as protected grounds would also improve compliance with ICCPR, the International Covenant on Social, Economic and Cultural Rights (ICESCR) and ICERD (see appendix 3 for further details).

3.6.17 As these proposals do not include sex, there may remain further work to be done to meet key requirements of all of the above Conventions, and also CEDAW. The Committee's proposals would pave the way for sex to be added to the new Ordinance (repealing the existing Sex Discrimination Ordinance) - this would extend protection from discrimination on the grounds of sex to service provision (where it now is only protected in employment). Provisions for equal pay for work of equal value on the grounds of sex would also be key for compliance with the ICESCR and CEDAW. Again, the more limited equal pay for equal work provisions in the Committee's proposals could provide a foundation to build upon. Proposals to take these next steps are included in the Committee's plan for future work (in section 8).

4. EXISTING LEGISLATION AND HISTORY OF THE PROJECT

This section explains the existing legislative framework and the work undertaken to date on this project. A timeline of developments in relation to equality and human rights policy in Guernsey has also been included in appendix 2 for reference.

4.1 Local legislative context

4.1.1 The Human Rights (Bailiwick of Guernsey) Law, 2000[25] ("the Human Rights Law") was brought into force on 1 September 2006. The Human Rights Law incorporates provisions set out in the European Convention on Human Rights[26] into Bailiwick law. It also makes it unlawful for a public authority to act in a way which is contrary to those provisions.

[25] The Human Rights (Bailiwick of Guernsey) Law, 2000, available at: http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=71807&p=0 [accessed 29th February, 2020].

[26] European Convention on Human Rights, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 29th February, 2020].

4.1.2 The Human Rights Law ensures that everyone in the Bailiwick is entitled to the fundamental rights and freedoms of the European Convention on Human Rights. It also allows Guernsey residents to have their cases heard in the Bailiwick's courts and tribunals. Until the law came into force, a Guernsey resident who felt that their rights had been violated had to go to the European Court of Human Rights in Strasbourg to have their case heard. This was costly and could take several years before a decision was reached.

4.1.3 In terms of international law, a number of UN conventions relating to human rights and non-discrimination have also been extended to Guernsey - these are detailed in appendix 3.

4.1.4 In 2003 (Billet d'État XXI of 2003, Article XIV[27]), the States of Guernsey discussed the principle of introducing multi-ground discrimination legislation and agreed that legislation should be enacted to make discrimination unlawful and to promote equality of opportunity and diversity. The Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004[28] ("the Enabling Law") came into force on 5 September 2005. The Enabling Law does not, in itself, make discrimination unlawful or promote equality of opportunity and diversity. The Enabling Law gives the States the power by Ordinance to make such provision as it thinks fit in relation to the prevention of discrimination (section 1(1)).

4.1.5 "Discrimination" is defined in broad terms in section 1(2) of the Enabling Law as follows:

> "…"discrimination" means discrimination against any person by reason of race, colour, sex, sexual orientation, language, religion, belief, political or other opinion, national or social or ethnic origin, association with a national minority, age, disability, gender reassignment, property, birth, or marital, family or other status."

4.1.6 To date, three Ordinances have been made under the provisions of s.1 of the Enabling Law:

- The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005[29]

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[27] States Advisory and Finance Committee – Proposals for Comprehensive Equal Status and Fair Treatment Legislation (Billet d'État XXI of 2003, Article XIV). Available at: https://www.gov.gg/CHttpHandler.ashx?id=3754&p=0 [accessed 29th February, 2020].

[28] The Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004, available at: http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=71702&p=0 [accessed 29th February, 2020].

[29] The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, available at: http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=67618&p=0 [accessed 1st March, 2020].

- The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005[30] ("the Sex Discrimination Ordinance")
- The Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016[31]

4.1.7 Under the Sex Discrimination Ordinance, as amended by the Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016, discrimination is unlawful on the following grounds in the field of employment only:

- Sex (including maternity leave or adoption leave[32]),
- Marriage[33],
- Gender reassignment[34].

4.1.8 Discrimination on these grounds in the provision of goods or services, education, etc is currently not unlawful in Guernsey. Discrimination on all other grounds (e.g. disability, carer status, age, race, religious belief and sexual orientation) in employment, the provision of goods or services, education, etc is currently not prohibited in Guernsey.

4.2 The Disability and Inclusion Strategy

4.2.1 In November 2013, the States unanimously approved the Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX[35]). In giving their approval, the States agreed that a number of specific work streams should be undertaken as part of the Strategy and a timetable for this work was included in the Strategy.

4.2.2 Following consideration of this report the States resolved, amongst other things:

> "3. To approve, in principle, the enactment of legislation under the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 to prevent discrimination against disabled persons and carers and provide for equality of opportunity, and direct the Policy Council to revert to the States with detailed proposals for such legislation following consultation with other States Departments, and representatives of the

[30] The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, available at: http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=67566&p=0 [accessed 1st March, 2020].
[31] The Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016, available at: http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=102296&p=0 [accessed 1st March, 2020].
[32] Provisions in respect of maternity leave and adoption leave were added with effect from 1 April 2016.
[33] Not marital status – meaning that there is no protection against less favourable treatment of unmarried persons vs. married persons.
[34] Protection applies to those who are intending to undergo, are undergoing or have undergone gender reassignment.
[35] Policy Council - Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX). Available at: https://www.gov.gg/article/150421/States-Meeting-on-27th-November-2013-Billet-XXII [accessed 1st March, 2020].

business sector, disabled people and carers, before the end of 2015.

4. To direct the Policy Council to seek the extension of the UN Convention on the Rights of People *[sic]* with Disabilities to Guernsey at the earliest appropriate opportunity.

5. *[…]*

6. To approve, in principle, the establishment of an equality and rights organisation, based on the Paris Principles, but defer the implementation of such an organisation dependent on:

- A business plan being developed stating in detail the functions, staffing resources, costs and charges for such an organisation; and
- Any additional funding required being available and the States having given priority to the establishment of an organisation through any prioritisation process in effect."

4.2.3 Disability discrimination legislation is a cornerstone of the Disability and Inclusion Strategy. Enactment of this legislation will signal that the States, and the whole Island community, take seriously the issue of discrimination by reason of disability. It is also a precursor to demonstrating compliance with the CRPD, which the States has agreed should be extended to Guernsey at the earliest opportunity.

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

4.2.5 In November 2015, the Policy Council reported to the States (Billet d'État XX of 2015, Article VII[36]) on progress made on the implementation of the Strategy. This report noted:

"55. The DLG has met frequently, during which differing and often conflicting views have been able to be aired. Whilst agreement has not been reached on all aspects of the proposed legislation and its application, consensus has been reached on a number of areas and all parties have gained a better understanding of the issues involved. In particular, the deliberations of the DLG have been instructive in determining what matters should be considered for public and stakeholder consultation, and in identifying areas where policy decisions still need to be made.

[36] Policy Council – Update on the Disability and Inclusion Strategy (Billet d'État XX of 2015, Article VII). Available at: https://www.gov.gg/article/150853/States-Meeting-on-24th-November-2015-Billets-XX-XXI-and-XXII [accessed 29th February, 2020].

> 56. The discussions within the DLG have highlighted the complexities of the issues and shown that sufficient time will be needed to enable informed consultation to occur, and to enable all views to be taken into account, before the legislative proposals are finalised. To allow insufficient time for this process would represent too great a risk to the successful implementation of the legislation. Regrettably, this means that it will not be possible to return to the States with detailed proposals this political term as planned. Notwithstanding this, the Policy Council remains firmly of the view that this work stream is a high priority and it will be treated as such…"
>
> "60. …However, it is important to note that because it has already been agreed that Guernsey's legislation will be based on the 'social model' of disability, it will not just be a matter of replicating the UK legislation which is based on the 'medical model' of disability. This is one reason why developing legislation specific to Guernsey has proven challenging."

4.2.6 In the same report, it was noted that preliminary work to develop proposals for an Equality and Rights Organisation during 2013-2015 had found that a) it would be difficult to predict caseload for such an organisation and b) "this is a complex area that requires a level of dedicated resource to carry out preliminary work that simply does not exist at present".

4.2.7 On 1 May 2016, responsibility for implementation of the Disability and Inclusion Strategy transferred from the Policy Council to the Committee, falling under the Committee's mandated responsibility: *"To advise the States and to develop and implement policies on… social inclusion, including in relation to disability"*.

4.2.8 Work on the development of policy proposals for disability discrimination legislation recommenced in February 2017 following the allocation of a Policy Officer from within the Committee's existing policy team to lead the workstream. A Project Team was established in April 2017 to discuss policy issues and to provide input in relation to draft briefing papers prior to consideration by the Committee. The Project Team included representatives of the Guernsey Disability Alliance, the Chamber of Commerce and St James Chambers, in addition to one political member and officers of the Committee.

4.2.9 Parallel to the development of the legislation, from late 2017 into 2018 work was commenced on developing a business plan for an Equality and Rights Organisation (ERO). Civil society organisations with an interest in equality and human rights were engaged with and workshops were held regarding what the scope of such an organisation might be.

4.3 Comparative evaluation of disability discrimination legislation in other jurisdictions

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

4.3.2 In February 2018, following a competitive procurement process, the Committee appointed Dr Lucy-Ann Buckley[37] and Dr Shivaun Quinlivan[38] from the National University of Ireland Galway's internationally acclaimed Centre for Disability Law and Policy to undertake a comparative analysis of the equality/disability discrimination legislation in force in the following six English speaking common law jurisdictions[39] against agreed assessment criteria:

- United Kingdom
- Republic of Ireland
- Canada
- Australia
- New Zealand
- Hong Kong[40]

4.3.3 Drs Buckley and Quinlivan facilitated face-to-face dialogue with representatives of Disabled People's Organisations, the business community, political members and Civil Servants in order to develop a clear understanding of the policy and legislative needs of Guernsey when developing the proposed assessment criteria. The proposed assessment criteria were presented to Committee members and other key stakeholders and were approved by the Committee in mid-February 2018.

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[37] Staff profile of Dr Lucy-Ann Buckley BCL, LL.M(NUI), BCL(Oxon), Ph.D, Solicitor, available at: http://www.nuigalway.ie/business-public-policy-law/school-of-law/staff/lucy-annbuckley/ [accessed 1st March, 2020].

[38] Staff profile of Dr Shivaun Quinlivan B.A, LL.B, LL.M, B.L, Ph.D available at: http://www.nuigalway.ie/law/staff/shivaunquinlivan/ [accessed 1st March, 2020].

[39] The Discrimination (Jersey) Law, 2013 ("the Jersey Law") was not reviewed against the assessment criteria (at that time) because disabled persons and carers were not protected under the Jersey Law at the time that the review was carried out. "Disability" was added to the Jersey Law as a protected characteristic with effect from 1 September 2018. The Jersey Law was reviewed by Drs Buckley and Quinlivan against the same evaluation criteria in November 2019 following feedback received through the public consultation that Jersey would be an appropriate model on which to base Guernsey's discrimination legislation principally because of its familiarity to pan-island businesses.

[40] Hong Kong was dismissed at an early stage.

4.3.4 The agreed assessment criteria were as follows:

- Compliance with the CRPD;
- Rights-based, yet recognising business and economic realities;
- User-friendly, not too complex;
- Comprehensive scope - covering all forms of disability discrimination, in multiple contexts (e.g. employment, goods and services, education, housing);
- Based on the social model of disability;
- Should include a broad definition of disability that offers guidance but incorporates the social element;
- Not too expensive or legalistic for users (disabled people, employers, service providers) to access, but with meaningful enforcement;
- Compatible with the Guernsey legal context;
- Should protect carers;
- Should be compatible with a modular approach (i.e. possible to add or activate other protected grounds, for example, race, age, sexual orientation, either immediately or at a later stage), but should cover intersectional disability discrimination immediately (e.g. situations where people may experience discrimination because of a combination of characteristics – for example, being a disabled woman, etc);
- Should include non-exhaustive examples of reasonable accommodation and factors for assessing disproportionate burden (i.e. some examples of the types of things employers or service providers might be expected to do to include people);
- Should permit (though not require) positive action;
- Should be effective in practice.

4.3.5 The comparative analysis involved desk-based research to develop a detailed analysis of the various legislative provisions in the shortlisted jurisdictions in light of the agreed assessment criteria. The results of the analysis were documented in a written report and key points were presented to Committee members and key stakeholders, including representatives of the Policy & Resources Committee, the Chamber of Commerce, the Guernsey Disability Alliance, the Equality Working Group, St James Chambers and the Employment Relations Service, in late March 2018.

4.3.6 Following consideration of this analysis, the Committee decided to use the Republic of Ireland's Employment Equality Acts 1998-2018[41] ("Employment

[41] Employment Equality Acts 1998-2018, available at: http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html [accessed 29th February, 2020].

Equality Acts") and Equal Status Acts 2000-2015[42] ("Equal Status Acts"), and the Australian Disability Discrimination Act 1992[43] as models, recognising that tailoring would be required to fit with the local legislative, operational and policy context.[44]

4.4 Expansion to multiple grounds of protection

4.4.1 In June 2018, following consideration of an Amendment[45] laid by the President of the Committee to the Policy & Resources Plan (2017 Review and 2018 Update) (Billet d'État XV of 2018, Article I[46]) States members unanimously agreed[47] to direct the Committee to expand the scope of existing work to develop detailed policy proposals for disability discrimination legislation into a project that developed proposals in respect of multiple grounds of protection, including disability.

4.4.2 The Committee proposed the Amendment for the following reasons:

- It is common for discrimination/equality laws in other jurisdictions to cover multiple-grounds of protection.
- It would fulfil other States Resolutions faster, for example the Resolution to develop proposals for age discrimination legislation, agreed by the States as part of Longer Working Lives (Billet d'État V of 2018, Article IV[48]).
- It would better meet Guernsey's obligations under international conventions (e.g. ICERD).
- It would be cost-effective in the long-run compared to developing a series of projects for each protected ground.

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[42] Equal Status Acts 2000-2015, available at: http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html [accessed 29th February, 2020].
[43] Disability Discrimination Act 1992, available at: https://www.legislation.gov.au/Details/C2016C00763 [accessed 29th February, 2020].
[44] See section 6 for details of how this position changed during the development of the draft policy proposals on which the Committee consulted in the summer of 2019.
[45] P.2018/45 Le Clerc and Langlois Amendment 2 to the Policy & Resources Plan (2017 Review and 2018 Update), Billet d'État XV of 2018, Article I (Resolution set out in full in appendix 1). Available at: https://www.gov.gg/CHttpHandler.ashx?id=113327&p=0 [accessed 1st March, 2020].
[46] Policy & Resources Committee - Policy & Resources Plan (2017 Review and 2018 Update), Billet d'État XV of 2018, Article I. Available at: https://www.gov.gg/article/163879/States-Meeting-on-5-June-2018-Billet-dtat-XV [accessed 29th February, 2020].
[47] Voting record in respect of P.2018/45 Amendment 2 available at: https://www.gov.gg/CHttpHandler.ashx?id=113540&p=0 [accessed 29th February, 2020].
[48] Committee *for* Employment & Social Security – Longer Working Lives, Billet d'État V of 2018, Article IV. Available at: https://www.gov.gg/article/162927/States-Meeting-on-7-February-2018-Billets-dtat-V-VI--VII [accessed 29th February, 2020].

4.4.3 Following States approval of the Amendment, the constitution and role of the Discrimination Legislation Project Team was reviewed. Following consultation with the existing members of the Project Team, it was agreed that the team be expanded to include people who represented other grounds of protection and representatives of the enforcement function. However, given the size of the group routine meetings were no longer held. From this point in time, communications took place via email and members were invited to workshops at critical junctures.

4.5 Consultation regarding the Sex Discrimination Ordinance

4.5.1 Given that approval of the Amendment meant that proposals in respect of sex discrimination would be included in the Committee's proposals for new multi-ground discrimination legislation, in September 2018, the Committee issued a consultation on the existing Sex Discrimination Ordinance. The aim of the consultation was to get a better understanding of how the Sex Discrimination Ordinance was operating in practice, focussing, in particular, on what was working well and should be retained, and what was less effective and should potentially be changed. In particular, the responses highlighted the fact that many people who felt that they had been discriminated against did not feel that they were supported to take action to address the discrimination that they had experienced. This could be for a range of reasons including lack of awareness of their rights, the culture in their workplace, and access to advice. The Committee published the findings of the consultation in December 2018[49].

4.6 Proposal of an "interim" ERO Policy Letter

4.6.1 In 2018, the Committee had been preparing a Policy Letter to bring in early 2019 to seek to establish an interim educational phase of an "ERO" as soon as possible, before finalising proposals about what an ERO might look like in the long-run. In early 2019 this work was suspended as the Committee recognised that it was necessary to look at the full picture: to understand what the end model would look like, and to know how it would interact with the new discrimination legislation, the Tribunal and the Employment Relations Service.

4.7 Development of draft policy proposals for consultation

4.7.1 The Committee's advisers were next tasked with preparing a "straw man" which was essentially an amalgamation of key provisions from the Irish and Australian models. The straw man was not intended to be a draft Ordinance - instead it was intended for use as a basis for discussion with stakeholders regarding what would

[49] States of Guernsey (December 2018) Discrimination Legislation Project: Sex Discrimination Ordinance - Summary of Consultation Findings. Available at: www.gov.gg/sexdiscrimination [accessed 29th February, 2020].

be appropriate for Guernsey. In November 2018, the straw man was presented to key stakeholders, including representatives from business, civil society groups, the Employment and Discrimination Tribunal, Civil Servants and political members and feedback was requested.

4.7.2 During the first half of 2019, the Committee sought to translate the straw man into a set of draft policy proposals for consultation. During this process, the Committee moved away from the Irish/Australian model in several important respects, meaning that the draft policy proposals on which the Committee consulted were actually based largely on equality legislation in force in the Republic of Ireland and the United Kingdom.

4.7.3 Throughout the development of the draft policy proposals, the Committee proactively engaged with representatives of civil society groups, the business community, legal professionals, groups who might be affected by the legislation, States Committees and other States entities.

4.7.4 The Committee published its draft policy proposals for multi-ground discrimination legislation on 9 July 2019. The consultation period ran for 12 weeks until 30 September 2019. Several documents were published[50]:

- a technical consultation document aimed at those with existing subject specialism,
- a summary of the proposals (which was also available in Latvian, Polish, Portuguese and as an audio file),
- an Easy Read version of the proposals,
- Frequently Asked Questions (for employers and service providers, rights holders and accommodation providers), and
- a consultation questionnaire (an online version and a paper version).

4.7.5 In addition, various meetings were held with interested groups throughout the consultation period (see appendix 1 of the Consultation Findings Report[51]).

4.7.6 Consultation responses were accepted via a range of methods, including via the online or paper version of the consultation questionnaire, in writing by post or via email. The questionnaire was divided into three parts[52]. The Committee

[50] Consultation documents available at: https://www.gov.gg/discriminationconsultation [accessed 29th February, 2020].
[51] States of Guernsey (January 2020) Consultation Findings: Draft Policy Proposals for Discrimination Legislation. Available at: https://www.gov.gg/CHttpHandler.ashx?id=123084&p=0 [accessed 29th February, 2020].
[52] Part A included questions regarding some of the proposed grounds of protection; Part B included questions regarding compensation limits, the mandate of the Equality and Rights Organisation and

received an excellent response to the questionnaire with the following numbers of responses: Part A - 1,163; Part B - 392; and Part C - 154. The Committee also received 57 separate letters and emails, some of which provided extensive and detailed feedback.

4.7.7 In January 2020, the Committee published a report setting out the key findings of the consultation[53]. The report included anonymised quotes intended to give a flavour of the responses received and to highlight the key themes, viewpoints and policy issues raised.

4.7.8 Many respondents did not comment on the general principle of whether we should have discrimination legislation. However, where respondents did comment, opinions were divided. Some strongly advocated for the need for discrimination legislation and an Equality and Rights Organisation (ERO) to be introduced as soon as possible. Others strongly opposed arguing that there was a lack of evidence that discrimination happened in Guernsey (this is incorrect - there is evidence of discrimination, see section 3.4 above). A third position was to argue against the Committee's proposals in particular rather than the principle in general, with some feeling the proposals went too far and were not similar enough to equivalent legislation in Jersey and the UK. Those holding this position argued that this could increase the cost of compliance for businesses and make Guernsey less competitive as a jurisdiction. The need for an ERO was also questioned, with suggestions that the Employment Relations Service should be expanded as an alternative. As the decision to develop proposals for disability discrimination legislation and an ERO were already agreed by the States of Guernsey in November 2013, the comments from some of those opposing the general principles challenged the foundations on which the Committee based their work.

4.7.9 In response to the consultation, the Committee has reviewed and/or reconsidered a substantial number of policy issues. Section 6 summarises the areas where the Committee has agreed to make significant changes to the draft policy proposals on which it consulted in the summer of 2019 (further detail is set out in appendix 4). In other areas, the Committee decided not to change its proposals.

phasing implementation; Part C asked for feedback in respect of the list of proposed exceptions to the legislation.

[53] States of Guernsey (January 2020) Consultation Findings: Draft Policy Proposals for Discrimination Legislation. Available at: https://www.gov.gg/CHttpHandler.ashx?id=123084&p=0 [accessed 29th February, 2020].

4.8 ERO Options appraisal

4.8.1 In autumn 2019, the Committee undertook an options appraisal exercise. This was intended to explore both what options there were for developing a Paris Principles compliant Equality and Rights Organisation and also to look at what service developments would be required to implement the legislation (as outlined in the technical draft proposals consulted on in summer 2019).

4.8.2 After an initial scoping exercise, a series of long-lists of options explored what functions might be required in a new system; what organisations might deliver these functions; how the governance of these organisations should work; how the organisations should be funded and how the change should be implemented. Two shortlists of options were selected for an initial costing exercise - one shortlist for the Employment and Discrimination Tribunal, and the other for the future Employment Relations Service/ERO (a summary of these is included in appendix 7).

4.8.3 Following the initial costing exercise and on consideration of the wider advantages and disadvantages of the options on the shortlists, the Committee selected its preferred options. These options were then discussed with key stakeholders including the Policy & Resources Committee, civil society groups, representatives of business associations, trade unions, local employment lawyers, the staff in the Employment Relations Service and the Tribunal Panel.

4.9 Keeping people informed

4.9.1 In addition to issuing media releases to mark important milestones, the Committee has sought to keep States Members and the wider community apprised of progress on the development of proposals for discrimination legislation and the ERO through the regular Statements made by the President to the States and the Disability and Inclusion Strategy highlight reports and "news in brief" reports published every two months. Relevant extracts of the President's Statements are provided at appendix 8. Highlight reports and news in brief reports are available at: www.signpost.gg/improvingislandlife.

4.9.2 Also, the Scrutiny Management Committee held a public hearing on the implementation of the Disability and Inclusion Strategy on 31st January, 2018[54].

[54] Hansard of Scrutiny Management Hearing No.1/2018 on the Disability and Inclusion Strategy available at https://www.gov.gg/CHttpHandler.ashx?id=112340&p=0 [accessed 17th February, 2020].

5. SUMMARY OF THE COMMITTEE'S POLICY PROPOSALS

5.1 Introduction

5.1.1 This section provides a high level overview of the Committee's policy proposals. Appendix 4 sets out the Committee's detailed policy proposals in full, including explanations of policy intent, legal concepts and illustrative examples. Appendix 4 is intended to provide sufficient detail to enable the legislative draftsmen to prepare the legislation without tying their hands in respect of the specific wording of provisions.

5.1.2 Several respondents to the consultation felt that the level of detail in the draft proposals made them overly complex for Guernsey. The Committee understands this concern and agrees that the legislation should be easy to understand - indeed one of the agreed assessment criteria for the multi-jurisdicational review was that the legislation should be user-friendly and not too complex. However, there is no getting away from the fact that discrimination law is highly technical and complex by nature. While it would be possible to present proposals which appeared to be less complex, this would not change the complexity of the cases that will arise and would risk "glossing over" significant points. In the long-term, if the proposals are less clear this could lead to increased litigation and costs.

5.2 Phased approach

5.2.1 The Committee remains of the view that there is significant merit in all non-discrimination provisions being set out in a single Ordinance rather than in a collection of Ordinances covering different grounds of protection and/or different fields (e.g. employment, provision of goods or services, etc). A single Ordinance will make it easier for duty bearers and rights holders to understand their respective duties and rights and will allow for a consistent approach to be taken in defining discrimination, in bringing and hearing cases and in the remedies available to complainants. However, due to the quantity of feedback received through the public consultation and in order to manage workload, the President of the Committee announced in November 2019[55] that the proposals under development would be refocused on fewer grounds of protection, with disability and carer status as a priority.

5.2.2 The Committee recommends that a phased approach is taken to the development of a single Discrimination Ordinance under the provisions of the Enabling Law covering multiple grounds of protection. The proposals set out in this report represent the first phase in the development of this Ordinance.

[55] Media release issued on 8 November 2019, available at: https://www.gov.gg/article/175022/Discrimination-Legislation-proposals-to-be-re-focussed [accessed 19th February, 2020].

Section 8 sets out a high level plan in respect of the proposed future phases of development.

5.2.3 The Sex Discrimination Ordinance will remain in force and operate alongside the proposed new Ordinance until such time as sex, marriage and gender reassignment are taken into the new Ordinance in phase 3.

5.3 Protected grounds

5.3.1 Discrimination legislation protects people from being treated less favourably because they have certain characteristics. It is proposed that the new Discrimination Ordinance covers the following three grounds of protection initially:

- Disability,
- Carer status,
- Race.

5.3.2 The Committee recognises that the ground of disability is the most challenging, not only in respect of the question of how to define "disability", but also because employers and service providers sometimes have to treat disabled people differently to non-disabled people in order to ensure that they have equal opportunities and are fully included in society, and this can, in some cases, incur financial cost (although cost is taken into account in determining whether an adjustment has to be made by a duty bearer). Despite these challenges, the Committee is firmly of the view that disability and carer status must be included in the first phase of the development of a multi-ground discrimination Ordinance because it has been over six years since the States approved, in principle, the enactment of legislation to prevent discrimination against disabled persons and carers. There is also strong public pressure, in particular from disabled people, for the introduction of this legislation at the earliest opportunity.

5.3.3 The Committee is proposing that race is also included within the first phase of the development of the Ordinance for two reasons. Firstly, discrimination on the basis of "race and colour", which includes an individual's ethnic origin, is prohibited by the ICESCR as well as by other treaties including ICERD. The Bailiwick of Guernsey was included in H.M. Government's ratification of ICERD in 1969. This Convention requires States Parties to, amongst other things, *"prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization"*. The Committee is of the view that it is not acceptable that, as ICERD was extended over 50 years ago, racial discrimination is still not prohibited in Guernsey.

5.3.4 Secondly, the proposed protected ground of race did not generate much in the way of feedback through the consultation and, unlike other potential protected grounds, no further policy work is required. Therefore, the Committee can see no reason to further delay the enactment of legislation to prohibit racial discrimination.

5.4 Proposed definition of "disability"

5.4.1 In the draft technical proposals, on which the Committee consulted in the summer of 2019, a working draft definition of disability was proposed which was based on the definition included in the Republic of Ireland's Employment Equality Acts and Equal Status Acts with various amendments[56]. This was a broad, impairment based, definition which included no requirements in terms of actual or expected duration of the disability, or impact on a person's ability to carry out, engage or participate in normal day-to-day activities.

5.4.2 The Committee received extremely diverse feedback on this proposal. Some stakeholders supported a broad definition. Others argued that the words "disability includes but is not limited to…" effectively meant that the definition was unlimited. There was also both support for and criticism of the removal (from the Irish definition) of the word "chronic" in relation to illness, with concerns raised over how employers would be able to distinguish between short-term sickness absence and a longer-term disability. There was both support and criticism for the suggestion that the duration that a disability had existed was not relevant. Some respondents suggested that adopting the definition of disability used in the UK Equality Act 2010 or the Discrimination (Jersey) Law 2013 would be preferable for employers and businesses as they were more familiar with these definitions. Others were highly critical of the UK and Jersey definitions arguing that they sought to reduce the protected pool of people and that they focussed attention on proving disability, rather than on the alleged discriminatory act.

[56] Working draft definition of "disability" which the Committee consulted on in the summer of 2019:
"'disability' includes but is not limited to –
(a) the total or partial absence of a person's bodily or mental functions, including the absence of 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;
To avoid doubt, where a disability is otherwise covered by this definition, the source or duration of the disability is not relevant and there is no required level of impact on the ability of the affected person to function."

5.4.3 Following the consultation, the Committee has met on a number of occasions with representatives of the Guernsey Disability Alliance and business associations, both separately and together, to try to find common ground in relation to this key issue. Unfortunately, it has not been possible to find a definition of disability that all stakeholders support.

5.4.4 Some stakeholders have indicated that they would support the adoption of the Jersey definition of disability with no amendments. Other stakeholders do not support the Jersey definition due to the way it defines a requirement for the impairment to be "long-term"[57] and also because it includes a requirement that the impairment "can adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law" (herein referred to as "the adverse effect test"). It is not clear how the adverse effect test will be interpreted by the Jersey Employment and Discrimination Tribunal as only one disability discrimination complaint has been considered by the Tribunal to date and interpretation of this requirement was not a key determinant in this case. Although the Committee has been advised that it is likely that UK case law will be followed by the Jersey Employment and Discrimination Tribunal, the adverse effect test in the Discrimination (Jersey) Law 2013 is actually different to the equivalent test applied under the UK Equality Act 2010, so this may be an unsafe assumption. The some stakeholders have indicated they would be likely to support the definition of disability in the Republic of Ireland's Employment Equality Acts and Equal Status Acts with no amendments; but, at a meeting with the Committee, other stakeholders did not support this definition as it does not explicitly include any tests on duration or adverse effects (although in practice impairments of a minor or trivial nature are not considered to be disabilities under these Acts).

5.4.5 The Committee proposes that a person would fall within the protected ground of disability if the person has one or more long-term physical, mental, intellectual or sensory impairments.

5.4.6 In order to provide greater clarity for individuals, employers and adjudicators, it is proposed that "impairment" is defined in terms consistent with the following:

> *"'impairment' means:*
> (a) the total or partial absence of one or more of a person's bodily or mental functions, including the absence of a part of a person's body,
> (b) the presence in the body of organisms or entities causing, or likely to cause, chronic disease or

[57] In the Discrimination (Jersey) Law, 2013 "a long-term impairment is an impairment which –
(a) has lasted, or is expected to last, for not less than 6 months; or
(b) is expected to last until the end of the person's life."

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, illness or disease which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour."[58]

5.4.7 In Jersey, the impairment(s) must have lasted, or be expected to last, for not less than six months or until the end of the person's life to be considered a disability for the purposes of the Discrimination (Jersey) Law, 2013. In the UK, the equivalent period is 12 months. The Committee accepts that the inclusion of a time limit would be helpful for employers in order to draw a clear distinction between people with short-term minor ailments and injuries, who would fall outside the scope of protection of the proposed Discrimination Ordinance, and people with longer-term impairments who would be protected. Exactly where this line is drawn is open to debate and has been the subject of such since work on the development of these proposals first began in 2014.

5.4.8 Having given the matter much consideration, and taking into account the views of representatives of business associations and representatives of disabled people, the Committee proposes that for the purposes of the new Discrimination Ordinance, a "long-term" impairment is an impairment which has lasted, or is expected to last, for not less than six months; or is expected to last until the end of the person's life. The objective of this time limit is to exclude minor illnesses, injuries, etc., which do not fall within society's normal understanding of the concept of disability (for example, flu, norovirus, broken arm, etc.).

5.4.9 For the purposes of clarification, the proposed time period would not exclude potentially relapsing/reoccurring conditions where the person was in a period of remission (e.g. cancer, multiple sclerosis, mental health conditions) or where treatment was controlling the condition (e.g. HIV, diabetes).

5.4.10 The Committee proposes that, unlike under the definitions of disability in the UK Equality Act 2010 and the Discrimination (Jersey) Law 2013, there should be no requirement or threshold included within the definition of disability in the new Discrimination Ordinance for the impairment(s) to have an adverse effect on the

[58] This definition of impairment comes from the definition of 'disability' in the Republic of Ireland's Employment Equality Acts and Equal Status Acts, which was largely based on the definition of 'disability' in the Australian Disability Discrimination Act 1992.

person's ability to carry out, engage or participate in normal day-to-day activities. The Committee's view, informed by its expert advisers, is that this is in line with guidance published by the Committee on the Rights of Persons with Disabilities. Paragraph 73(b) of the Committee on the Rights of Persons with Disabilities' General Comment no. 6 on equality and non-discrimination[59] says:

> "…Persons victimized by disability-based discrimination seeking legal redress **should not be burdened by proving that they are "disabled enough" in order to benefit from the protection of the law**. Anti-discrimination law that is disability-inclusive seeks to outlaw and prevent a discriminatory act rather than target a defined protected group. In that regard, **a broad impairment-related definition of disability is in line with the Convention**;" *[emphasis added]*

5.4.11 The UK definition of disability is highly complex, including supplementary provisions regarding the determination of disability in the Act itself, supported by a 58 page guidance document on matters to be taken into account in determining questions relating to the definition of disability[60]. Definitions of disability in use in the Republic of Ireland, Australia and Hong Kong do not include a requirement for the impairment(s) to adversely affect a person's ability to carry out, engage or participate in normal day-to-day activities (or, in fact, to have lasted or be expected to last for a particular period of time) which avoids much of the complication experienced in the UK. Evidence from these jurisdictions shows that this has not been abused.

5.4.12 Case numbers from the Republic of Ireland demonstrate that a broad impairment based definition of disability with no requirement for the impairment(s) to adversely affect a person's ability to carry out, engage or participate in normal day-to-day activities does not lead to an excessive burden of cases for employers and organisations. In 2018, there were just under 900 equality complaints in the field of goods and services provision relating to all nine of the protected grounds. Only 90 of these complaints cited disability[61]. In 2018 there were just less than 1,800 employment related complaints under all of the protected grounds. Of those, less than 300 complaints referenced disability[62].

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[59] United Nations, Committee on the Rights of Persons with Disabilities, General comment no. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (26th April 2018), available at: https://digitallibrary.un.org/record/1626976?ln=en [accessed 17th February, 2020].

[60] Office for Disability Issues, Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability (May 2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf [accessed 20th February, 2020].

[61] Workplace Relations Commission (2018) Annual Report, p. 21. Available at: https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/annual-report-2018.pdf [accessed 2nd March 2020].

[62] *Ibid.,* p.22

Considering that there are about 2.5 million people in the Irish labour market[63], less than 300 disability employment complaints in a particular year is extremely low.[64]

5.4.13 The Committee does not support the inclusion of a requirement for the person's impairment to adversely affect their ability to carry out, engage or participate in normal day-to-day activities because this draws the initial focus of adjudication to the question of whether a person is "disabled enough" to qualify for protection from discrimination. This can be personally intrusive and embarrassing and it may also potentially deter genuine complainants from coming forwards as they may fear being effectively cross examined by a respondent's lawyer arguing that they are not disabled, leaving instances of discrimination unchallenged. The Committee is of the view that the focus of the Tribunal should be on the alleged discriminatory act. It should be recognised that a person with an impairment that does not have any impact on their ability to carry out, engage or participate in normal day-to-day activities can be discriminated against on the basis of social stigma or prejudice. It is crucial to the Committee's objectives that people disadvantaged in this way can seek legal redress.

5.4.14 In considering the merits of the Committee's proposal in this regard, it is important to understand that just because someone falls within the definition of disability, does not mean that they would be entitled to bring a discrimination complaint. Disability, in this regard, is no different to any other protected ground - for example, everyone has an age, or a gender or race, but this does not mean that everyone can hope to succeed in an action for discrimination. For example, all men and women are protected from discrimination in the field of employment under the Sex Discrimination Ordinance and there is no evidence that this has led to a high caseload in Guernsey. It follows that a broad definition of disability does not mean that all people with disabilities would seek to bring legal cases. In any case, the burden of proof initially rests on the complainant who has to show

[63] Central Statistics Office (2019) Labour Force Survey – Q4. Available at: https://www.cso.ie/en/statistics/labourmarket/labourforcesurveylfs/ [accessed 2nd March 2020].

[64] Figures from Ireland for 2014 (the latest available) show of all the equality cases included in that year, around a quarter went to adjudication; that includes both employment equality cases and cases relating to goods and services on all the different protected grounds. Of the remaining equality cases that were concluded that year, about 15% reached a mediated agreement and around 60% were discontinued for varying reasons. [See Equality Tribunal (2014) Annual Report, p.6. Available at: https://www.workplacerelations.ie/en/publications_forms/equality-tribunal-annual-report-2014-fin.pdf [accessed 2nd March 2020].

primary facts from which discrimination on the basis of disability could be inferred (i.e. a prima facie case) before the burden of proof switches to the respondent[65].

5.4.15 It is also a key point that just because someone falls within the definition of disability, does not mean that they would be entitled to a reasonable adjustment. Under the Committee's proposals, adjustments must be "appropriate" and "necessary" and not represent a "disproportionate burden". This ensures that the duty is focussed on the removal of barriers that actually exist in a way that is sensitive to the needs of employers in terms of proportionality (taking account of available resources). So, if the person's impairment has no practical effect in the context of the particular employer's workplace, the employer would not have to make an adjustment as it would not be "necessary".

5.4.16 The Committee accepts that its proposal is unlikely to be seen as ideal by representatives of the business community or by representatives of disabled persons but for opposite reasons. Essentially, what the Committee is proposing is a compromise which recognises the requirement of employers for there to be a clear distinction between short-term sickness and longer-term impairments for operational reasons, but which does not require a person to prove, through the provision of evidence, how and to what extent their impairment adversely affects their ability to carry out, engage or participate in normal day-to-day activities. That is not to say that a person need not provide evidence that they have an impairment. Sometimes this will be obvious and evidence will not be required, but if the existence of an impairment or the prognosis is in doubt, medical, or other expert, evidence may be required.

5.4.17 The Committee recommends that the definition of disability should be reviewed as part of a wider post-implementation review of the Ordinance, no later than two years after the implementation of phase 3, and earlier if significant problems arise (see section 8.5).

5.4.18 If a person says that they have been discriminated against, this means that they have been treated in a less favourable way than a person who does not share a particular characteristic. In order to show this, they would need to make a comparison between themselves and someone (real or hypothetical) who does not share that characteristic. For the purposes of making a discrimination complaint on the grounds of disability, the Committee proposes that a disabled person may compare themselves to someone with a different disability, or to a

[65] A shifting burden of proof is entirely normal in equality law, as it would otherwise be almost impossible to succeed in a complaint. Once the complainant has shown primary facts from which discrimination on the basis of disability could be inferred (i.e. a prima facie case) the respondent needs to show that there is a good explanation for why the circumstances that appear to be discriminatory are actually not.

non-disabled person. A person without a disability may not compare themselves to a disabled person. This means that treating a disabled person more favourably than a non-disabled person, for example, by providing a reasonable adjustment, cannot lead to the registration of a complaint of discrimination from the non-disabled person.

5.5 Proposed definition of "carer status"

5.5.1 The Committee recommends that a person would have "carer status" if they provide care or support (in a non-professional capacity) on a continuing, regular or frequent basis for a close relative[66] or a person that they live with who has a disability which is of such a nature as to give rise to the need for that level of care and support.

5.5.2 This protected ground is intended to cover people who provide a significant amount (meaning more than minor or trivial) of care or support for a person with a disability that they are related to or that they live with. "Care or support" is intended to include a wide range of activities, such as the provision of physical care (e.g. dressing, feeding, washing, administration of medication or treatment, etc), supervision to protect the disabled person from harm, and assistance with essential day-to-day activities such as shopping, cleaning, cooking, taking the disabled person to appointments, etc. It is not intended to cover people who provide care or support infrequently, on an ad hoc basis, or for relatively short periods of time (e.g. doing someone's shopping for them once a week).

5.5.3 It is important to understand that in order to have "carer status", the person being cared for must have a disability which is of such a nature as to give rise to the need for continuing, regular or frequent care or support. Many people who fall within the proposed definition of "disability" do not need this amount of care or support, if any. So, it does not follow that having a broad definition of disability means that there are more people who could make complaints on the basis of carer status.

5.5.4 The definition of carer status which the Committee is recommending differs to the draft proposal on which it consulted in the summer of 2019 in two respects:

- it does not cover people who provide care or support on a continuing, regular or frequent basis for a dependent child (unless the child has a disability of such a nature as to give rise to the need for care and support on a continuing, regular or frequent basis);

[66] For the purposes of the Discrimination Ordinance the Committee is proposing that a 'close relative' would include a spouse or partner, parent (including step parent or a parent of a spouse or partner), sibling (including step-sibling), child, step-child, grandchild, or grandparent.

- it includes the requirement for the carer to live with the person that they care for or to be closely related to the person that they care for.

5.5.5 The Committee has changed the proposed definition of "carer status" in these two respects in response to consultation feedback from employers and landlords (see section 3 of the Consultation Findings Report[67]).

5.5.6 The Committee is of the view that the introduction of a right to request flexible working would assist parents (and others) to obtain (subject to business requirements) a greater degree of flexibility in their working hours and/or conditions. In February 2018, the States directed the Committee to return to the States with detailed proposals for the enactment of legislation to provide employees in Guernsey with a right to request flexible working (Billet d'État V of 2018, Article IV[68]). The Committee hopes that this extant Resolution will be prioritised by the new Committee. In addition, the Committee recommends that the situation is monitored through the proposed attitudes survey in order to determine whether there is a need to expand the definition of carer status in future to also include carers of dependent children.

5.5.7 The Committee recognises that a wide variety of caring arrangements exist in practice and that this relatively narrow definition of carer status will not cover all carers. However, it is important to note that carers who do not meet the proposed requirement to live with or to be related to the person that they care for may, depending on the circumstances of the case and subject to approval of the Committee's proposals, be protected through prohibition of "discrimination by association" (see paragraphs 5.7.4 to 5.7.5).

5.5.8 The Committee notes that there is no equivalent "protected characteristic" under the UK Equality Act 2010 or under the Discrimination (Jersey) Law 2013. That is not to say that carers have no protection from discrimination in the UK or Jersey. UK case law and guidance has established that carers of disabled persons are protected from direct discrimination by virtue of their association with a disabled person. Given that the Jersey Employment and Discrimination Tribunal follows UK case law (noting that they are not bound to do so) carers in Jersey may, depending on the circumstances of the case, be protected from direct discrimination. However, carers are not protected from indirect discrimination in the UK or Jersey, although it's possible that a carer may be able to bring a complaint under a different protected ground (e.g. sex under the Sex Discrimination Ordinance, although this protection only applies in the field of

[67] States of Guernsey (January 2020) Consultation Findings: Draft Policy Proposals for Discrimination Legislation. Available at: https://www.gov.gg/CHttpHandler.ashx?id=123084&p=0 [accessed 29th February, 2020].

[68] Committee *for* Employment & Social Security – Longer Working Lives, Billet d'État V of 2018, Article IV. Available at: https://www.gov.gg/article/162927/States-Meeting-on-7-February-2018-Billets-dtat-V-VI--VII [accessed 29th February, 2020].

employment at present). By including carer status as a protected ground, the protection is more transparent and applies protections directly to the role of being a carer, rather than having to rely on, say, in the case of indirect discrimination, a sex based comparison. The Committee recommends that, in order to provide clarity for rights holders, duty bearers and adjudicators, "carer status" be a protected ground and discrimination by association be clearly and transparently prohibited under the legislation (see sections 5.7.4 to 5.7.5 for further information in respect of discrimination by association).

5.5.9 For the purposes of making a discrimination complaint on the grounds of carer status, the Committee proposes that someone with carer status may compare themselves to a person with a different carer status or someone without carer status. A person without carer status may not compare themselves to a person with carer status. This means that treating a person with carer status more favourably than a person without carer status (for example, by allowing flexible working hours based on their caring needs) cannot lead to the registration of a complaint from a person without carer status.

5.6 Proposed definition of "race"

5.6.1 The Committee proposes that "race" would include colour, descent, nationality, ethnic origins and national origins. A racial group could comprise two or more distinct racial groups (for example, a person with a particular combination of colour, nationality/ies and ethnic origin/s could seek protection on the basis of any one or the combination of all of these).

5.6.2 "Descent" is intended to protect members of communities affected by forms of social stratification such as caste and analogous systems of inherited status which impair their equal enjoyment of human rights. This is in line with the interpretation given to "descent" by the UN in ICERD, which has been extended to Guernsey.

5.6.3 "'National origin' refers to a person's State, nation or place of origin."[69] Place of origin would include, for example, being of Guernsey origin. So, people of Guernsey origin would be protected from racial discrimination.

5.6.4 For the purposes of making a discrimination complaint on the grounds of race, the Committee proposes that a person may compare themselves to a person with a different race (including people of different colour, descent, nationality or ethnic or national origin).

[69] UN Committee on Economic, Social and Cultural Rights (2009) General Comment no. 20: Non-discrimination in economic, social and cultural rights. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en [accessed 17th February, 2020].

5.7 Forms of discrimination

5.7.1 The Committee proposes that the following forms of discrimination be prohibited:

- Direct discrimination,
- Discrimination by association,
- Discrimination arising from disability,
- Indirect discrimination, and
- Denial of a reasonable adjustment for a disabled person.

These types of discrimination are common internationally, aligning with European Law - with the addition of discrimination arising from disability, based on UK legislation.

Direct discrimination

5.7.2 "Direct discrimination" occurs when a person is treated less favourably than another person is, has been or would be treated in a similar situation for a reason related to a protected ground which:

- exists,
- existed but no longer exists,
- may exist in the future, or
- is imputed[70] to the person concerned.

(See section 3.3.4 of appendix 4 for examples.)

5.7.3 The reason for the less favourable treatment must be clearly linked to one or more of the protected grounds for it to be unlawful. For example, if an employer refuses to shortlist a well-qualified candidate because they have a disability. Direct discrimination also includes detrimental acts or omissions on the basis of a protected ground where there is no comparable similar situation.

Discrimination by association

5.7.4 "Discrimination by association" is a form of direct discrimination. It is when someone is treated less favourably than another person (or people) in a similar situation or circumstances because of their association with another person who has a protected ground. For example, if a child is discriminated against because of the nationality of their parents, even if the child does not have that nationality. (See section 3.3.6 of appendix 4 for examples.)

5.7.5 The Equality Act 2010 introduced the concept of discrimination by association into UK legislation, following the landmark decision of the European Court of

[70] Where it is assumed that a person has a characteristic which they do not have.

Justice (ECJ) in *Coleman v Attridge Law*[71]. Even so, the concept is not spelled out in the text of the legislation itself. The Committee recommends that, in order to provide clarity and transparency for rights holders, duty bearers and adjudicators, discrimination by association be clearly identified as a form of discrimination in the new Ordinance.

Discrimination arising from disability

5.7.6 "Discrimination arising from disability" is when a person is treated unfavourably because of something arising in consequence of the person's disability rather than the disability itself. This might be, for example, that they are treated less favourably because of a behaviour arising from a disability, or the side effects of medication taken associated with a disability; or it might be that they are treated less favourably because they have an assistance animal. Some examples are provided in section 3.3.8 of appendix 4. In line with the UK Equality Act 2010 and the Discrimination (Jersey) Law 2013, the Committee proposes that an employer or organisation can treat a person less favourably in relation to something arising in consequence of their disability if:

- this treatment can be "objectively justified" by a legitimate aim and the means of achieving that aim are appropriate and necessary (this concept is explained in paragraphs 5.12.8 below and in section 3.4.2 of appendix 4), or
- they could not reasonably be expected to know that the person had the disability.

Indirect discrimination

5.7.7 "Indirect discrimination" occurs when an apparently neutral provision[72] (i.e. a provision that is applied equally to everyone) would put a person at a disadvantage compared with other persons because of any of the protected grounds, unless the employer or service provider can show that the provision is objectively justified. For instance, applying an inflexible policy where limited on-site parking spaces are only allocated as an employment benefit to senior managers may indirectly discriminate on the ground of disability if it can be demonstrated that this places people with mobility impairments at a disadvantage in relation to access to employment, and the practice is not objectively justified.

Failure to provide a reasonable adjustment

5.7.8 "Failure to provide a reasonable adjustment" is also a form of disability discrimination. A reasonable adjustment (also called "reasonable

[71] Coleman v Attridge Law (2008) Case C-3030/06, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CJ0303 [accessed 1st March, 2020].

[72] What is meant by "provision" is not intended to differ substantially from the UK position where the phrase "policy, criterion or practice" is used but the precise wording of the legislation is at the discretion of legal drafters.

accommodation" in the CRPD) is a necessary and appropriate modification or adjustment (that does not impose a "disproportionate burden") which a disabled person requires in order to be treated equally. The concept of "reasonable adjustment" is explained in more detail in section 5.10 below and in section 6 of appendix 4.

5.7.9 Discrimination arising from disability and failure to provide a reasonable adjustment only apply to the ground of disability. The other forms of discrimination apply to all protected grounds.

5.8 Other prohibited conduct

5.8.1 In addition to these forms of discrimination, the Committee proposes that the legislation will also prohibit:

- Harassment or sexual harassment of a person,
- Victimisation of a person[73],
- Publication of discriminatory advertisements,
- Causing, instructing or inducing another person to undertake a prohibited act, and
- Failure to provide equal pay for equal work [employment only].

Harassment/sexual harassment

5.8.2 "Harassment" is any form of unwanted conduct related 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. "Unwanted conduct" can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures, or other material.

5.8.3 "Sexual harassment" is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature. Sexual harassment may occur in relation to grounds other than sex (for example, if unwanted sexually explicit comments are made to someone because they are disabled).

5.8.4 Pursuing a course of conduct which amounts to harassment of another person is already a criminal offence in Bailiwick law under the Protection from Harassment (Bailiwick of Guernsey) Law, 2005. That Law also makes provision in relation to civil remedies. In addition, certain acts constituting sexual harassment will already be the subject of criminal sanction. As such, the legislation will be drafted so as to work consistently with these existing provisions.

[73] There is already protection from victimisation in employment in the context of sex discrimination under the Sex Discrimination Ordinance. This proposal would apply to all protected grounds in the new Discrimination Ordinance.

5.8.5 The Committee proposes that employers and service providers must not harass or sexually harass their employees or service users. It is proposed that employers (and service providers[74] where they are employers) may be responsible for harassment undertaken by their employee or agent. In certain cases, the employee may also be liable (see section 7 of appendix 4). The Committee proposes that if the employer or service provider has taken reasonable steps to address harassment which has occurred and/or to prevent harassment from occurring, this would be a defence. Demonstrating this would usually require that they had a policy in place which addressed harassment and that this was put into practice. Further information in respect of the Committee's proposals on harassment and sexual harassment is provided in section 3.5 of appendix 4.

Victimisation

5.8.6 "Victimisation" in this context is where a person is dismissed, penalised or subjected to or threatened with any detriment on the grounds that they have sought to enforce their rights under the discrimination legislation or helped someone else to do so. It is intended that protection from victimisation should apply from the earliest point at which something unlawful is alleged. It would include where a person had made a complaint; brought proceedings; represented or otherwise supported someone else to bring a complaint or proceedings; if they had given information to a person exercising a function under the legislation; or appeared as a witness or comparator in a proceeding; if they had opposed, by lawful means, an act which is unlawful in the legislation; or if they had given notice that they intended to undertake any of these actions. This protection would not apply if the allegation was not made in good faith. Further information in respect of the Committee's proposals on victimisation is provided in section 3.6 of appendix 4.

Discriminatory advertising

5.8.7 The Committee also proposes that people or organisations must not publish advertisements which give the impression that they are seeking to attract a person based on discriminatory reasons (for example, "seeking a French au pair" or "seeking a Guernsey person to…"), thus preventing equal access to opportunities. In addition, advertisements which give the impression that someone would be treated less favourably on the basis of one of the protected grounds of protection would not be permitted. Further information in respect of the Committee's proposals on discriminatory advertising is provided in section 3.8 of appendix 4.

Causing, instructing or inducing another person to undertake a prohibited act

5.8.8 It is proposed that it would be unlawful to cause, instruct or induce another person to do something prohibited under the legislation. Further information in

[74] This includes accommodation providers, education providers, and clubs and associations as well as providers of goods or services.

respect of the Committee's proposals in this regard is provided in section 3.9 of appendix 4.

Failure to provide equal pay for equal work

5.8.9 The Committee proposes that it would be unlawful for an employer to establish or maintain differences in pay between employees doing "equal work" based on any of the protected grounds. It is proposed that people are considered to do equal work when they do the same work in the same or similar conditions, or where two people are doing work of a similar nature and the differences in the work performed or the conditions under which it is performed are either of small importance or the different duties are performed infrequently when considering the work as a whole. An employer might be able to defend a case where an employee is paid more for similar work if this work involves more responsibility, additional duties, additional skills, if it is work carried out at different (e.g. more unsociable) hours, if it requires further training or more physical effort. Further information in respect of the Committee's proposals on equal pay for equal work is provided in section 4.5 of appendix 4.

5.8.10 To be clear, the Committee is not proposing to introduce a right for equal pay for work of equal value in respect of sex until a later phase in the development of the new Discrimination Ordinance (see section 8.1).

5.9 In what contexts would discrimination be unlawful

5.9.1 In line with other comparable jurisdictions, the Committee proposes that discrimination should be unlawful in:

- employment - to ensure that everyone has equality of opportunity to access, progress in and retain work,
- the provision of goods, services and transport - to ensure that everyone has equal opportunity to participate in society and access the goods and services they need,
- the provision of accommodation - to ensure that everyone has equal opportunity to access residential and commercial property,
- the provision of education - to ensure that there is equality of opportunity in education, and
- the membership of clubs and associations - to ensure that clubs and associations do not exclude people from membership or participation, or treat members unfavourably because of any of the protected grounds.

5.9.2 The following paragraphs set out, in brief, the circumstances in which employers, providers of goods or services, etc must not discriminate on any of the protected grounds. Further detail is set out in sections 4 and 5 of appendix 4. The Committee recognises that there are some circumstances in which differential

treatment of a person or people based on a protected ground is necessary and should not, therefore, be viewed as discriminatory. These circumstances are explained, in brief, in section 5.12, so it is necessary to also read this section to fully understand the scope of the Committee's proposals.

Discrimination in employment

5.9.3 The Committee proposes to take a wide definition of employment which extends to a-typical and casual workers. This might extend to certain contexts where a person is described as self-employed but would not extend to cases where self-employed persons are better understood as having a customer to service provider relationship with their clients.

5.9.4 Protection also includes recruitment situations where someone is seeking to enter into a contract of employment with someone who will work for them even if they have not commenced employment.

5.9.5 As is the case at present, a person should be able to bring a complaint against an employer if they no longer work for that employer, provided this is within the prescribed time-limits as set out in section 7.6.5 of the technical proposals in appendix 4.

5.9.6 The Committee proposes that an employer should not discriminate on any of the protected grounds in relation to:

- job advertising,
- access to employment (including recruitment),
- terms and conditions of employment,
- equal pay,
- vocational training and work experience,
- promotion or re-grading,
- classification of posts, and
- dismissal.

5.9.7 This means that an employer should not have rules or give instructions which would result in discrimination in any of these areas. They should also not apply or operate a practice which results or would be likely to result in discrimination.

5.9.8 Employers would also be required not to harass or sexually harass employees or job applicants; not to issue discriminatory advertisements; not to victimise employees or job applicants; and not to cause, instruct or induce another person to do something prohibited under the legislation (as outlined in sections 5.7 and 5.8 above).

Provision of goods and services

5.9.9 The Committee proposes that this be a broad definition covering all kinds of provision of goods or services to the public (or part of the public). This would be anticipated to include (but is not limited to) services in relation to:

- banking, insurance, superannuation and the provision of grants, loans, credit or finance,
- entertainment, recreation or refreshment,
- transport or travel,
- telecommunications,
- the services of professionals or tradespersons, or
- the provision of services by the government.

5.9.10 It is proposed that anyone who provides goods or services should not use any of the protected grounds to discriminate by:

- refusing to provide a person with goods or services or access to facilities,
- providing goods or services to a person on different terms or conditions,
- providing goods or services in a manner which is discriminatory,
- issuing advertisements about their goods or services which could be interpreted as displaying an intention to discriminate,
- refusing access to their premises or vehicles,
- harassing or sexually harassing a service user,
- victimising a person who tries to enforce their rights, or support someone else to enforce their rights, under the proposed legislation, or
- causing, instructing or inducing another person to undertake a prohibited act.

Education providers

5.9.11 The Committee proposes that "education providers" with duties under this legislation should include States of Guernsey Education Services; educational institutions (such as pre-schools, schools, colleges, training institutions and tertiary education providers) and any organisation who develop or accredit curricula or training courses used by other education providers.

5.9.12 It is proposed that it should be unlawful for education providers to discriminate against a person, based on any of the protected grounds, in admissions, in the delivery of education to students and in the development of curricula.

5.9.13 In admissions, an education provider should not refuse or fail to admit someone based on any of the protected grounds. They should also not admit someone on different terms and conditions based on any of the protected grounds.

5.9.14 Education providers should not discriminate against students on the basis of any of the protected grounds by:

- denying or limiting a student's access to any benefit provided by the provider,
- expelling the student,
- subjecting the student to any other detriment,
- issuing advertisements about their services which could be interpreted as displaying an intention to discriminate,
- refusing access to their premises or vehicles,
- harassing or sexually harassing a student,
- victimising a person who tries to enforce their rights, or support someone else to, under the proposed legislation, or
- causing, instructing or inducing another person to undertake a prohibited act.

5.9.15 Education providers should not develop curricula or training courses that have content that would exclude a person from participation or subject them to a detriment based on any of the protected grounds. They should also not accredit curricula which have such content. This is not to say that someone could bring a discrimination complaint against the teaching of a subject on the basis that the set material or texts are not representative of all social groups or identities - the Committee recommends an exception to this effect to put this matter beyond doubt (see exception no. 23 in section 8 of appendix 4).

5.9.16 The Committee recommends that the commencement of the legislation is delayed, with respect to the education field, until an appropriate adjudication mechanism for disability discrimination complaints in schools and pre-schools and in relation to States and Voluntary school admissions (on any of the protected grounds) has been established, working in partnership with the Committee *for* Education, Sport & Culture. Further detail in this respect is set out in section 8.2.

Accommodation providers

5.9.17 The Committee proposes that accommodation providers would include people who sell, rent or lease commercial or residential property or land to others (with exceptions, for example property transactions between family members - see section 8 of appendix 4). This includes estate agents, landlords and individuals who rent or sell property. It also includes government services and charities who provide accommodation or accommodation services.

5.9.18 Accommodation providers must not discriminate on any of the protected grounds in the decisions that they make about who the property (or land) is provided to (including by sale, rent, lease or other agreement). They must also not discriminate against existing tenants.

5.9.19 The Committee proposes that, in making decisions about who to provide accommodation or sell property to, people must not refuse a person's application, or refuse to sell to a person, in relation to a protected ground. They must not offer the accommodation or land on different terms and conditions in relation to a protected grounds. They also must not use a protected ground to give a person a lower priority on a waiting list for accommodation (unless this is covered in the exceptions in section 8 of appendix 4).

5.9.20 The Committee intends that when a person has a tenant then they should not discriminate based on any of the grounds of protection by:

- denying or limiting access to a benefit associated with their accommodation,
- evicting them,
- subjecting them to a detriment, or
- refusing to allow reasonable alterations to a property.

Clubs and associations

5.9.21 By "association" the Committee means any group of 25 or more members which has rules to control how someone becomes a member, involving a genuine selection process. The rules may be written down, like a constitution, or may be unwritten, having developed over time by custom and practice. It does not matter if the association is run for profit or not, or if it is legally incorporated[75] or not.

5.9.22 Clubs are associations who provide and maintain facilities (at least partially) from the funds of an association.

5.9.23 Clubs and associations can include:

- organisations established to promote the interests of their members, such as an association of disabled people with a particular impairment or condition, or a club for parents,
- private clubs, including sports clubs, clubs for ex-service personnel, working men's clubs and so on,
- associations for people with particular interests such as fishing, music, gardening or wine tasting,
- young people's organisations, or children's clubs,
- membership organisations with a community or charitable purpose,
- political associations, or
- associations for sports, literary, social or cultural purposes.

[75] Incorporation is a particular legal status which means the law treats an organisation as if it is a person rather than a group of people.

5.9.24 This list is for illustration purposes only and many more types of associations would be covered by the legislation.

5.9.25 If a club or association has no formal rules or process for selection of members and its "membership" is, effectively, open to the public, then for the purposes of this legislation, the Committee proposes that it is considered a provider of goods or services and not a club or association. This would include, for example: a film rental service which you need a "membership" for but which anyone can sign up to online; "friends of" a cultural venue who receive information about events in exchange for an annual "membership fee" but which is open to anyone who wishes to pay the fee.

5.9.26 The Committee proposes that the management committees of clubs and associations should not discriminate on any of the protected grounds, when managing membership applications, and should not treat existing members differently based on any of the protected grounds.

5.9.27 This includes not treating people differently based on any of the protected grounds, by:

- refusing or failing to accept someone's application for membership, or acceptance to a type or class of membership,
- offering different terms and conditions to someone,
- limiting or denying access to member's benefits,
- subjecting a member to a sanction or detriment, or
- terminating membership.

5.9.28 Under the Committee's proposals, clubs and associations should also not:

- harass or sexually harass members/prospective members,
- victimise a person who tries to enforce their rights, or support someone else to enforce their rights, under the proposed legislation,
- issue advertisements which could be interpreted as displaying an intention to discriminate, or
- cause, instruct or induce another person to undertake a prohibited act.

5.10 Duty to provide reasonable adjustments for disabled people

5.10.1 Where usually discrimination legislation requires that employers and service providers treat people in a similar way, in some cases it might be necessary to treat disabled people differently in order for them to have equal access and opportunity or for them to be included where they would otherwise be excluded.

5.10.2 Article 5(3) of the CRPD requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided. "Reasonable accommodation" is defined in Article 2 of the CRPD as meaning:

> "…necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".[76]

5.10.3 The essential aim of reasonable accommodation is to remove unnecessary barriers (physical and non-physical) to enable a person with a disability to avail of a service or to participate in employment. This concept is known by different terms in different places. In Jersey and the UK it is known as "reasonable adjustment" and the Committee proposes that this term is also adopted in Guernsey.

5.10.4 The Committee proposes that the legislation places a positive duty on employers, providers of goods or services, accommodation providers[77], education providers and clubs and associations to make reasonable adjustments when requested by a disabled person. In accordance with the guidance set out by the Committee on the Rights of Persons with Disabilities in General Comment No. 6 (2018) on Equality and Non-discrimination[78], it is proposed that the requirements of the duty be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable adjustment which is a modification or adjustment that is necessary[79] and appropriate[80] where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a disproportionate financial or other burden on the duty bearer. It sets the limit of the duty. Therefore, this duty is sensitive to the needs of businesses and organisations. So, for example, the States of Guernsey would be required to provide more in terms of reasonable adjustment than any small, private individual employer.

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[76] Extract from Article 5(3) of the Convention on the Rights of Persons with Disabilities. Available at: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html [accessed 29th February, 2020].

[77] The requirements for accommodation providers are drawn more narrowly than those for employers, providers of goods or services, education providers and clubs and associations – see section 6.3 of appendix 4 for further information.

[78] United Nations, Committee on the Rights of Persons with Disabilities, General comment no. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (26th April 2018). Available at: https://digitallibrary.un.org/record/1626976?ln=en [accessed 17th February, 2020].

[79] "Necessary" meaning that if somebody clearly does not require that particular adjustment or accommodation then there would be no legal duty to provide it.

[80] "Appropriate" meaning that it must be appropriate to the person's needs and it must address the particular situation and meet that person's needs.

5.10.5 In response to consultation feedback, the Committee is proposing that the duty would only apply where not providing the adjustment would put the disabled person at a substantial disadvantage (where "substantial" means more than minor or trivial), in line with Jersey. In some circumstances, the reasonable adjustment provided will benefit other people. In other cases, the reasonable adjustment provided will only benefit the person who requested it.

5.10.6 It is proposed that the legislation should require the duty-bearer to consult with the employee, customer, service user, student or tenant who needs the adjustment to ensure that the voice of the person needing the adjustment is heard. While the duty-bearer should give appropriate weight to the knowledge of the individual about their own needs and impairment(s), they may take independent expert advice about what adjustment would be appropriate to meet that person's needs (for example, occupational health advice).

5.10.7 As set out in paragraph 5.7.8, it is proposed that failure to provide a reasonable adjustment for a disabled person would be unlawful discrimination.

5.10.8 It would not be possible to list all of the reasonable adjustments people might need or request because everyone is different. However, some examples are listed below:

- making changes to facilities or buildings to make them more accessible,
- making information accessible,
- modifying equipment,
- reorganising activities,
- rescheduling work,
- adjusting curricula, learning materials and teaching strategies,
- adjusting medical procedures, or
- enabling access to support personnel or assistance animals.

5.10.9 More often than not, reasonable adjustments are inexpensive. The Job Accommodation Network[81] (JAN) in the United States has been monitoring reasonable accommodation (the US equivalent of reasonable adjustment) in the employment context since 2004 through the use of employer surveys. These surveys indicate that workplace accommodations not only are low cost, but also positively impact the workplace in many ways.

5.10.10 The 2018 survey[82] showed that of the 776 employers who were able to provide cost information related to accommodations they had provided, 453 (58%) said

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

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

the accommodations needed by their employee cost absolutely nothing. Another 289 (37%) experienced a one-off cost. Only 25 (3%) said the accommodation resulted in an ongoing, annual cost to the company and 9 (1%) said the accommodation required a combination of one-off and annual costs. Of those accommodations that did have a one-off cost, the median one-off expenditure as reported by the employer was $500[83].

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

5.10.12 All employers and service providers would be expected to make small adjustments that cost little or nothing. However, whether someone has to make significant changes (like changes to the physical features of a building) would depend on the wider impact those changes would have, the size and financial resources of the business, the cost of the adjustment, and other factors.

5.10.13 The Committee recognises that the test of disproportionate burden has the potential to skew the labour market for disabled people towards larger employers with potentially greater financial resources. In order to address this potential issue, the Committee intends to bring proposals to the States by the end of 2021 for the establishment, operation and funding of an "Access to Work Scheme" to fund adjustments that would otherwise not be provided because they would be a disproportionate burden for an employer. This proposal is explained further in paragraphs 7.9.4 to 7.9.7. It is envisaged that the provision of such a scheme would result in less complaints being made in relation to failure to provide a reasonable adjustment as funding will be available for adjustments that would otherwise be too expensive.

5.10.14 Paragraphs 5.10.3 to 5.10.8 describe the proposed reactive duty to make modifications and adjustments to respond to the specific needs of individual employees or service users. However, it is important that education providers and providers of goods or services proactively try to ensure that a service is available to as many people as possible. This can be done by planning or designing services or spaces which include people with common impairments to start with. This does not only apply to mobility impairments: it also applies to sensory impairments, intellectual impairments, autism, dementia and more. It is

[83] £388 as at 27 February, 2020 (https://www.xe.com/currencyconverter).

about buildings, but it is also about signage, websites, how information systems are designed, how staff are trained, and how services are delivered. Therefore, it is proposed that, as in the UK, the duty on education providers and goods or services providers to provide reasonable adjustments is also anticipatory.

5.10.15 In light of the fact that education providers and goods or services providers require time to consider what adaptations they might need to make to infrastructure and buildings to improve accessibility for disabled persons, the Committee is proposing that discrimination complaints specifically relating to a physical feature of a building may not be made until five years after the main body of the Ordinance comes into force. These could be complaints relating to a failure to make a reasonable adjustment or indirect discrimination. The duty to make reasonable adjustments relating to anything other than a physical feature of a building will be immediately enforceable. What constitutes a "physical feature" is explained in detail in section 6.2.8 of appendix 4. The Committee proposes that it be given the power to prescribe by regulation what is and is not a physical feature and when tenants can request improvements to accommodation when it is their principal residence.

5.11 Improving accessibility of public services for disabled people

5.11.1 The Committee is proposing that there is a duty on public sector goods, services and education providers to prepare accessibility action plans in relation to the public facing aspects of their services (although this would not apply to ancient monuments where no other service is provided - see exception no. 13 in section 8 of appendix 4). Society's understanding of accessibility is constantly developing - as are the best practice standards. The purpose of an accessibility action plan would not, therefore, be to reach a position of full compliance and then no longer give any consideration to access issues. Instead, the plan should demonstrate that: the organisation has considered how accessible its service is, it has an appropriate and proportionate plan to improve access to the service, and to be able to show that this plan is being implemented. The plan should be reviewed and updated periodically. The duty for public sector goods, services and education providers to have accessibility action plans in place would only come into force five years following the introduction of the legislation. This would allow time for services to develop plans. For the time being, this proposed duty is not intended to apply to organisations that receive an element of grant funding (but not sole funding) from the States.

5.11.2 While private and third sector organisations would not be required to have an accessibility action plan, they may find the process of developing one helpful when thinking about the service that they provide. Having a plan in place could also form part of the evidence an organisation could use to defend a complaint. For this reason, the Committee intends that guidance on how to undertake an access audit and develop an accessibility action plan should be made widely

available. Some accessibility consultancy would also be commissioned to support small organisations who would like advice on how to sensibly prioritise or address access issues that they have identified (see section 7).

5.12 Permissible scope of differential treatment

5.12.1 The Committee recognises that there are some circumstances in which differential treatment of a person or people based on a protected ground is necessary and should not, therefore, be viewed as discriminatory. The following paragraphs seek to explain, in brief, the various circumstances in which it is proposed that differential treatment should be permissible.

Positive action

5.12.2 The Committee proposes that positive measures on any of the protected grounds should be permissible (but not required) provided that the action is adopted with a view to ensuring full equality in practice and that one of the following is true:

- It is intended to prevent or compensate for disadvantage linked to any of the protected grounds.
- It is intended to promote equality of opportunity on any of the protected grounds.
- It is intended to cater for the special needs of persons, or a category of persons, who, because of a protected ground may require facilities, arrangements, services or assistance not required by others (e.g. flexible working for carers).
- It is intended to remove existing inequalities that affect people's opportunities.

5.12.3 There are very limited circumstances in which it would be permissible to require job applicants or employees to have a particular characteristic where there is a "Genuine and Determining Occupational Requirement" (see paragraph 5.12.9 below).

5.12.4 The Committee is proposing that it would be unlawful to set quotas to recruit or promote a specific proportion of people with a particular characteristic. This mirrors the position under the UK Equality Act 2010.

Exceptions

5.12.5 Exceptions describe situations where it would be lawful to treat people differently on the basis of a protected ground. During early 2019, the Committee consulted with States Committees, Boards and Authorities in the development of a draft list of proposed Guernsey-specific exceptions. Comments were sought on the draft exceptions as part of the public consultation exercise and several of

those draft exceptions have been revised by the Committee in response to feedback received.

5.12.6 A list of proposed exceptions, described in policy terms, is set out in full in section 8 of the technical policy proposals attached at appendix 4. It should be noted that this list might change at the legal drafting stage if the legal drafters identify something that is required to make this legislation consistent with other legislation or the legal system in Guernsey.

5.12.7 It is recommended that the Committee be given the power to add, remove or amend any of the exceptions by Regulation in order to enable a swift response to any issues that may arise once the legislation is in force.

Objective justification

5.12.8 It is proposed that "objective justification" would be a permitted defence for indirect discrimination (where an apparently neutral provision results in a disadvantage for people in a particular group) and discrimination arising from disability. If a complaint were made, the respondent would need to objectively justify the provision or unfavourable treatment arising in consequence of a person's disability by demonstrating that they had a legitimate aim and that the means of achieving the aim were appropriate and necessary. This concept is explained in more detail in sections 3.4.2 to 3.4.4 of appendix 4.

Genuine and Determining Occupational Requirement

5.12.9 There are a limited range of circumstances in which an employer may have a strong and justifiable reason why a job must be done by a person of a particular description which requires selection based on one of the protected grounds - this is known as a "genuine and determining occupational requirement". The Committee proposes that it would be lawful for an employer to specify a genuine and determining occupational requirement if it can be objectively justified (e.g. if a charity working with visually impaired people felt it important to have a person with a visual impairment as their outreach worker, it is likely that this could be objectively justified).

Reasonable adjustment

5.12.10 The Committee proposes that it would be lawful to treat people differently if one person needs a reasonable adjustment and another does not. However, if a reasonable adjustment would be a disproportionate burden to provide, an employer or service provider would not have to provide it (as set out in section 5.10).

Could not reasonably have been expected to know that the person has a disability

5.12.11 The Committee proposes that when an employer or service provider does not know and could not reasonably have been expected to know that the disabled person has a disability, then unfavourable treatment would not amount to

discrimination arising from disability, and the person could not have a complaint of a failure to provide a reasonable adjustment upheld.

Difference in treatment for other legitimate reasons

5.12.12 It is worth noting that it would also be possible to defend a complaint by showing that the difference in treatment was due to some other, legitimate reason and not a protected ground (for example, that a job candidate was better qualified).

5.13 Competency and availability in the work context

5.13.1 Some employers expressed concern during the public consultation that the introduction of discrimination legislation covering disability may result in a nervousness on the part of employers to address competency issues with disabled employees due to the risk of that employee making a direct discrimination complaint. To address this concern, the Committee proposes that the legislation explicitly provides that nothing in the Ordinance shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual is not, or is no longer, fully competent and available to undertake, and fully capable of undertaking, the essential functions of the role, having regard to the conditions under which those functions are, or may be required to be, performed.

5.13.2 Therefore, it would not be discriminatory to dismiss a person in these circumstances, provided that proper procedures were followed. However, if the employee had a disability, the employer would need to check whether the person could do the job with a reasonable adjustment.

5.14 Adjudication process

5.14.1 The expectation would be that if someone feels that they have been discriminated against then they should raise this with their employer or service provider first. Some employers or service providers will address issues well, leading to good outcomes.

5.14.2 The Committee's proposals aim to resolve complaints at the earliest possible stage. Informal resolution is not only more cost-effective, it is also better for everyone involved as it is less confrontational and faster. Taking a case to a formal hearing should be a last resort. The Committee is recommending that budget is allocated to enable conciliation to be offered to people before they have made a formal complaint. This is not something that is currently provided by the Employment Relations Service, but there is evidence that it can be very successful. Further information is set out in section 7 below.

5.14.3 However, if a person is not happy with how an employer or service provider has responded to their informal complaint, they would be able to register a formal complaint.

5.14.4 The Employment and Discrimination Tribunal hears complaints under our existing legislation about sex discrimination, minimum wage and unfair dismissal. This system works well in that it is less intimidating and more accessible to people than a court. The Committee proposes that the Tribunal is adapted to hear the majority of complaints under the new legislation - see section 8.2 for the exception to this rule.

5.14.5 The process for registering a complaint would be similar to the process that is used today. Complaints would be registered with the Secretary of the Employment and Discrimination Tribunal. Once a complaint was registered the parties to the complaint would then be offered conciliation in an attempt to resolve the complaint informally. If either of the parties did not want to engage with the conciliation process and would rather have their case heard by the Tribunal, or if the conciliation process did not lead to an agreement, then a hearing would be arranged. Cases are currently heard by three people selected from a larger Panel of people who are trained to adjudicate such matters.

5.14.6 Section 7 and appendix 6 provide further information in respect of how it is proposed that the Tribunal is developed in order to have the necessary skills and capacity to hear cases under the new legislation.

5.14.7 A person aggrieved by a decision or award of the Tribunal on a question of law would be able to appeal to the Royal Court.

5.15 Awards and Remedies

5.15.1 The Committee proposes that if a complaint of discrimination, harassment or victimisation is upheld, the Tribunal could:

- order financial compensation be paid to the person who has been discriminated against, harassed or victimised; and/or
- order a non-financial remedy (this might include, for example, a requirement for someone to undergo training or an order to provide a reasonable adjustment).

Compensation

5.15.2 At the moment, if an employer is found to have discriminated under the Sex Discrimination Ordinance then the employer must pay three months' pay to the person who has been discriminated against. If the Committee's policy proposals are approved, in future, complaints could be registered about discrimination in

the provision of education, goods, services, accommodation and clubs and associations (as well as in relation to employment). Clearly, it would not be appropriate to link awards to pay in non-employment contexts.

5.15.3 In its response to the Committee's draft policy proposals, the Policy & Resources Committee said:

> "It should be recognised that the unfair dismissal element of any form of award is entirely separate from discrimination legislation and that there is no requirement to change the unfair dismissal regime."[84]

5.15.4 The Committee is, therefore, proposing the idea of a simple development to the award structure already in operation under the Sex Discrimination Ordinance for successful discrimination complaints in the field of employment, which would work alongside the current award structure for unfair dismissal without requiring any changes to that system; and to operate a separate compensatory awards structure for non-employment complaints containing two elements - firstly, actual financial loss and secondly, injury to feelings[85], recognising that awards cannot be based on pay in non-employment contexts.

5.15.5 For discrimination in the field of employment, the Committee recommends an upper limit of 6 months' pay plus up to £10,000 for injury to feelings based on a three banded scale akin to the Vento Scale used in the UK (albeit with a much lower upper limit). The lower band tends to be for one-off relatively minor incidents, the highest band for the most serious cases which could be an ongoing situation or series of incidents which publicly humiliate or degrade an individual.

5.15.6 Where a complainant makes complaints for both unfair dismissal under the Employment Protection (Guernsey) Law, 1998 ("the Employment Protection Law") and discrimination in the field of employment under the Sex Discrimination Ordinance or the new Discrimination Ordinance, and the complaints are related (i.e. discriminatory dismissal), if successful the complainant could be awarded either:

- up to 6 months' pay under the employment protection legislation if the unfair dismissal complaint is upheld but the discrimination complaint is not, or
- up to 6 months' pay plus up to £10,000 for injury to feelings if the discrimination complaint is upheld but the unfair dismissal complaint is not, or

[84] Letter from the President of the Policy & Resources Committee to the President of the Committee *for* Employment & Social Security, dated 2nd October, 2019.

[85] Compensation for injury feelings looks at the personal impact of the experience on the individual, whether the conduct complained of continued over a long period of time, etc.

- a combined award of up to 9 months' pay plus up to £10,000 for injury to feelings if both the unfair dismissal and the discrimination complaints are upheld.

5.15.7 For discrimination in all other fields, the Committee proposes an upper limit of £10,000 for financial loss, plus up to £10,000 for injury to feelings.

5.15.8 The Tribunal's current powers to reduce awards or make cost awards on application would remain (noting that costs cannot be awarded in relation to legal representation/advice).

5.15.9 In setting the compensation limits the Committee was seeking to balance the need to provide "effective, proportionate and dissuasive" [86] sanctions and the desire to ensure legislation is "light-touch" in the first instance, and focused on promoting cultural change.

5.15.10 The Committee proposes that the effectiveness of the compensation regime in terms of protecting against infringements and providing relief for victims is reviewed as part of the proposed post-implementation review (discussed further in section 8.5). It may be appropriate, once the legislation is well understood by duty-bearers, to consider increasing the compensation limits to reflect international norms.

5.15.11 *Non-financial remedies*

In some cases where discrimination has happened, the most important outcome might not be financial compensation, it might be to take some action to put things right and avoid what has happened from happening again. For this reason, the Committee is also proposing that the Tribunal has powers to order non-financial remedies. Any action proposed by the Tribunal must be easily understandable and it must be possible to check that the person has done it within the timeframe specified. Actions the Tribunal could require would include:

- an order for equal treatment (e.g. to hire someone or to provide a reasonable adjustment),
- an order that a person or persons specified in the order take a course of action which is also specified (e.g. put an equality policy in place),
- an order for re-instatement (back into a role that a person used to undertake as an employee),
- an order for re-engagement (re-engagement as an employee of the same firm, but potentially in a different role, department, branch or office).

[86] A general duty in EU Directives (which does not apply in Guernsey).

5.15.12 It is proposed that the awards and remedies available under the Sex Discrimination Ordinance are amended, so far as appropriate, to bring them into line with the awards and remedies available under the proposed new Discrimination Ordinance in the field of employment.

6. SUMMARY OF KEY CHANGES THE COMMITTEE HAS MADE TO THE DRAFT TECHNICAL PROPOSALS

6.1 This section summarises the changes that the Committee has made to its policy proposals in response to consultation feedback received during the summer of 2019. Table 6.1 sets out the Committee's previous proposals (that have now been superceded), the consultation feedback to which the Committee has responded and, in the right hand column, the position that the Committee is now recommending in this Policy Letter. Further explanation in respect of the changes made can be found in section 2 of the technical proposals in appendix 4.

Table 6.1 - Summary of changes made to policy proposals in response to consultation feedback

Issue	**Draft policy proposal the Committee consulted on**	**Consultation feedback to which the Committee has responded**	**Summary of how the Committee has changed its policy proposal**
Phasing of grounds	Consultation question regarding whether all ten protected grounds should come into force at once or if they should be phased in.	Mixed response. Some felt the grounds of protection should be phased in, as was the case in Jersey, in order to give businesses more time to adapt and adjust.	**Phased implementation.** Phase 1: Disability, carers, race. Phase 2: Age, religious belief. Phase 3: Sexual orientation and the replacement and extension to other fields of the current Sex Discrimination Ordinance (sex, gender reassignment and marital status)
Definition of "disability"	Irish definition but with some changes, for example: - addition of phrase "Disability includes but is not limited to…"; - Removal of the word "chronic" in relation to "the presence in the	Definition too broad. "Includes but is not limited to" would have the effect that disability was not defined at all. A time limit is vital to differentiate between sickness and disability Use UK/Jersey	**Revised definition of disability.** Based on the Jersey definition of disability with the following changes: - To provide additional clarity, "impairment" is defined based on the definition of "disability" in several other countries. - Without the unique and untested phrase "which can

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
	body of organisms causing, or likely to cause, chronic disease or illness".	definition of disability.	adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law." - Exclusions from the Jersey definition of disability are instead covered as a more targeted exception to protect people and property from harm. - In addition, clarification is provided that if the existence of a condition, impairment or illness or the prognosis is in doubt, medical, or other expert, evidence may be required.
Definition of "carer status"	Carer status would include carers of dependent children under the age of 18 and carers of disabled people (subject to meeting a minimum threshold in relation to the provision of care).	Definition is too broad. Some respondents queried why carers of dependent children were included. Some suggested that the definition should be narrowed by including a requirement for the care-giver to be living with the person with a disability that they provide care for or to be related to that person.	**Scope of definition of "carer status" narrowed.** Proposed definition no longer includes carers of dependent children, unless they have a disability. Requirements included for the care-giver to be living with the person with a disability that they provide care for or to be closely related to that person.
Timescale for making a complaint	6 months following the last alleged incident of discrimination	6 months is too long a period of uncertainty for business	**Timescale for making a complaint shortened to 3 months** following the last incident of discrimination, in line with the current Sex Discrimination Ordinance. Following formal registration

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
			it would be possible for the time period to be suspended to allow formal pre-complaint conciliation to take place.
Third party harassment	Irish position on third party harassment included	The UK has repealed section 40 of the Equality Act 2010 in relation to third party harassment. Jersey does not have a specific provision relating to third party harassment.	**Moved from the Irish to the UK position** so there is no specific protection against third party harassment, but employers should still take reasonable steps to prevent harassment as explained in the technical proposals (see appendix 4).
Liability	Individual liability not specified	The draft proposals do not offer sufficient protection for employers and service providers in situations where employees or service users acted in ways which were beyond the employer's or service provider's control.	**Now more closely aligned to the UK** (sections 109 and 110 of the UK Equality Act 2010 – see technical proposals for details).
Financial compensation structure	Introduction of compensatory awards proportionate to the loss someone has experienced and potentially made up of two elements - financial loss and injury to feelings. Revised awards structure for all employment protection cases so compensatory	No need to change the unfair dismissal regime/award. Should be light touch and proportionate	**No change to unfair dismissal regime and capped awards.** For discrimination in the field of employment: **An upper limit of 6 months' pay plus up to £10,000 for injury to feelings** based on a three banded scale akin to the Vento Scale used in the UK (albeit with a much lower upper limit). For discrimination in all other fields: An **upper limit of £10,000 for financial loss plus up to £10,000 for injury to**

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
	award received once.		**feelings**. Where a claimant makes complaints for both unfair dismissal under the Employment Protection Law and discrimination in the field of employment under the existing or new discrimination legislation, and the complaints are related (i.e. discriminatory dismissal), the claimant could be awarded either: - up to 6 months' pay under the Employment Protection Law if the unfair dismissal complaint is upheld but the discrimination complaint is not, or - up to 6 months' pay plus up to £10,000 for injury to feelings if the discrimination complaint is upheld but the unfair dismissal complaint is not, or - a combined award of up to 9 months' pay plus up to £10,000 for injury to feelings if both the unfair dismissal and the discrimination complaints are upheld.
Reasonable adjustment	Committee proposed the term "appropriate adjustment"	Request to re-name the duty "reasonable adjustment" and for it to be more similar to the UK due to familiarity.	**"Appropriate adjustment" to be re-named "reasonable adjustment".** The duty to provide a reasonable adjustment will only apply where a disabled person would suffer a "substantial disadvantage" (i.e. more than minor or trivial disadvantage) without the adjustment. **For education providers and goods or services providers**

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
			the reasonable adjustment duty will be to disabled people generally, thereby making it proactive (as well as reactive), as in the UK. **Five year delay from commencement before any changes (removal or alteration) required to physical features.**
Anticipatory accessibility duty and action plans	Anticipatory accessibility duty - requirement for education providers and goods or services providers to prepare an accessibility action plan within two years of commencement – but with no duty to implement physical alterations to buildings in relation to accessibility until 10 years after commencement (subject to a fine for non-compliance).	A separate duty is not needed. Instead, either the reasonable adjustment duty could be owed to disabled people in general or a complaint of indirect discrimination could be made.	**Separate anticipatory accessibility duty removed.** For education and goods or services providers the reasonable adjustment duty will be to disabled people generally, as in the UK. **Duty to prepare accessibility action plans for publicly accessible buildings to apply only to the public sector.** Five year lead-in period.
Accommoda-tion providers	Accommodation providers cannot unreasonably refuse changes to physical features where the tenant pays for the adjustment and has the funds to	Request to clarify what is to be considered a "physical feature" and opposition from private landlords.	**Provided clarification over what constitutes a physical feature based on the UK Equality Act 2010. Only limited reasonable adjustment improvements (based on UK position) where private residential landlords cannot unreasonably refuse.**

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
	return the property to its original condition.		See sections 6.2.8 to 6.3.3 of appendix 4 for detail.
Equal pay for work of equal value.	Applied to all protected grounds. Consultation question on whether a lead-in period was required.	This should only apply to the sex ground, as in the UK. Cross jurisdictional comparators should not be allowed.	**Should apply only to the ground of sex.** **Delayed commencement as sex is in phase 3 - estimated implementation five years after commencement of phase 1 (estimated to be 7 years from now).** **No cross-jurisdictional comparators.**
Landlords and children	Under the protected ground of "carer status", landlords would not be able to specify "no children" except in limited circumstances.	Landlords felt they should be able to specify "no children".	**Carers of non-disabled dependent children have been removed from the definition of carer status** so landlords can continue to specify "no children" if they wish but not because of a child's disability and not because of something arising in consequence of their disability (e.g. having an assistance animal) unless, in the case of something arising in consequence of their disability, it can be objectively justified.
Advice and enforcement	Additional resource requirements for implementation and ongoing administration were not included in the original proposals (as this work was still to do).	Cost should be proportionate for a small Island. The current advisory and conciliation function would need to be expanded. The capacity, skills and expertise of the Employment and Discrimination Tribunal would	Recommendation to **expand the current Employment Relations Service to become an Employment and Equal Opportunities Service.** **Resource requirements for the proposed Employment and Equal Opportunities Service and the Employment and Discrimination Tribunal have been identified** (see section 7 for further information).

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
		need to be developed.	
Definition of employee/ worker	Definition of employee did not cover all employees and workers covered in the UK.	The range of persons who could make an employment discrimination complaint appeared to be narrower than under the existing Sex Discrimination Ordinance and the UK Equality Act 2010.	**Clarification:** The Committee intends to include a wide range of "workers". **A-typical and casual workers would be protected in the employment field**, but some situations of self-employed persons (where this is more like service provision than an employment relationship) would not be protected. The Committee proposes that **agency workers are also protected.**
Victimisation	No reference to the requirement for a complaint to have been made in good faith.	There should be a requirement for the complaint to have been made in good faith. Protection should apply from the earliest stage, not just from when a person makes or proposes to make a formal complaint.	**Clarification:** **Complaints must be made in good faith.** **Protection from victimisation would apply from when an individual alleges that there has been a breach of the equality legislation**, not just when a person makes or proposes to make a complaint.
Race	"Race" would include colour, descent, nationality, ethnic origins and national origins.	Request for clarification in respect of racial groups	**Clarification:** **A racial group could comprise two or more distinct racial groups** (e.g. a person may describe themselves as black, African or Nigerian, so the racial group they belong to would comprise of any or all three of these).
Multiple and intersectional discrimination	Included in the Committee's draft proposals	Not covered in the UK.	**Multiple and intersectional discrimination deferred.** Propose they should be **considered as part of phase 2** of the proposals when

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal
			additional protected grounds are added.
Striking out or dismissing complaints or responses	Power to strike out complaints not included.	Concerns about management time required to deal with vexatious complaints.	**New powers for the Tribunal.** The Committee intends to make an Order giving the Employment and Discrimination Tribunal the power to strike out (amongst other things) vexatious complaints and the power to dismiss complaints with no reasonable prospect of success.
Exceptions			**Various changes:** Included feedback from pension professionals. Removed exceptions relating to protected grounds not included in phase 1. Modified exceptions to take account of feedback from other States Committees. Propose the Committee is given the power to amend the exceptions by Regulation.

7. PUTTING EQUALITY INTO PRACTICE: SERVICE DEVELOPMENTS TO IMPLEMENT THE LEGISLATION

7.1 Introduction

7.1.1 The Committee proposes to build on the existing services used to administer employment and discrimination legislation. The service developments needed to implement the legislation go beyond simply expanding capacity. The new legislation will be more complex and will cover service provision as well as employment. Current governance standards fall short of those seen in comparator jurisdictions such as Jersey and the UK. The Committee is also committed to a proactive and preventative approach to change attitudes and raise awareness to reduce instances of unlawful acts and to ensure that disputes can be resolved as quickly and informally as possible.

7.2 Overview of current services

7.2.1 Guernsey currently has a small body of employment legislation, including the existing Sex Discrimination Ordinance. The main services supporting this legislation are the Employment Relations Service and the Employment and Discrimination Tribunal.

The Employment Relations Service

7.2.2 The Employment Relations Service provides impartial advice and conciliation for individuals and businesses, support for industrial disputes and has delegated authority (from the Committee) to issue compliance notices. As well as discrimination, the current service manages unfair dismissal complaints, minimum wage complaints and complaints related to Sunday shop working. The Employment Relations Service is based at Edward T. Wheadon House and the staff are civil servants. The service has no statutory independence. There are currently 2.5FTE[87] staff working in the Employment Relations team. The budget for 2020 is approximately £155,000.

7.2.3 There are also Industrial Disputes Officers who are on a retainer. They assist with conciliation and arbitration of disputes between groups of employees and their employer.

The Employment and Discrimination Tribunal

7.2.4 The Tribunal panel currently has thirteen members, three of whom are convened for any particular hearing with one member acting as chair. There is currently no requirement for panel members, including chairs, to be legally qualified. Tribunal hearings are held in public venues (for example, Les Cotils). The Tribunal panel are remunerated on a day/half day basis for the time that they actually spend on

[87] FTE means 'full-time equivalent'

Tribunal business. The Secretary to the Tribunal is a civil servant and is line managed by the Senior Employment Relations Officer. They provide administrative support for the Employment and Discrimination Tribunal including managing communications, registration of complaints, arranging quarterly meetings and training for the Panel, case management meetings and hearings. The secretariat supporting the Employment and Discrimination Tribunal also support the Industrial Disputes Tribunal. They currently have 2FTE and a budget in 2020 of around £135,000.

7.2.5 It would be inappropriate for an officer working on conciliation to have any form of influence over the later hearing of that case, should an agreement not be reached in conciliation. Consequently, there is a strict separation of duties between the Employment Relations Officers and the secretariat to the Tribunal.

Total expenditure

7.2.6 The total expenditure of the Tribunal and Employment Relations Service combined is currently £290,000.

7.3 Objectives for change

7.3.1 When considering what funding and service developments are required, the Committee's objectives have been as follows. These are not the same as the objectives for the legislation as a whole, included in section 3.5 (though the performance indicators for the service development objectives and legislation objectives are combined into the table in section 3.5.4). Note that these will be examined as part of the post-implementation review (see section 8.5):

i. Meet **demand for complaints handling** in relation to the new Discrimination Ordinance from its entry into force (which may be in 2022) until the post-implementation review - time period between average complaint registration to Tribunal hearing not to significantly exceed the current average time period of 6 months.

ii. Meet **demand for advice, guidance and informal resolution** on forthcoming new discrimination legislation. Starting at least one year in advance of the legislation coming into force (i.e. from 2021) to ensure employers and service providers can prepare for the legislation's introduction. From legislation introduction until post-implementation review, the service will aim for at least 70% of complaints to be resolved at conciliation and advice enquiries should ordinarily be responded to within 3 working days.

iii. Increase opportunity for **early and informal resolution** to reduce complaint resolution costs and personal impact for complainants and respondents by the end of 2022. To aim for an uptake of at least 20

voluntary early/pre-complaint conciliations per year from 2023.

iv. Ensure adequate **confidence in services** via fit for purpose governance arrangements, training and skills for complaints handling implemented by the end of 2022 (an approach to measuring customer satisfaction will be piloted, following which specific targets will be set).

v. Over the next eight years, **reduce levels of prejudice and discrimination** in the community and increase awareness of rights (a survey on prejudice and discrimination will be undertaken, following which specific targets will be set).

Human rights monitoring mechanism

7.3.2 The Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX) included a Resolution to establish an Equality and Rights Organisation. It was envisaged that this organisation would be "an independent statutory institution for the protection and promotion of all equality and human rights issues".[88] It was felt that this would be key to complying with Article 33 of the CRPD which calls for a Paris Principles compliant human rights monitoring mechanism. (Note that the States committed to seek extension of CRPD as part of the Disability and Inclusion Strategy.)

7.3.3 The Committee recognise the potential value of such an organisation and originally undertook an options appraisal including options that would fulfil this vision. However, the need for a Paris Principles compliant organisation is no longer included within the objectives. This is because the Committee considers that:

- a staged approach to development is required,
- a Paris Principles compliant human rights monitoring mechanism would come at significant additional cost and add complexity to the change process, which may not be considered to be affordable or proportionate at present,
- the immediate priority for furthering human rights compliance is the implementation of the new Discrimination Ordinance, and
- the new Discrimination Ordinance could be implemented without a Paris Principles compliant human rights monitoring mechanism.

7.3.4 Consequently, the human rights monitoring element is not included in the investment objectives outlined at this time. The Committee considers the option presented to be the "do minimum" option to deliver the remaining objectives.

[88] Policy Council - Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX, para 120). Available at: https://www.gov.gg/article/150421/States-Meeting-on-27th-November-2013-Billet-XXII [accessed 1st March, 2020].

7.4 Summary of Committee's proposals

7.4.1 In brief, the Committee is proposing the following changes. Each of the elements outlined in this text and table 7.4.1 below are explained in more detail in appendix 6.

Employment Relations Service becomes Employment and Equal Opportunities Service

7.4.2 The existing Employment Relations Service will be expanded so that it has capacity to meet projected demand. Training will be provided to new and existing staff. The service will be led by a statutory official: this will guarantee operational independence when managing complaints about the States of Guernsey. The service should also be rebranded (as the "Employment and Equal Opportunities Service"), to recognise its expanded function, and relocated to move it further away from core civil service functions. This is to ensure that people are not deterred from making complaints due to its perceived degree of connection with the civil service. The Service will have an additional function - namely to promote equal opportunities through education and awareness raising.

Employment and Discrimination Tribunal

7.4.3 The Employment and Discrimination Tribunal will have increased staff capacity proportionate to projected demand. The Tribunal Panel (who adjudicate cases) will also be expanded to ensure that the Panel as a whole has a mix of expertise including service provision, accommodation provision and other areas, alongside existing expertise in employment. The Panel would represent a balance of interests. In order to increase the legal skills of the Panel, in line with practice in Jersey and the UK for administering this kind of legislation, a requirement will be introduced for the Tribunal Panellists appointed to chair any Tribunal to be legally qualified (meaning at least four panellists would need to be legally qualified). Some of the legally qualified chairs will be recruited off-island to ensure that there is a lower risk of conflict of interest, given the risk that those with legal skills on the island may not be available to chair cases involving clients or businesses associated with their practice. Training on the new legislation will be provided for the Panel and the Secretary to the Tribunal. A rolling programme of training will be introduced to ensure that Panellists maintain their skills and keep their knowledge up to date. In order to make the process more transparent, Rules of Procedure will be introduced (along the lines of those used in Jersey and the UK). The Tribunal will also have enhanced powers to strike out complaints if vexatious or misconceived complaints are received (with appropriate safeguards). Suitable legislative provision is also likely to be necessary to ensure that any material relating to national security or sensitive intelligence can be properly protected from disclosure. This may necessitate the transfer of proceedings [from the Employment and Discrimination Tribunal] to, or some other involvement of, the Royal Court in specified circumstances.

Managing change

7.4.4 Some temporary resource input will be required to undertake the initial work to develop guidance materials, a code of practice and provide training for employers and service providers at the time of the change. Programme management will also be required.

Other support

7.4.5 The Committee considers it critical to delivering change for disabled people to ensure that small service providers have access to the advice that they require. While it may be possible for a small organisation interested in accessibility for disabled people to use a checklist to undertake a self-audit of their service, they might need some advice on what to do with the outcome of their audit. It can be complex to understand what changes to prioritise and the different options to address any problems identified. This is a specialist skill. The Committee considers this to be something which could be best delivered through the community and will look to commission some access consultancy for small organisations who are not in a position to purchase advice of this nature.

Summary – resource implications

7.4.6 In order to deliver this change, in the long run, the combined Tribunal and Employment and Equal Opportunities Service annual budget would be £370,000 more than current expenditure. Between 2020 and the end of 2023 there would be around £400,000 in project expenses (average of £100,000 per annum). This includes a significant amount of outreach and education for businesses during the change process. It should be noted that the ongoing annual figures could be higher or lower if demand varies from what has been predicted (see appendix 6). Further explanation of the resources required to meet the objectives is outlined in Table 7.4.1, with examination of the elements in further detail included in appendix 6.

Options appraisal

7.4.7 As part of the process of developing the proposal outlined, the Committee undertook a long-list and short-list options appraisal to consider what the range of possibilities were for service delivery, governance, funding and implementation. Two shortlists were developed – one for the Tribunal and one for the "Equality and Rights Organisation"/Employment Relations Service. The shortlists were used as a basis for engagement with the Policy & Resources Committee, business representatives, civil society groups, trade unions, the Tribunal and relevant staff. A summary of the shortlisted options considered is included in appendix 7. The proposal presented is a modification of what was presented as the Committee's preferred option. It has changed both in response to feedback received and also in light of recent changes to the scope of the Committee's discrimination legislation proposals (particularly the reduction in the number of grounds of protection covered).

Table 7.4.1 – Resource requirements

Description:		2020	2021	2022	2023+
Objective: Meet demand for complaints handling *To deliver:* • Ability to formally register complaints under new discrimination legislation – making rights real and enforceable. • Ability to take a case to hearing under new discrimination legislation (without unacceptable delays or waiting periods). • Access to adjudication for disabled people and people whose first language is not English. *How?* • Increase secretariat staffing levels proportionate to projected demand (i.e. from 50 to 63 average complaints per annum). • Increase Tribunal panel size from 13 to 20 to incorporate wider skill set (e.g. in service provision contexts as well as employment) and an appropriate balance of interests. • Additional budget for room bookings for hearings, etc. and for adjustments for disabled people and people whose first language is not English.	*Budget allocation:*	£0	£35,000 *(recruit part way through year and train)*	£95,000 *(increased caseload from Q2)*	£100,000
	Transition funding (one-off):	n/a	£28,000 *(training, recruitment and IT)*	£2,000 *(training, recruitment and IT)*	n/a
Objective: Meet demand for advice and informal resolution (Employment and Equal Opportunities Service) *To deliver:* • Advice for employers and service providers (particularly small businesses) so that they understand their	*Budget allocation:*	£20,000 *(begin expansion of advice and conciliation staff from Q4*	£115,000 *(continued expansion of staffing, staff time for training,*	£125,000 *(manage conciliation cases from Q2)*	£135,000 *(full year)*

Description:		2020	2021	2022	2023+
responsibilities and are able to avoid doing anything unlawful in the first instance - reducing the potential for discrimination complaints and improving the experience of workers and service users. • Advice for individuals with potential complaints so that they understand their rights and how to frame discussions when things go wrong - improving chances of early resolution. • Opportunity to resolve complaints before escalation to a Tribunal Hearing, reducing the personal and financial impact of disputes on all parties involved. • Access to service for disabled people and people whose first language is not English. *How?* • Increased staff capacity in what is now Employment Relations Service to meet projected demand of 700 additional enquiries and 25% increase in post-complaint conciliations per year. • Budget to provide adjustments and translation/interpretation. • Training for advice and conciliation staff.		*+ budget for adjustments)*	*giving advice)*		
	Transition funding (one-off):	£10,000 *(Recruitment, IT, Training)*	£13,000 *(Recruitment, IT, Training)*	£7,000 *(Recruitment, IT, Training)*	n/a
Objective: Meet demand for advice and informal resolution (outside the Employment and Equal Opportunities Service) *To deliver:*	*Budget allocation*	n/a	£35,000 *(accessibility consultancy)*	£35,000	£35,000
• Expert advice to help small service providers to prioritise and make the right changes to improve accessibility - maximising the value of change in removing barriers to	*Transition funding (one-off)*	£15,000 *(code of practice)*	£70,000 *(code of practice)*	£15,000 *(code of practice)*	n/a

Description:		2020	2021	2022	2023+
participation for disabled people and reducing liability of small organisations. • Clarity about the meaning, interpretation and requirements of the legislation (reducing the need for "test cases"). • Widespread awareness of the legislation and change timetable - ensuring community is prepared for changes and not "caught out". *How?* • Developing a code of practice (staff resource and technical consultancy). • Staff resource to produce and deliver training and guidance on the new legislation (one-off development phase 2020-2022). • Accessibility consultancy - expert advice on what accessibility adjustments to make - commissioned.		£20,000 *(training, awareness raising, guidance)*	£45,000 *(training, awareness raising, guidance)*	£20,000 *(training awareness raising, guidance)*	
Objective: Increase opportunity for early and informal resolution *To deliver:* • Opportunity to have assistance to resolve an issue before raising a formal complaint. • This would apply to employment complaints (e.g. unfair dismissal) as well as discrimination complaints. *How?* • Develop a "pre-complaint conciliation" offering similar to that used in UK and Jersey. Assume that this will increase demand for conciliation as a whole so slight increase in	*Budget allocation*	n/a	n/a	£10,000 *(dependent on legislative change)*	£10,000

Description:		2020	2021	2022	2023+
staff capacity required.					
Objective: Adequate confidence in services *To deliver:* • Better support for people representing themselves in hearings to understand what is happening - improved fairness of adjudication. • Greater confidence in independence of advice and conciliation for people with complaints about the States of Guernsey - improving access to justice and reducing reputational risk.	*Budget allocation*	n/a	*£15,000 (part year cost legally qualified chairs – unchanged caseload)*	£40,000 *(Legally qualified chairs – incl. hearings)* £5,000 *(Rolling training for Tribunal)*	£40,000 *(Legally qualified chairs)* £5,000 *(Rolling training for Tribunal)*
• Legal skills have potential to enhance focus, consistency and speed of judgement writing, hearings and case management meetings in the context of more complex legislative environment. This would be in the interests of complainants and respondents. • Maintain public confidence in judgements of the Tribunal. • Appropriate management of cases if complaints are vexatious (with safeguards). *How?* • Introduce striking out powers for the Tribunal. • Rebrand the Employment Relations Service and appoint a statutory official responsible for operational independence. Relocate the service. Ensure appropriate separation of duties within the service (i.e. between advice and compliance). • Introduce codified Rules of Procedure. • Rolling training programme for Tribunal.	*Transition funding*	£5,000 *(Engagement costs – develop Rules of Procedure)*	£75,000 *Employment Relations Service relocation and rebranding*	n/a	n/a

Description:		**2020**	**2021**	**2022**	**2023+**
• Legally qualified Tribunal chairs - rate per half day and travel costs increase. Projected increase in number of complaints and hearings from 2022.					
Objective: Reduce levels of prejudice and discrimination *To deliver:* • Improved and shared understanding of prejudice and discrimination issues in Guernsey. • Greater appreciation of how unconscious bias operates, how to respond to prejudice and its impact on people, leading to change in attitude and behaviours and reduction in discrimination occurring. *How:* • An attitudinal survey covering prejudice and perceived discrimination (undertaken every 8 years – every other political term). • Consultation with groups affected by prejudice (staff resource). • Strategically targeted education and awareness raising programme around issues identified in survey (staff resource and budget).	*Budget allocation:*	£10,000 *(recruit in Q4)*	£45,000	£45,000	£45,000
	Survey cost:	£80,000	n/a	n/a	n/a
Change management *- Programme management staff resource*	*Transition funding*	*£20,000 (part year)*	*£35,000*	*£15,000 (part year)*	*n/a*

Table 7.4.2 - Summary of cost implications of policy objectives - Employment and Equal Opportunities Service plus Employment and Discrimination Tribunal

		2020	2021	2022	2023
Current service resource	Revenue budget**	£290,000	£290,000	£290,000	£290,000
	Staff (FTE)***	4.5	4.5	4.5	4.5
Resource implications of policy objectives	Revenue budget**	£60,000*	£245,000	£350,000	£370,000
	Staff (FTE)***	0.38	1.75	2.5	2.5
Revised service resource	Revenue budget**	£350,000	£535,000	£640,000	£660,000
	Staff (FTE)***	4.88	6.25	7.0	7.0
Transition resource	Revenue budget**	£70,000	£265,000	£60,000	£0
	Temporary staff requirement (FTE)***	0.75	1.5	0.75	0

Notes

* This has had £50,000 deducted from the total sum of the cost of changes, assuming that £50,000 of the £75,000 allocated in the 2020 budget for Disability and Inclusion Strategy initiatives will be used for the survey and awareness raising initiatives.

**It should be noted that this cost is not only staff costs, but also includes other budgets for Tribunal room bookings, Panel members' remuneration, etc.

***The FTE is an estimate – the money allocated will be used to deliver the objective specified and should the future Committee feel that there is an alternative way of commissioning the work the actual staffing levels may vary. This is FTE averaged across the whole year, taking into account that some staff might be hired part way through the year.

7.5 Change within the States of Guernsey

7.5.1 Some changes will be needed within the States of Guernsey to ensure accessibility for service users. States Property Services has provided an initial estimate of an average of up to £100,000 per year over five years to fully assess the States of Guernsey estate's accessibility requirements - this figure may require further scoping. Once this assessment is undertaken, identified work will need to be prioritised for resourcing through the standard processes.

7.5.2 Regarding adjustments not related to buildings and infrastructure, it was noted in the 2013 Disability and Inclusion Strategy that the costs of other reasonable adjustments should be met "from existing Departmental budgets and existing centralised funding through Policy Council's Human Resources Unit".

7.6 Impact and public value of Service Developments

7.6.1 Assuming the States of Guernsey wish to introduce new discrimination legislation on the grounds of race, carer status and disability, the following factors are relevant when considering how the proposed service developments impact the wider government and economy.

i. While some employers already follow best practice, some may need to review and adapt their processes in order to ensure that they are treating staff fairly and in line with the new legislation. This might be of benefit to them in the long run in terms of staff retention and satisfaction as well as managing the risk of a complaint being made against them. Some businesses may seek specialist advice to support them with this (at a cost to themselves). The proposed advice services and education, training and guidance around the legislation's introduction would remove the barriers for employers and service providers who are interested in following best practice and make it easier to get advice. This may have the effect of shifting the cost of accessing advice from employers and service providers to the public sector. This would be particularly relevant to smaller businesses who might not otherwise have an HR or compliance officer to turn to.

ii. Similarly, if individuals have experienced discrimination, without provision of advice in place some individuals may need to contact a lawyer to understand their rights. The effect of providing some free impartial advice is to shift some potential cost away from people who believe they have experienced discrimination and also to make the service more accessible for those who would simply not pursue a complaint due to the cost.

iii. If the legislation were introduced with the intention of using existing services without increasing capacity in services this would be likely to lead to long waiting times and reduced customer service quality, meaning complaint

resolution could take longer which could lead to personal and financial costs for respondents and complainants.

iv. Continuing to use a system where the service providing advice and conciliation has no statutory independence from the States of Guernsey could raise significant reputational issues for the States of Guernsey (with the potential for wider economic impacts, that could include difficulties attracting staff, as well as perceived double standards as compared with employment practice expected in the private sector). It could also have significant personal cost for individuals who are deterred from raising complaints about poor practice in the States of Guernsey.

v. Without options for early resolution of complaints, the cost of dispute resolution increases. UK evaluations[89] of pre-complaint conciliation have shown reduced dispute resolution cost to both complainants and respondents.

vi. Individuals who experience discrimination face significant personal cost due to the exclusionary effect of the discrimination, which can affect their ability to participate in society, earn a living and find somewhere to live. Seeking to change attitudes and raise awareness of the barriers people face can prevent discrimination from occurring, which alleviates the individual burden of those experiencing discrimination.

7.6.2 Admittedly, any new system would also need to balance the fact that increased cost to the public sector means diversion of public monies away from other service provision, or risk an increase in general taxation on the population as a whole.

7.7 Summary of legal changes

7.7.1 In order to implement the changes outlined, the States will need to amend or introduce legislation to achieve the following (in addition to drafting the new Discrimination Ordinance):

- Amend the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 to allow for the Tribunal to be restructured so that it has four legally qualified chairs.

[89] ACAS (2009) "Research Paper: Pre-Claim Conciliation pilot – Evaluation summary report". Available at: https://archive.acas.org.uk/media/1079/Pre-Claim-Conciliation-pilot--Evaluation-summary-report/pdf/0209_PCC_pilot_summary.pdf-accessible-version-Jun-2012.pdf [accessed 21st January, 2020].
ACAS (2015) "Research Paper: Evaluation of Acas Early Conciliation 2015". Available at: https://archive.acas.org.uk/media/4335/Evaluation-of-Acas-Early-Conciliation-2015/pdf/Evaluation-of-Acas-Early-Conciliation-2015.pdf [accessed 21st January, 2020].

- Draft legislation to outline the powers and functions of the statutory official who would lead the new Employment and Equal Opportunities Service and amend existing employment and discrimination legislation to transfer the relevant powers to the new official (as outlined in appendix 6).
- Amend existing employment and discrimination legislation to ensure that a consistent approach is taken to offering pre-complaint conciliation with regards its effect on suspending the time limit for registering complaints.
- Introduce Rules of Procedure for the Tribunal by Order under paragraph 3 of the Schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005.
- Suitable legislative provision is also likely to be necessary to ensure that any material relating to national security or sensitive intelligence can be properly protected from disclosure. This may necessitate the transfer of proceedings [from the Employment and Discrimination Tribunal] to, or some other involvement of, the Royal Court in specified circumstances.

7.8 Staged and scalable implementation

7.8.1 As outlined in section 8, the Committee is proposing expanding the discrimination legislation in phases, with each phase including proposals on different grounds of protection and fields.

7.8.2 The staged implementation plan below only applies to the first phase of the discrimination legislation – i.e. what is proposed in this Policy Letter covering disability, carer status and race.

7.8.3 Legal changes need to be in place in order to develop services, but the new Discrimination Ordinance cannot enter into force until these services are developed. The Committee is, therefore, proposing that, broadly speaking, a three staged plan is followed to implement phase 1 of the discrimination legislation:

- **Enable -** actions in 2020 largely focus on enabling work so that changes can take place later, such as preparing legislation that would allow legally qualified Tribunal chairs to be recruited. If, by September 2020, the drafting of the new Discrimination Ordinance has not begun, then recruitment of staff could be paused and timescales reviewed by the Programme Manager.
- **Train -** from late 2020 and in 2021, services would be developed in time to allow for recruitment and training so that staff have the skills they need to support people in plenty of time before the legislation comes into force. Information and training would also be provided for employers, service providers and the general public.
- **Implement -** the proposed discrimination legislation would come into force during 2022.

7.8.4 Clearly, all of the timescales are dependent on when and whether the required legislation can be drafted, and also on recruitment processes and so on. The Programme Manager would be responsible for managing the timetable and interdependencies between the workstreams so that change is managed smoothly.

7.8.5 The approach is scalable in the sense that if more (or less) cases than expected emerge, and if additional grounds are added to the legislation, then the capacity of the services can be reviewed:

- It is proposed that new recruits to the Tribunal Secretariat and Employment and Equal Opportunities Office are appointed on a contract basis and caseload is monitored. If there are significantly more or less cases than anticipated staffing could be adjusted accordingly.
- Aside from a baseline of meetings and training sessions, the Tribunal Panel are paid by the day/half day for the cases that they hear. So, with an increased Panel size, if there are more or less cases than anticipated the budget for Panel Members time, and room bookings for hearings would need to be adjusted accordingly.

7.8.6 The Policy & Resources Committee has appointed an independent panel to undertake a review of Arm's Length Bodies and, at the time of writing, the review panel has yet to submit its report. However, based on the Committee's current understanding, the changes proposed in this Policy Letter would not conflict with changes being made under the Arm's Length Body Review. While the review panel is proposing the possibility of creating a centralised tribunal service, if such a service were created, the Committee does not believe that this would negate the need for the Employment and Discrimination Tribunal to have legally qualified chairs appointed, Rules of Procedure and appropriate additional training on adjudicating cases in service provision contexts, as outlined above.

Table 7.8.1 – Staged implementation plan (legislation cannot be brought into force until underlined sections have been completed)

	Tribunal	**Employment Relations Service**	**Discrimination Legislation (disability, race, carers)**	**Other**
2020 Enable	Draft amendment to the Tribunal legislation to require chairs to be legally qualified and return to States so it can go to Privy Council. Begin to develop Rules of Procedure. Begin to develop new rolling training programme.	See if an alternative States-owned premises can be found to accommodate the Service.	Begin drafting discrimination legislation (after the Tribunal amendments) including any necessary amendments to the Sex Discrimination Ordinance.	Commission social attitudes survey. Analyse survey. Recruit officer to work on promoting equality. Policy work on an "Access to Work" equivalent. Programme Manager starts to coordinate changes.
Late 2020-2021 Train	Expand capacity and recruit legally qualified chairs and additional staff capacity *[If amendments to Tribunal legislation can be brought into force].* Training for the Tribunal Panel and staff	Expand and train the advice and conciliation team. Begin to give one-to-one advice on new legislation. Move to new premises and rebrand if a premises is found. Draft legislation for Statutory Official. Amend relevant employment legislation to allow for pre-complaint conciliation and transfer of existing powers	Prepare guidance materials for awareness raising and training (from Q4 2020 if drafting prioritised). Draft code of practice prepared. Training for employers and service providers (2021). Finish drafting discrimination legislation and States agree Ordinance *(maybe by October 2021, depending*	Commission access consultancy. *[Work to promote equality and attitude change ongoing].* *[Possibility of Policy Work on next phases of legislation - age discrimination, etc].*

	Tribunal	Employment Relations Service	Discrimination Legislation (disability, race, carers)	Other
		from "the Committee" to the statutory official.	*on drafting).* Legislation does not come into force immediately.	
2022 Implement	Finish training and ready to hear cases.	Begin conciliation and enforcement of new legislation. Appoint Statutory Official *[if the necessary legislation is in place].* Begin offering pre-complaint conciliation *[if the legislation is amended to allow this to happen].*	Further training. Legislation comes into force *(6 months after legislation agreed by the States – might be April 2022).* Code of practice formally becomes a statutory code of practice once legislation is in force.	

7.9 Policy work and evaluation

Important connected service developments

7.9.1 Two other areas were raised with the Committee in relation to service development during consultation.

7.9.2 Firstly, in order to support employers making decisions about reasonable adjustments it may be important to ensure good access to advice. The Benefits team at Employment & Social Security have previously reviewed access to Occupational Health provision as part of the Supporting Occupational Health and Wellbeing workstream. They are also currently exploring the provision of Occupational Therapy advice for people trying to get back into work who may need adjustments.

7.9.3 Secondly, the importance of advocacy for disabled people has been raised. An advocacy service would help people to understand processes and documents and assist them in expressing their views about what they want. Advocacy staff can help people to fill out forms and can accompany them to meetings. As part of the Disability and Inclusion Strategy work the Business Disability Forum undertook an audit of States Services and recommended that the Committee work with Committee *for* Health and Social Care to develop an advocacy service to assist people in accessing services[90]. The need for advocacy has also been raised when reviewing Mental Health Services. An advocacy service could be helpful to some people who they feel that they have experienced discrimination. In February 2020, the States resolved to instruct the Committee *for* Health & Social Care to return proposals to develop an advocacy services to the States[91]. Consequently, a proposal has not also been included in this Policy Letter.

Policy and services in relation to disabled people at work

<u>Reasonable adjustment funding</u>

7.9.4 The Disability and Inclusion Strategy (2013) recommended:

> "that provision is made for a reasonable adjustment fund to be established. This would help small businesses and organisations to make adjustments that would not otherwise be considered reasonable… A decision on reasonableness, which fails solely on the grounds of cost to a small employer, and that might be wholly reasonable for a large employer, has the effect of skewing the labour market for disabled

[90] States of Guernsey (2019) Report for Disability Review Project Board – Action reports October 2018-June 2019. Available at: https://gov.gg/disabilityreview [accessed 17th February, 2020].

[91] Committee *for* Health and Social Care (2020) 'Capacity Law' – Supplementary Policy Matters and Potential Financial Implications arising from the Appeals Process (Billet d'État V of 2020, Article VI). Available at: https://www.gov.gg/article/172423/States-Meeting-on-26-February-2020-Billet-dtat-III-V--VI [accessed 1st March, 2020].

people towards larger employers. The fund will help balance this and increase opportunities for disabled people to gain and remain in work with smaller employers." [Billet d'État XXII of 2013, Article IX, paragraphs 61 and 62].

7.9.5 The duty to provide reasonable adjustments that is proposed contains within it the concept that an employer or service provider would not have to make the adjustment if it is a disproportionate burden on them to do so. Consequently, the focus of the proposal to develop a reasonable adjustment fund was not intended to ease the burden on businesses (who would already not have to provide adjustments that were disproportionate for them); instead, it is focused on providing additional employment opportunities for disabled people by funding adjustments that would otherwise be a disproportionate burden for small employers to provide.

7.9.6 Both Jersey and the UK operate "Access to Work" schemes which support disabled people to take up or remain in work. The schemes can help with extra costs of adjustments to the workplace beyond employer obligations under any equality legislation. Support packages are agreed based on individual need. This both ensures equal treatment for disabled people and can potentially offer financial savings, if the individual who the adjustment is for would otherwise be out of work and claiming benefits.

7.9.7 Full proposals for a Guernsey scheme have not yet been developed. However, the Committee recommend that this is reviewed in the near future, including considering whether it would be possible to develop an "Access to Work" equivalent scheme as part of, or alongside, Social Security's existing "back to work" benefits. Proposals on such a scheme should be returned to the States during 2021 in order that the scheme can be implemented to align with the first phase of the legislation coming into force.

<u>Minimum wage</u>

7.9.8 A question was also raised during the development of these proposals about whether the minimum wage legislation could have an adverse effect on the employment of persons who have a reduced capacity to work. It has not been possible to consider this issue in depth. However, the future Committee *for* Employment & Social Security may wish to revisit this.

Policy areas to keep under review

7.9.9 There are a number of policy issues that the Committee may need to keep under review in order to ensure that services are delivered effectively. These could form part of the post-implementation review discussed further in section 8.5.

7.9.10 Firstly, although the Committee is not proposing introducing a duty to prepare accessibility action plans for the private sector in the first instance, people considering their liability for reasonable adjustment and indirect discrimination complaints may wish to undertake an access audit to understand what changes they might be able to make to ensure that their services are more accessible. While it is proposed that a small amount of access consultancy is commissioned, the Committee may wish to keep under review the wider picture in terms of whether access auditing and consultancy services and skills are available on the island.

7.9.11 Secondly, in the UK, Jersey and Isle of Man, Employment Tribunals have separate lay panels representing different interests. In the UK there are separate panels for employee representatives and employer representatives. In Jersey there are three panels: one primarily for employee representatives, one for employer and one other panel which might be used for discrimination complaints outside of work, for example. In the Isle of Man, they currently have an employee and employer panel but have powers to create a third panel. This is intended to ensure that there is a balance of interests that would be fair to the complainant and respondent represented in any Tribunal hearing convened. A hearing would be convened with a legally qualified chair, and two lay panel members one from the employer panel and one from the employee panel (or the third general discrimination panel, as the case may be). The Committee is currently not proposing formally having separate lay panels. However, it does intend that there should be a balance of interests within the pool of lay panel members available to be convened for hearings. Following the next round of recruitment, the Committee should review whether it has been possible to achieve a mix of representation in the panel without formally separating different groups.

7.9.12 Lastly, the Committee may wish to review, before introducing further discrimination legislation, whether the Employment and Equal Opportunities Service structure established has been able to meet its objectives.

8. FUTURE PHASES OF THE LEGISLATION

8.1 Addition of protected grounds

8.1.1 As set out in section 5.2 of this report, the Committee recommends that a phased approach be taken to the development of a single Discrimination Ordinance under the provisions of the Enabling Law covering multiple grounds of protection. The proposals set out in section 5 of this report represent the first phase in the development of this Ordinance.

8.1.2 In June 2018, the States agreed “to approve, in principle, the enactment of legislation under the Prevention of Discrimination (Enabling Provisions)

(Bailiwick of Guernsey) Law, 2004 for the purpose of preventing discrimination ***on multiple grounds*** (to be determined), and promoting equality of status, opportunity and treatment, and the equal enjoyment of rights and freedoms"[92] *[emphasis added]*.

8.1.3 The Committee's proposals to develop an Ordinance covering the grounds of disability, carer status and race go part way towards discharging this Resolution. The Committee is proposing that it seeks to fully discharge this Resolution over two future phases of work. During phase 2, proposals will be developed in respect of age and religious belief. During phase 3, proposals will be developed for the grounds covered in the existing Sex Discrimination Ordinance (i.e. sex, marriage, and gender reassignment) (with any appropriate updates in the framing of those grounds) plus sexual orientation. The aim would be for these grounds of protection to be transferred into the Ordinance proposed in this Policy Letter, meaning that protection from discrimination on the grounds of sex, marriage, and gender reassignment would be extended to cover the fields of education, accommodation, goods or services and membership of clubs and associations, in addition to employment. The Sex Discrimination Ordinance would then be repealed. The Committee envisages that phase 3 will include a proposal to introduce the right to equal pay for work of equal value in respect of sex in accordance with Guernsey's obligations under the International Covenant on Economic, Social and Cultural Rights and in order to support the extension of the Convention on the Elimination of All Forms of Discrimination Against Women.

8.1.4 The proposed timescale for the future phases of work is set out in table 8.6.1 below.

8.1.5 The Committee would like to stress that the proposed order of phasing should not be interpreted as an indication of whose rights matter more or less - the Committee wanted to develop proposals for a multi-ground Discrimination Ordinance to avoid exactly that impression.

8.1.6 All of the grounds proposed to be included in phases 1 and 2 are not currently protected from discrimination in any field which is why they have effectively been prioritised over those in phase 3, all of which (except for sexual orientation) are covered under the Sex Discrimination Ordinance which will remain in force until the implementation of phase 3. So, women and men, married persons, pregnant women, women on statutory maternity leave or adoption leave and people planning to undergo, undergoing or having undergone gender reassignment are already protected and will continue to be protected from

[92] P.2018/45 Le Clerc and Langlois Amendment 2 to the Policy & Resources Plan (2017 Review and 2018 Update), Billet d'État XV of 2018, Article I (Resolution set out in full in appendix 1). Available at: https://www.gov.gg/CHttpHandler.ashx?id=113327&p=0 [accessed 1st March, 2020].

discrimination in the field of employment. Sexual orientation has been included in phase 3 because the Committee is of the view that it makes sense to include this along with the review of the other sex related protected grounds.

8.2 Complaints of disability discrimination in schools (and preschools)

8.2.1 In England there is a first tier tribunal (the Special Educational Needs and Disability or SEND Tribunal). This is an independent national tribunal which hears parents' and young people's appeals against local authority decisions about the special educational needs of children and young people. It also hears disability discrimination complaints against schools.

8.2.2 The Committee believes that the Employment and Discrimination Tribunal may not be the most appropriate adjudicating body to hear complaints relating to disability discrimination in schools (and possibly preschools). If the Committee *for* Education, Sport & Culture's proposals regarding the review of the Education Law contain an appeals mechanism for complaints relating to special educational needs, then it would be prudent for disability discrimination complaints in schools to be heard by the same appeals body.

8.2.3 The Committee has written to the Committee *for* Education, Sport & Culture to discuss this option further and also to discuss discrimination complaints in relation to school admissions. It is recommended that if an education tribunal is either not established or is not the most appropriate mechanism, then the Employment and Discrimination Tribunal could hear complaints relating to disability discrimination in schools and preschools and complaints (on all grounds) relating to States and Voluntary school admissions, but it would not be the Committee's first choice.

8.2.4 The Committee is recommending that the commencement of the legislation is delayed, with respect to the education field, until this issue of adjudication of complaints has been resolved. Discrimination complaints in the education field, other than i) disability discrimination complaints against schools (and possibly pre-schools) and ii) discrimination complaints on other grounds with respect to States and Voluntary school admissions, will be heard by the Employment and Discrimination Tribunal (with additional training and resources as described in section 7) when the education field comes into force.

8.3 Equal pay for work of equal value

8.3.1 The draft policy proposals on which the Committee consulted in the summer of 2019 included a proposal to introduce a right to equal pay for work of equal value applying to all proposed protected grounds, as is the position in the Republic of Ireland. In response to feedback from representatives of the business community that the proposed scope of the provision was too wide and would be impractical

to monitor in practice, the Committee recommends adopting the UK position where this right would only apply to the ground of sex.

8.3.2 Given that it is proposed that the ground of sex will be included in phase 3 of the development of the multi-ground Discrimination Ordinance, the introduction of the right to equal pay for work of equal value will be delayed. However, given that a lead-in period is required in order to provide sufficient time for employers to undertake pay audits and to seek to address any historic pay differences that may exist, entry into force would need to be delayed even if this provision were included in phase 1 or 2 of the proposals. The Committee envisages that this provision will come into force the year after the replacement of the Sex Discrimination Ordinance (estimated to be in seven years' time, i.e. in 2027), in line with the timeline set out in table 8.6.1 below.

8.4 Multiple and intersectional discrimination

8.4.1 "Multiple discrimination" refers to a situation in which a person experiences discrimination on two or more grounds, leading to discrimination that is compounded or aggravated.[93] "Intersectional discrimination" refers to a situation where several grounds interact with each other at the same time in such a way as to be inseparable.[94] Article 6(1) of CRPD recognizes that women with disabilities are subject to multiple discrimination and requires that States parties take measures to ensure the full and equal enjoyment by women with disabilities of all human rights and fundamental freedoms. The Convention refers to multiple discrimination in Article 5(2), which not only requires States parties to prohibit any kind of discrimination based on disability, but also to protect against discrimination on other grounds.[95]

8.4.2 Given that no provisions regarding multiple or intersectional discrimination are currently in force in the UK[96], the Committee has decided to defer consideration of this matter until phase 2 when it is envisaged that additional protected grounds will be added to the proposed new Ordinance. While it would be possible under the Committee's proposals for a person to register two separate complaints on two grounds against the same employer or service provider (for example, a race discrimination complaint and a disability discrimination complaint) these would be decided separately, though they could be combined into one hearing. For example, the complainant would have to compare their

[93] See Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004) on temporary special measures, para. 12.
[94] Ibid., general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, para. 18.
[95] See Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004) on temporary special measures, para. 12.
[96] Section 14 of the Equality Act 2010 seeks to prohibit "combined" discrimination based on two protected characteristics, however, this section is not yet in force.

treatment to someone of a different race and then compare their treatment to a person who is not disabled or who has a different disability. A decision would be made based on each complaint – the Tribunal could not, at present, consider multiple grounds in one comparison.

8.5 Post-implementation review

8.5.1 It is recommended that a post-implementation review of the effectiveness of the legislation for individuals, employers and service providers should take place no later than two years after the implementation of the final phase of the legislation (including changes to physical features coming into effect), or earlier if there are significant issues with respect to the operation of the legislation. The Committee's Policy Letters in relation to the implementation of phases 2 and 3 could also be used to identify and address any such issues.

8.6 Recommended future work plan

8.6.1 The Committee's recommended future work plan is set out in table 8.6.1 overleaf.

Table 8.6.1 - Recommended Future Work Plan

Time pre or post commenc-ement	**Year -2**	**Year -1**	**Yr 0: Ordinance comes into force**	**Yr 1**	**Yr 2**	**Yr 3**	**Yr 4**	**Yr 5**	**Yr 6**	**Yr 7**
Year	**2020**	**2021**	**2022**	**2023**	**2024**	**2025**	**2026**	**2027**	**2028**	**2029**
Grounds	States to consider Policy Letter for phase 1 (disability, carer status and race). Move into enabling stage	Training stage - provision of training and info, etc	Phase 1 implem-entation: disability, carer status and race comes into force	Phase 2 Policy letter: Age and religious belief. Also consideration of multiple and intersectional discrimination	Phase 2 implem-entation: age and religious belief comes into force	Phase 3 Policy Letter: SDO and sexual orientation, including equal pay for work of equal value	Phase 3 implem-entation: SDO and sexual orienta-tion comes into force			
Other provisions				Education field comes into force sometime between years 1 and 4				Accessibility Action Plans required (public sector). Complaints may be made involving changes to physical features. Implementation of equal pay for work of equal value.		Post-implem-entation review no later than two years after all provisio-ns are in force

9. LEGISLATION THAT MAY BE DISCRIMINATORY

9.1 The Committee has proposed the following exception:

> "…if someone is doing something that they are required to do by law this would not be discrimination for the purposes of the proposed legislation. This includes where someone is required to act in compliance with the law of another country."

9.2 However, this does not mean that discriminatory legislation, where there is no justifiable reason for that provision, should remain in force. The Committee proposes that the Policy & Resources Committee prioritises, through the Future Guernsey Plan, policy work that is required to amend pieces of legislation that have been identified as potentially discriminatory through this project.

9.3 One priority project already previously identified in the Future Guernsey Plan is to introduce independent taxation. The Policy & Resource Plan (Phase 2) (Billet d'État XII of 2017, Article I[97]) stated:

> "Under the current tax system a married couple are assessed jointly, with the husband responsible for submitting the tax return, disclosing income for himself and his spouse and receiving a married person's allowance irrespective of whether one or both spouses receive income. Provisions have recently been put in place for civil partners to have the same rights and co-habitees who are in receipt of family allowance can elect to transfer allowances between the partners. This system discriminates against women and treats those unmarried co-habiting couples who do not have children differently, as they have no entitlement to transfer any unused allowance. The recently published Policy Letter on the final phase of the revenue service programme would, if approved, move a step further towards addressing this."

9.4 Other out of date legislation that the Committee would wish to recommend for change includes legislation regarding birth and death registration[98]. For example, birth registrations distinguish between married and non-married parents. It distinguishes legitimate and illegitimate children. It distinguishes between mothers and fathers as only fathers' occupations are required to be recorded (the Greffe now records mothers' occupations but this is optional and records

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[97] Policy Council - The Policy & Resource Plan - Phase 2, Billet d'État XII of 2017, Article I, Appendix 5, p.206-224. Available at: https://www.gov.gg/CHttpHandler.ashx?id=107774&p=0 [accessed 1st March, 2020].

[98] Loi relative à l'Enregistrement des Naissances et Décès dans le Balliage de l'Ile de Guernesey (1935). Available at http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=96920&p=0 [accessed 1st March, 2020].

cannot be backdated). The birth registration process does not cater for same sex parents to register both parents' names on their child's birth certificate. There is no provision for amending a birth certificate if a person subsequently legally changes their gender. When registering a death, men and women are treated differently when recording their name and marital status. A married woman is described by her maiden name and then either "wife of…" or "widow of…" and her husband's full name, or, if divorced, "formerly the wife of….". By contrast, current or previous marital status is not recorded on a man's death certificate.

9.5 Some health and safety legislation is outdated with respect to provisions relating to women. The Committee recommends that the restrictions on women listed below should be repealed:

Law/Ordinance	Restriction
Loi ayant rapport á L'emploi de femmes, de jeunes personnes et d'enfants, 1926	Women may not work at night in any public or private industrial undertaking unless within a family business.
The Quarries (Safety) Ordinance, 1954	Only a "competent male" may perform certain actions and undertake a supervisory role. Certain actions may be carried out only by a male who is 18 years and above.
The Safety of Employees (Growing Properties) Ordinance, 1954	Prohibits women from cleaning machines in motion.
The Safety of Employees (Miscellaneous Provisions) Ordinance, 1952	Prohibits women from cleaning machines in motion.

9.6 In addition, some policy and legislation gaps have been identified, for example the lack of a gender recognition law in Guernsey, which the Committee would like to see considered for prioritisation in the future.

10. REVISIONS TO THE CURRENT SEX DISCRIMINATION ORDINANCE

10.1 The Committee is proposing that the current Sex Discrimination Ordinance remains in force until implementation of phase 3, as set out in section 8. Two key changes are required to the Sex Discrimination Ordinance to make it consistent with the proposed new Discrimination Ordinance covering the grounds of disability, carer status and race.

10.2 Firstly, the awards and remedies under the new Discrimination Ordinance and the Sex Discrimination Ordinance need to align, so far as appropriate. Secondly, the Committee is proposing that some of the offences that are criminal offences under the Sex Discrimination Ordinance should be civil penalties under the new Discrimination Ordinance. Again the two Ordinances will need to align in this respect.

10.3 There are four different contexts in which some form of civil or criminal sanction may need to be applied:

a) In relation to failing to comply with a compliance notice,
b) In situations where a person misleads another person in order to get them to do something unlawful,
c) In situations where someone is obstructing the process associated with compliance notices (i.e. destroying or giving misleading evidence), and
d) Non-compliance with an order of the Tribunal or Court for a non-financial remedy.

10.4 The Committee believes that the situation outlined in c) above should continue to be a criminal offence, but that a), b) and d) should be managed via civil penalties.

10.5 There are likely to be further minor amendments required to the Sex Discrimination Ordinance to ensure it aligns and works consistently with the new Discrimination Ordinance.

11. CONSULTATION WITH ALDERNEY AND SARK

11.1 The Committee has consulted with the Policy and Finance Committees of Alderney and Sark in respect of the potential extension of the proposed legislation to the islands.

11.2 Both Alderney and Sark expressed support for the principles of non-discrimination and interest in introducing discrimination legislation at an appropriate point in the future. However, both islands felt that it was not appropriate, due to the legislative context in both islands, to seek to actively work towards extension of the proposed new Discrimination Ordinance at this time. They recognised that it would first be necessary to introduce foundational employment legislation (e.g. conditions of employment, employment protection, minimum wage, etc). Alderney's Policy and Finance Committee made a first step in this direction on 23 January 2020 when it resolved that legislation, suitably amended to meet Alderney's needs, be drafted replicating,

in its entirety, the Conditions of Employment (Guernsey) Law, 1985[99].

11.3 The Enabling Law applies in Alderney and Sark meaning that at such time as the States of Alderney or the Chief Pleas of Sark consider it appropriate, discrimination legislation can be enacted by Ordinance under the provisions of section 1(1).

12. CONCLUSION

12.1 Having given careful consideration as to how to fulfil the States Resolutions (outlined in appendix 1), the Committee believes that the proposals contained in this Policy Letter would be a proportionate and appropriate step for the island to take at this time. The introduction of legislation would progress longstanding commitments that the States have made both through international conventions and directly to the island community. While further work will be required - and is recommended - the proposed legislation is a vital step towards better implementing islanders' fundamental rights and would provide a foundation that could be built upon.

12.2 While the proposals are a compromise between divergent views, the Committee believes that it is unlikely to be able to find a set of proposals amenable to all and that it would be inappropriate to allow further delay.

12.3 The introduction of new legislation will require more than a simple expansion of the capacity of existing services. The proposals also recommend bringing the service standard closer to UK and Jersey best practice for all employment and discrimination complaints. These changes would include: offering an opportunity for conciliation before people formally register complaints, having legally qualified Tribunal chairs and ensuring the service that handles complaints about the States of Guernsey has a degree of statutory independence from the States.

12.4 While legislation can generate cultural change, the Committee considers education and awareness raising to be equally important to the achievement of the Committee's equality objectives. As well as a temporary investment in a code of practice, guidance, training and outreach immediately ahead of and around the time that the legislation changes, the Committee is asking for States support to undertake an attitudes survey and initiate ongoing work to identify and address prejudice and discrimination in our community.

[99] The Conditions of Employment (Guernsey) Law, 1985, available at: http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=71458&p=0 [accessed 1st March, 2020].

12.5 The journey towards demonstrating Guernsey's commitment to being an "inclusive community" "where everyone has equal opportunity"[100] started many years ago, and will continue for some years to come. The Committee recommends that the States accept these proposals and takes the next step forward.

13. COMPLIANCE WITH RULE 4 OF THE RULES OF PROCEDURE

13.1 In accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees, Her Majesty's Procureur has provided advice to the Committee on any legal or constitutional implications in respect of the Propositions.

13.2 In accordance with Rule 4(3), the Committee has included Propositions which request the States to approve funding to implement the proposals set out in this Policy Letter. Further details about the financial implications of the Propositions are provided in tables 7.4.1 and 7.4.2.

13.3 In accordance with Rule 4(4), it is confirmed that the Propositions have the unanimous support of the Committee.

13.4 In accordance with Rule 4(5), the Propositions relate to the Committee's purpose:

> "To foster a compassionate, cohesive and aspirational society in which responsibility is encouraged and individuals and families are supported through schemes of social protection relating to pensions, other contributory and non-contributory benefits, social housing, employment, re-employment and labour market legislation."

13.5 In particular, the Propositions relate to the Committee's mandated responsibilities:

> "To advise the States and to develop and implement policies on matters relating to its purpose, including… equality and social inclusion, including in relation to disability… [and] labour market legislation and practices;"

13.6 The Propositions are aligned with the priorities and policies set out in the Committee's Policy Plan, which was approved by the States in June 2017 (Billet

[100] States of Guernsey (2016) Future Guernsey: Policy & Resource Plan, Phase One. Available at: https://gov.gg/CHttpHandler.ashx?id=105052&p=0 [accessed 17th February, 2020].

d'État XII of 2017, Article I[101]). The Committee's Policy Plan is aligned with objectives set out in the Future Guernsey Plan.

13.7 The Committee has consulted extensively throughout the process of the development of these proposals with representatives of business associations and civil society groups (see section 4 for further details). All principal States Committees were written to and consulted with in advance of, and as part of, the public consultation in the summer of 2019. The findings of the public consultation are available at www.gov.gg/discriminationconsultation.

Yours faithfully

M K Le Clerc
President

S L Langlois
Vice-President

E A McSwiggan
J A B Gollop
P J Roffey

M J Brown
Non-States Member

A R Le Lièvre
Non-States Member

[101] Policy Council - The Policy & Resource Plan - Phase 2, Billet d'État XII of 2017, Article I, Appendix 5, p.206-224. Available at: https://www.gov.gg/CHttpHandler.ashx?id=107774&p=0 [accessed 1st March, 2020].

APPENDIX 1

PERTINENT STATES RESOLUTIONS

Resolutions on Billet d'État XXII of November 2013 – The Disability and Inclusion Strategy

3. To approve, in principle, the enactment of legislation under the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 to prevent discrimination against disabled people and carers and provide for equality of opportunity, and direct the Policy Council to revert to the States with detailed proposals for such legislation following consultation with other States Departments, and representatives of the business sector, disabled people and carers, before the end of 2015.

4. To direct the Policy Council to seek the extension of the UN Convention on the Rights of People with Disabilities to Guernsey at the earliest appropriate opportunity.

6. To approve, in principle, the establishment of an equality and rights organisation, based on the Paris Principles, but defer the implementation of such an organisation dependent on:
   a. a business plan being developed stating in detail the functions, staffing resources, costs and charges for such an organisation; and
   b. any additional funding required being available and the States having given priority to the establishment of an organisation through any prioritisation process in effect at that time.

Resolutions on Billet d'État XV of 5th June 2018 - P. 2018/45 Le Clerc and Langlois amendment to the Policy & Resources Plan (2017 Review and 2018 Update)

4. To agree that the Committee *for* Employment & Social Security should expand its existing programme of work to develop detailed policy proposals for disability discrimination legislation (agreed as part of the Disability & Inclusion Strategy – see Article 9 of Billet d'État XXII, 2013) into a project that develops proposals for multiple-grounds of protection against discrimination, including disability and, for the purposes of that project –
   a. to substitute, for the policy objective heading "Disability and inclusion policy" (approved by the States on 8 November 2017 - see paragraph 4.32 of Article 1 of Billet d'État XX, 2017) and referenced at paragraph 3.16 of this report), the heading "Disability, Equality and Inclusion";
   b. to approve, in principle, the enactment of legislation under the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 for the purpose of preventing discrimination on multiple grounds (to be

determined), and promoting equality of status, opportunity and treatment, and the equal enjoyment of rights and freedoms;

c. to note that the Committee *for* Employment & Social Security will investigate, and make recommendations as to, the inclusion within the legislation of the following grounds of protection, in addition to disability - age; race (including colour, nationality, national or ethnic origins); sex (including pregnancy, maternity and intersex status); sexual orientation; civil (or "marital") status; gender identity or gender reassignment; family status or family responsibilities (including caring responsibilities); and religion (including lack of religious belief and philosophical belief);

d. to note that the legislation will be based, where appropriate, on relevant provisions of the Irish Employment Equality Acts 1998-2015, the Irish Equal Status Acts 2000-2015, and the Australian Disability Discrimination Act 1992; and

e. to direct the Committee *for* Employment & Social Security, subject to the allocation of the necessary additional resources, to revert to the States by April 2020 with detailed policy proposals in respect of the legislation referred to above, following consultation with other States Committees, representatives of the business sector and the public.

APPENDIX 2

POLICY TIMELINE – EQUALITY AND HUMAN RIGHTS IN GUERNSEY

	Report or law reference/title	Decision/implications
1908	Suffrage Committee recommend extending the vote to adult men and single women*.	Request that further work is undertaken.
1913	Suffrage Committee brings proposals to the States proposing voting rights for non-property holders, men and women*.	Proposals rejected (Bailiff reminded members universal suffrage was not adopted in Westminster yet).
1920	Loi supplémentaire à loi relative à la Réforme des Etats de Délibération (Order in Council 13.10.1920)*	Reform Committee propose voting age of 20 for men and 30 for women, incl. non-property owners. Women over 30 to be able to stand as Deputies. This is passed. The first female deputy is elected in 1924. An amendment to have an equal voting age of 20 for women is defeated (not considered advisable to take this step in advance of England).
1928	La Loi étendant les Droits de la Femme Mariée quant à la Properiété Mobilière et Immobilière*	Married women able to own property.
1933	Proposal to equalise voting age for women.*	Motion fails.
1938	States debate: lowering voting age for women to 25 leading to Loi relative à la Réforme des Etats (Order in Council 23.6.1939)*	Amended and equal voting age of 20 for both men and women agreed. First election on equal terms in December 1945, following WWII.
1946	Married women not barred from teaching.*	States Education Council release statement saying that the informal practice of barring married women from teaching would end.
1953	European Convention for the Protection of Human Rights and Fundamental Freedoms	Council of Europe treaty which allows for human rights cases to be taken to the European Court of Human Rights in Strasbourg.

	Report or law reference/title	Decision/implications
	extended to Guernsey.	
1961	Pay equalisation for teachers*	Women teachers to be paid at same rate as male teachers for the same work by States' Education Council.
1963	Parochial Taxation and Voting Law (Order in Council 29.8.1963)*	Law amended to allow married women equal rights to vote and hold office in Parishes.
1969	UN International Convention on the Elimination of All forms of Racial Discrimination extended to Guernsey	[Implies a commitment to incorporate protection from racial discrimination in domestic legislation.]
1976	UN International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) are extended to Guernsey.	[Implies a commitment to incorporate multi-ground discrimination legislation in domestic legislation.]
1983	The Sexual Offences (Bailiwick of Guernsey) Law, 1983	Decriminalisation of same-sex sexual activity in private with an age of consent at 21.
1992	UN Convention Against Torture extended to Guernsey	[Fourth core UN human rights treaty to be extended.]
1993	States Advisory and Finance Committee – United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Billet d'État XXV of 1993)	The States resolve that they do not consider it necessary or practicable to extend UN CEDAW because it "requires the implementation of a very onerous administrative and legislative regime for introducing and monitoring measures to eliminate" discrimination.
1995	States Board of Employment, Industry and Commerce – Employment Protection Provisions (Billet d'État XI of 1995)	Introduced protection from unfair dismissal and statutory minimum periods of notice. Complaints were originally heard by a single adjudicator, not a Tribunal – later adapted in 2004 to become what is now the Employment and Discrimination Tribunal.
1996	States Board of Industry – Review of Sex	The States agree to the drafting of Sex Discrimination legislation in the field of

	Report or law reference/title	Decision/implications
	Discrimination, Equal Pay and Statutory Maternity Rights (Billet d'État IV of 1996)	employment (though not covering equal pay for work of equal value). However, the Board of Industry delay implementation until unfair dismissal law has settled in.
1999	Reqûete – Homosexual Age of Consent (Billet d'État III of 1999)	The proposal was to equalise the age of consent, but the Resolution ended up only lowering the age of consent for homosexual men from 21 to 18, while the age of consent for heterosexual couples was 16.
	The Employment Protection (Guernsey) Law, 1998 comes into force	The Law provided protection in relation to unfair dismissal. It established a system of hearing complaints based on the appointment of a single adjudicator (as agreed in 1995).
2000	States Advisory and Finance Committee – Incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms into Bailiwick Legislation (Billet d'État IX of 2000)	States agree to allow cases in relation to the European Convention on Human Rights to be heard in domestic courts.
	Appendix II to Billet d'État XX of 2000 States Advisory and Finance Committee – International Covenant on Civil and Political Rights	Suggests that race discrimination legislation will be developed in response to UN feedback.
	Draft Sex Discrimination (Guernsey) Law, 2000	Draft law developed in response to 1996 Resolution, but implementation further delayed while Advisory and Finance consider implications of extending the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for the law.
2003	State Party Report to UN the Committee on the Elimination of Racial Discrimination	Guernsey reported that substantial comparative research had been undertaken with regards race relations legislation. It was reported that the Law Officers were in the course of preparing an outline

	Report or law reference/title	Decision/implications
		draft of appropriate legislation to assist the formulation of policy on race relations in Guernsey.
	States Advisory and Finance Committee – Proposals for Comprehensive Equal Status and Fair Treatment Legislation (Billet d'État XXI of 2003, Article XIV)	States agree to develop Enabling Provisions so that discrimination law can be brought in by Ordinance. The possibility of multi-ground discrimination legislation is discussed on the grounds of sex/gender, race/colour/ethnicity, religion/belief, age, disability, sexual orientation and gender reassignment. The possibility of an Equal Status and Fair Treatment Commissioner is discussed.
	Resolutions following amendment to the above report (Billet d'État XXI of 2003, Article XIV)	Proposals for gender discrimination to be brought forward at an early stage. To seek to extend CEDAW.
	States Advisory and Finance Committee – Legislation for Racially Motivated Offences (Billet d'État XXI of 2003, Article XIV)	Provided for the drafting of legislation to outlaw racially motivated offences – which became The Racial Hatred (Bailiwick of Guernsey) Law, 2005.
	Guernsey Social Security Authority – Revision of Social Insurance Scheme for Gender Equality (Billet d'État V of 2003)	Adjustments made to social insurance schemes to avoid gender-based discrimination.
2004	Commerce and Employment Department – Review of the Employment Protection (Guernsey) Law, 1998 and subsequent proposed amendments to the Law and other associated legislation (Syson Review) Billet d'État XVIII of 2004	Amendments made to Employment Protection legislation. Agreement to change from a single adjudicator to a Tribunal model. Agree to amend and implement the draft Sex Discrimination (Guernsey) Law, 2000.

	Report or law reference/title	Decision/implications
	The Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004	Allows the States to introduce discrimination legislation by Ordinance (i.e. without going to Privy Council).
	Policy Council – International Conventions Affecting Children, Young People and their Families (Billet d'État XV of 2004)	States resolve to extend UN Convention on the Rights of the Child.
2005	The Racial Hatred (Bailiwick of Guernsey) Law, 2005 comes into force	Makes certain behaviour intended to stir up racial hatred criminal.
	The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 comes into force The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 comes into force	People can register complaints of Sex Discrimination from 1st March, 2006 Employment and Discrimination Tribunal starts hearing cases.
2006	Human Rights (Bailiwick of Guernsey), 2000 law comes into force	Enables cases in relation to the European Convention on Human Rights to be heard in Guernsey courts (as was agreed in 2000).
	The Protection from Harassment (Bailiwick of Guernsey) Law, 2005 comes into force.	The Law criminalises harassment and putting people in fear of violence. (N.B. this is criminal legislation and is not employment law).
	Policy Council – Government Business Plan - Amendment (Billet d'État XVIII of 2006) Resolutions from adjourned meeting of 27th July – 26th Sept	Government Business Plan was amended to prioritise the preparation of a report on the enactment of legislation needed to extend CEDAW.
2007	'In the Matter of X' – Royal Court	In this case a new birth certificate was issued for a person with a gender recognition certificate from the UK, but the original record was not changed.

	Report or law reference/title	Decision/implications
		Consideration of gender recognition legislation in line with European Court of Human Rights ruling may be advisable and is outstanding. http://www.guernseylegalresources.gg/ccm/legal-resources/law-reports/Cases/GLR2007/GLR070161.htm
	Home Department – Restrictions on Homosexual Acts (Billet d'État VI of 2010)	Equalisation of age of consent for same-sex couples.
2010	Disability Needs Survey – BMG and University of Nottingham	Reviews prevalence of disability and explores experience of disabled islanders. https://www.gov.gg/article/154882/Disability-Needs-Survey
2013	Disability and Inclusion Strategy, Policy Council, Billet d'État XXII of 2013, Article IX	States resolve to extend CRPD. States resolve to develop business plan for Paris Principles compliant Equality and Rights Organisation. States resolve to develop proposals for discrimination legislation protecting carers and disabled people.
2014-2015	Disability Legislation Group	DLG group meet within Policy Council to develop proposals for disability discrimination legislation. There is significant debate about the definition of disability. No agreement is reached before the end of the term of government.
2015	Policy Council – Same-Sex Marriage Policy Council – Same-Sex Marriage Inheritance Rights (Billet d'État XXIII of 2015)	States agree to change the law to allow for same-sex marriage. The Policy Letter also highlighted some other issues, including the need for further consideration of the processes around dissolution of marriage (these were addressed in the recent Matrimonial Causes Policy Letter) and gender recognition.
	States Assembly and Constitution Committee - General Election 2016 (Billet d'État XI of 2015)	The bar on people who have a 'legal disability' from voting is removed. This means that 2016 was the first election where some disabled people could vote.
2016	Government restructure	Transfer of responsibility for inclusion (including discrimination legislation) from Policy Council to the Committee *for* Employment and Social

	Report or law reference/title	Decision/implications
		Security.
	Maternity Leave and Adoption Leave (Guernsey) Ordinance 2016 comes into force	Sets out entitlement to maternity and adoption leave.
2017	Developing a Model for Disability Equality Law in Guernsey	Dr Buckley and Dr Quinlivan from NUI Galway appointed to do a comparative study of six jurisdictions' discrimination legislation.
2018	Committee *for* Employment & Social Security - Longer Working Lives (Billet d'État V of 2018, Article IV)	States resolve to develop proposals for age discrimination legislation and proposals for legislation to introduce a right to request flexible working.
	Le Clerc and Langlois Amendment to Policy and Resources Plan	Resolution to develop multi-ground discrimination legislation (see Appendix 1 above).
	'Strawman' of multi-ground discrimination legislation	Presentation of 'strawman' of multi-ground discrimination legislation to key stakeholders. Invitation to give feedback.
	Consultation on the Sex Discrimination Ordinance	Reviewed effectiveness of existing Sex Discrimination Ordinance. https://gov.gg/sexdiscrimination
2019	Consultation on draft proposals for multi-ground discrimination legislation	Committee releases Technical Draft Proposals on multi-ground discrimination legislation. https://www.gov.gg/discriminationconsultation
	Carers Action Plan	Action plan to support informal carers, mentions that discrimination legislation is being developed in relation to carers. https://www.gov.gg/carersactionplan
2020	Projects underway	There is a public sector pay and terms and conditions review underway (which may be relevant to the question of equal pay for work of equal value).
		Work is ongoing to seek extension of UN CRC and has included the development of the "Rights Respecting Schools" programme.
	Committee *for* Health and Social Care - 'Capacity Law' – Supplementary Policy	Agreed some additional policy points in relation to the drafting of a law that would empower individuals who may lack capacity: to make their own decisions where possible, to allow them to

	Report or law reference/title	Decision/implications
	Matters and Potential Financial Implications Arising from the Appeals Process (Billet d'État V of 2020)	plan for the future and to ensure that decisions made on their behalf respect their basic rights and freedoms. (Building on the previous report in Billet d'État VII of 2016).
	This Policy Letter	Committee *for* Employment and Social Security propose extending discrimination legislation to the grounds of race, disability and carer status and recommend future work to add outstanding grounds into a single multi-ground Ordinance.

**See Rose-Marie Crossan (2018) A Women's History of Guernsey 1850s-1950s*

APPENDIX 3

HUMAN RIGHTS INSTRUMENTS

United Nations human rights conventions and protocols extended to Guernsey

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

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

[N.B. ICCPR-OP2 and CAT do not include any non-discrimination provisions.]

Regional human rights instruments extended to Guernsey

The following regional human rights instruments have also been extended to the Bailiwick of Guernsey:

- European Convention on Human Rights (ECHR)
- European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

[N.B. The latter two Conventions are not relevant in respect of discrimination.]

As noted in section 4.1.1, the ECHR is given effect in domestic law by the Human Rights (Bailiwick of Guernsey) Law, 2000).

A list of other conventions relevant to human rights can be found in the United Nations Core Document[102].

[102] United Nations (2014) Common core document forming part of the reports of States parties – United Kingdom of Great Britain and Northern Ireland, HRI/CORE/GBR/2014, p. 125. Available at: https://www.gov.gg/CHttpHandler.ashx?id=97737&p=0 [accessed 2nd March 2020].

International human rights instruments likely to be extended to Guernsey in the future

The States of Guernsey has committed to work towards signing up to the following additional United Nations human rights conventions:

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention on the Rights of the Child (UNCRC)

Non-discrimination requirements of overarching human rights instruments

Some of the aforementioned instruments (ICCPR, ICESCR, ECHR and UNCRC) are overarching and provide that the enjoyment of the rights and freedoms set out in those instruments shall be secured without discrimination of any kind on any ground, while listing various examples of specific grounds.

Article 2, paragraph 2 of ICESCR obliges each State party:

> "…to guarantee that the rights enunciated in the present Covenant will be exercised **without discrimination of any kind** as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Article 26 of ICCPR provides that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, **the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground** such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

ICESCR and ICCPR were both extended to Guernsey in 1976.

Articles in relevant UN Conventions which require States Parties to adopt legislative measures prohibiting all discrimination against women (CEDAW), on the basis of disability (CRPD) and on grounds of race, colour, descent, or national or ethnic origin (ICERD).

ICERD

Article 2

"**1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:**

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."

Article 5

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties **undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights**…"

CEDAW

Article 2

"**States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake**:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women."

CRPD

Article 2 - Definitions

""Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;"

Article 4 – General obligations

"**1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:**

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise…"

Article 5 - Equality and non-discrimination

"**1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law**.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

Article 27 - Work and employment

"1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities."

APPENDIX 4

THE COMMITTEE'S TECHNICAL POLICY PROPOSALS FOR A NEW DISCRIMINATION ORDINANCE

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Section 1: Introduction

This document sets out the Committee's technical proposals. Section 2 summarises the key changes that the Committee has made to its proposals following its consultation on the draft technical proposals in the summer of 2019. Sections 3-6 summarise the policy intent behind the Committee's proposals. Section 7 details the complaints process and section 8 outlines the proposed exceptions to the legislation.

THIS DOCUMENT IS NOT THE LEGISLATION

This document outlines the policy position the Committee would like to be drafted into legislation and how the legislation should operate. It is anticipated that such legislation would not come into force until Q2 2022 at the earliest.

The legal drafting team at St James' Chambers will have discretion to change the wording from the wording contained within this document, while adhering to the key policy objectives.

Some sections of this document are intended to provide guidance in terms of how the legislation would work in practice, and will not be reflected on the face of the legislation itself. This includes where examples are given, or where the document offers guidance about what good practice would be in certain situations.

Section 2: How the Committee has changed its proposals in response to the consultation

In response to the consultation, the Committee has reviewed and/or reconsidered a substantial number of policy issues. Several of these relate to exceptions to the legislation. This section explains where the Committee has decided to make significant changes to the draft policy proposals on which it consulted in the summer of 2019. In other areas, the Committee decided not to change its proposals.

2.1 Phasing

In 2018[103] and 2019[104], the Committee put forward a case for a new multi-ground discrimination ordinance covering ten protected grounds. During the consultation period, some stakeholders welcomed this approach. However, a strong view from several business representatives was that the protected grounds should be phased in over a period of time, similar to the implementation approach adopted in Jersey.

The Committee remains of the view that there is significant merit in all non-discrimination provisions being set out in a single Ordinance rather than in a collection of Ordinances covering different grounds of protection and/or different fields (e.g. employment, provision of goods or services, etc). A single Ordinance will make it easier for duty bearers and rights holders to understand their respective duties and rights and will allow for a consistent approach to be taken in defining discrimination, in bringing and hearing cases and in the remedies available to complainants. However, due to the quantity of feedback received through the public consultation, and in order to manage workload, the President of the Committee announced in November 2019[105] that the proposals under development would be refocused on fewer grounds of protection, with disability and carer status as a priority.

The Committee is proposing that a phased approach is taken to the development of a single multi-ground Discrimination Ordinance under the provisions of the Enabling Law. The proposals set out in section 5 of the Committee's Policy Letter, which are explained in sections 3 to 8 of this appendix, represent the first phase in the development of this Ordinance. During phase 2, proposals will be developed in respect of age and religious belief. During phase 3, proposals will be developed for the grounds covered in the existing Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 ("the Sex

[103] P.2018/45 Le Clerc and Langlois Amendment 2 to the Policy & Resources Plan (2017 Review and 2018 Update), Billet d'État XV of 2018, Article I (Resolution set out in full in appendix 1). Available at: https://www.gov.gg/CHttpHandler.ashx?id=113327&p=0 [accessed 1st March, 2020].
[104] See www.gov.gg/discriminationconsultation
[105] Media release issued on 8 November 2019 available at: https://www.gov.gg/article/175022/Discrimination-Legislation-proposals-to-be-re-focussed [accessed 19th February, 2020].

Discrimination Ordinance") (i.e. sex, marriage, and gender reassignment - with any appropriate updates in the framing of those grounds) plus sexual orientation. The aim would be for these grounds of protection to be transferred into the new multi-ground Ordinance proposed in this Policy Letter, meaning that protection from discrimination on the grounds of sex, marriage, and gender reassignment would be extended to cover the fields of education, accommodation, goods or services and membership of clubs and associations, in addition to employment. The Sex Discrimination Ordinance would then be repealed. The Committee envisages that phase 3 will include a proposal to introduce the right to equal pay for work of equal value in respect of sex in accordance with Guernsey's obligations under the International Covenant on Economic, Social and Cultural Rights[106] and in order to support the extension of the Convention on the Elimination of All Forms of Discrimination Against Women[107].

The Sex Discrimination Ordinance will remain in force and operate alongside the proposed new Ordinance until such time as sex, marriage and gender reassignment are taken into the new Ordinance in phase 3.

2.2 Definition of "disability"

In the draft technical proposals, on which the Committee consulted in the summer of 2019, a working draft definition of disability was proposed which was based on the definition included in the Republic of Ireland's Employment Equality Acts and Equal Status Acts with various amendments[108]. This was a broad, impairment based, definition which included no requirements in terms of actual or expected duration of the disability, or impact on a person's ability to carry out, engage or participate in normal day-to-day activities.

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[106] The UN International Covenant on Economic, Social and Cultural Rights was extended to Guernsey in 1976. Article 7(a)(i) notes that State Parties recognise the right to equal remuneration for work of equal value.

[107] The States of Guernsey agreed to seek extension of the UN Convention on the Elimination of All Forms of Discrimination Against Women in 2003, Article 11(1)(b) includes a right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value.

[108] Working draft definition which the Committee consulted on in the summer of 2019:

"'disability' includes but is not limited to –

(a) the total or partial absence of a person's bodily or mental functions, including the absence of 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;

To avoid doubt, where a disability is otherwise covered by this definition, the source or duration of the disability is not relevant and there is no required level of impact on the ability of the affected person to function."

The Committee received extremely diverse feedback on this proposal. Some stakeholders supported a broad definition. Others noted that the words "disability includes but is not limited to" effectively meant that the definition was unlimited and objected to this. There was also both support for and criticism of the removal (from the Irish definition) of the word "chronic" in relation to illness, with concerns raised over how employers would be able to distinguish between short-term sickness absence and a longer-term disability. There was both support and criticism for the suggestion that the duration that a disability had existed was not relevant. Some respondents suggested that adopting the definition of disability used in the UK Equality Act 2010 or the Discrimination (Jersey) Law 2013 would be preferable for employers and businesses as they were more familiar with these definitions. Others were highly critical of the UK and Jersey definitions arguing that they sought to reduce the protected pool of people and that they focused attention on proving disability, rather than on the alleged discriminatory act.

Following the consultation, the Committee has met on a number of occasions with representatives of the Guernsey Disability Alliance and business associations, both separately and together, to try to find common ground in relation to this key issue. Unfortunately, it has not been possible to find a definition of disability that all stakeholders support.

Some stakeholders have indicated that they would support the adoption of the Jersey definition of disability with no amendments. Other stakeholders do not support the Jersey definition due to the way it defines a requirement for the impairment to be "long-term"[109] and also because it includes a requirement that the impairment "can adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law" (herein referred to as "the adverse effect test"). It is not clear how the adverse effect test will be interpreted by the Jersey Employment and Discrimination Tribunal as only one disability discrimination complaint has been considered by the Tribunal to date and interpretation of this requirement was not a key determinant in this case. Although the Committee has been advised that it is likely that UK case law will be followed by the Jersey Employment and Discrimination Tribunal, the adverse effect test in the Discrimination (Jersey) Law 2013 is actually different to the equivalent test applied under the UK Equality Act 2010, so this may be an unsafe assumption. The some stakeholders have indicated that they would be likely to support the definition of disability in the Republic of Ireland's Employment Equality Acts and Equal Status Acts with no amendments; but, at a meeting with the Committee, other stakeholders did not support this definition as it does not explicitly include any tests on duration or adverse effects (although in practice impairments of a minor or trivial nature are not considered to be disabilities under these Acts).

[109] In the Discrimination (Jersey) Law, 2013 "a long-term impairment is an impairment which –

(a) has lasted, or is expected to last, for not less than 6 months; or

(b) is expected to last until the end of the person's life."

The Committee proposes that a person would fall within the protected ground of disability if the person has one or more long-term physical, mental, intellectual or sensory impairments.

In order to provide greater clarity for individuals, employers and adjudicators, it is proposed that "impairment" is defined in terms consistent with the following:

> *""impairment" means:*
> (a) the total or partial absence of one or more of a person's bodily or mental functions, including the absence of a part of a person's body,
> (b) the presence in the body of organisms or entities causing, or likely to cause, chronic 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, illness or disease which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour."[110]

In Jersey, the impairment(s) must have lasted, or be expected to last, for not less than six months or until the end of the person's life to be considered a disability for the purposes of the Discrimination (Jersey) Law, 2013. In the UK, the equivalent period is 12 months. The Committee accepts that the inclusion of a time limit would be helpful for employers in order to draw a clear distinction between people with short-term minor ailments and injuries, who would fall outside the scope of protection of the Discrimination Ordinance, and people with longer-term impairments who would be protected. Exactly where this line is drawn is open to debate and has been the subject of such since work on the development of these proposals first began in 2014.

Having given the matter much consideration, and taking into account the views of representatives of business associations and organisations representing disabled people, the Committee proposes that for the purposes of the new Discrimination Ordinance, a "long-term" impairment is an impairment which has lasted, or is expected to last for not less than six months; or is expected to last until the end of the person's life. The objective of this time limit is to exclude minor illnesses, injuries, etc., which do not fall within society's normal understanding of the concept of disability (for example, flu, norovirus, broken arm, etc.).

[110] This definition of impairment comes from the definition of 'disability' in the Republic of Ireland's Employment Equality Acts and Equal Status Acts, which was largely based on the definition of 'disability' in the Australian Disability Discrimination Act 1992.

For the purposes of clarification, the proposed time period would not exclude potentially relapsing/reoccurring conditions where the person was in a period of remission (e.g. cancer, multiple sclerosis, mental health conditions) or where treatment was controlling the condition (e.g. HIV, diabetes).

The Committee proposes that, unlike under the definitions of disability in the UK Equality Act 2010 and the Discrimination (Jersey) Law 2013, there should be no requirement or threshold included within the definition of disability in the new Discrimination Ordinance for the impairment(s) to have an adverse effect on the person's ability to carry out, engage or participate in normal day-to-day activities. The Committee's view, informed by its expert advisers, is that this is in line with guidance published by the Committee on the Rights of Persons with Disabilities. Paragraph 73(b) of the Committee on the Rights of Persons with Disabilities' General Comment no. 6 on equality and non-discrimination[111] says:

> "…Persons victimized by disability-based discrimination seeking legal redress **should not be burdened by proving that they are "disabled enough" in order to benefit from the protection of the law**. Anti-discrimination law that is disability-inclusive seeks to outlaw and prevent a discriminatory act rather than target a defined protected group. In that regard, **a broad impairment-related definition of disability is in line with the Convention**;" *[emphasis added]*

The UK definition of disability is highly complex, including supplementary provisions regarding the determination of disability in the Act itself, supported by a 58 page guidance document on matters to be taken into account in determining questions relating to the definition of disability[112]. Definitions of disability in use in the Republic of Ireland, Australia and Hong Kong do not include a requirement for the impairment(s) to adversely affect a person's ability to carry out, engage or participate in normal day-to-day activities (or, in fact, to have lasted or be expected to last for a particular period of time) which avoids much of the complication experienced in the UK. Evidence from these jurisdictions shows that this has not been abused.

Case numbers from the Republic of Ireland demonstrate that a broad impairment based definition of disability with no requirement for the impairment(s) to adversely affect a person's ability to carry out, engage or participate in normal day-to-day activities does not lead to an excessive burden of cases for employers and organisations. In 2018, there were just under 900 equality complaints in the field of goods and services provision

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[111] United Nations, Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination,* CRPD/C/GC/6 (26th April 2018), available at: https://digitallibrary.un.org/record/1626976?ln=en [accessed 17th February, 2020].

[112] Office for Disability Issues, *Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (May 2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf [accessed 20th February, 2020].

relating to all nine of the protected grounds. Only 90 of these complaints cited disability[113]. In 2018 there were just less than 1,800 employment related complaints under all of the protected grounds. Of those, less than 300 complaints referenced disability[114]. Considering that there are about 2.5 million people in the Irish labour market[115], less than 300 disability employment complaints in a particular year is extremely low.[116]

The Committee does not support the inclusion of a requirement for the person's impairment to adversely affect their ability to carry out, engage or participate in normal day-to-day activities because this draws the initial focus of adjudication to the question of whether a person is "disabled enough" to qualify for protection from discrimination. This can be personally intrusive and embarrassing and it may also potentially deter genuine complainants from coming forwards as they may fear being effectively cross examined by a respondent's lawyer arguing that they are not disabled, leaving instances of discrimination unchallenged. The Committee is of the view that the focus of the Tribunal should be on the alleged discriminatory act. It should be recognised that a person with an impairment that does not have any impact on their ability to carry out, engage or participate in normal day-to-day activities can be discriminated against on the basis of social stigma or prejudice. It is crucial to the Committee's objectives that people disadvantaged in this way can seek legal redress.

In considering the merits of the Committee's proposal in this regard, it is important to understand that just because someone falls within the definition of disability, does not mean that they would be entitled to bring a discrimination claim. Disability, in this regard, is no different to any other protected ground - for example, everyone has an age, or a gender or race, but this does not mean that everyone can hope to succeed in an action for discrimination. For example, all men and women are protected from discrimination in the field of employment under the Sex Discrimination Ordinance and there is no evidence that this has led to a high case load in Guernsey. It follows that a broad definition of disability does not mean that all people with disabilities would seek to bring legal cases. In any case, the burden of proof initially rests on the complainant

[113] Workplace Relations Commission (2018) Annual Report, p. 21. Available at: https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/annual-report-2018.pdf [accessed 2nd March 2020].
[114] *Ibid.,* p.22
[115] Central Statistics Office (2019) Labour Force Survey – Q4. Available at: https://www.cso.ie/en/statistics/labourmarket/labourforcesurveylfs/ [accessed 2nd March 2020].
[116] Figures from Ireland for 2014 (the latest available) show of all the equality cases included in that year, around a quarter went to adjudication; that includes both employment equality cases and cases relating to goods and services on all the different protected grounds. Of the remaining equality cases that were concluded that year, about 15% reached a mediated agreement and around 60% were discontinued for varying reasons. [See Equality Tribunal (2014) Annual Report, p.6. Available at: https://www.workplacerelations.ie/en/publications_forms/equality-tribunal-annual-report-2014-fin.pdf [accessed 2nd March 2020].

who has to show primary facts from which discrimination on the basis of disability could be inferred (i.e. a prima facie case) before the burden of proof switches to the respondent[117].

It is also a key point that just because someone falls within the definition of disability, does not mean that they would be entitled to a reasonable adjustment. Under the Committee's proposals, adjustments must be "appropriate" and "necessary" and not represent a "disproportionate burden". This ensures that the duty is focussed on the removal of barriers that actually exist in a way that is sensitive to the needs of employers in terms of proportionality (taking account of available resources). So, if the person's impairment has no practical effect in the context of the particular employer's workplace, the employer would not have to make an adjustment as it would not be "necessary".

The Committee accepts that its proposal is unlikely to be seen as ideal by representatives of the business community or by representatives of disabled persons but for opposite reasons. Essentially, what the Committee is proposing is a compromise, which recognises the requirement of employers for there to be a clear distinction between short-term sickness and longer-term impairments for operational reasons, but which does not require a person to prove, through the provision of evidence, how and to what extent their impairment adversely affects their ability to carry out, engage or participate in normal day-to-day activities. That is not to say that a person need not provide evidence that they have an impairment. Sometimes this will be obvious and evidence will not be required, but if the existence of an impairment or the prognosis is in doubt, medical, or other expert, evidence may be required.

2.3 Definition of carer status

The Committee received polarised feedback on the definition of carer status included in its technical proposals. The Committee had originally proposed that carer status be defined as:

> "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 is of such a nature as to give rise to the need for care and support."

Some consultation respondents viewed the inclusion of carer status in this way as a positive change, others considered the proposed definition of carer status to be too broad and suggested that it should be limited to carers of disabled persons only. Some respondents suggested that the introduction of a right to request flexible working would be a more proportionate and equitable mechanism to assist parents (and others) to

[117] A shifting burden of proof is entirely normal in equality law, as it would otherwise be almost impossible to succeed in a claim. Once the complainant has shown primary facts from which discrimination on the basis of disability could be inferred (i.e. a prima facie case) the respondent needs to show that there is a good explanation for why the circumstances that appear to be discriminatory are actually not.

obtain (subject to business requirements) a greater degree of flexibility in their working hours and/or conditions. Some people suggested that the definition should be narrowed by including a requirement for the care-giver to be living with the person with a disability that they provided care for or to be related to that person. Others said they would object to any requirement for the carer to reside with the person they care for. Some questioned the need for a carer status ground at all.

While Jersey and the UK do not have a specific "carer status" ground (the UK Equality Act 2010 has some protection from direct discrimination through "discrimination by association" established through case law), the Committee was specifically directed to return to the States with proposals for discrimination legislation to protect both disabled persons **and carers** from discrimination.

As a result of consultation feedback, the Committee now recommends that a person would have "carer status" if they provide care or support (in a non-professional capacity) on a continuing, regular or frequent basis for a close relative or a person that they live with who has a disability which is of such a nature as to give rise to the need for that level of care and support. For the purposes of the Discrimination Ordinance, the Committee is proposing that a "close relative" would include a spouse or partner, parent (including step-parent and parent of a spouse/partner), grandparent, child (including-step child), grandchild or sibling (including step-sibling).

2.4 Timescale for making a complaint

The Committee originally proposed allowing a complaint to be made up to 6 months after the last incident of discrimination had allegedly taken place. Following consultation feedback that this would cause too long a period of uncertainty for business, the Committee has agreed to amend the time period for making a complaint to three months following the last incident of alleged discrimination, in line with the current Sex Discrimination Ordinance. However, following formal registration of intent to make a complaint it would be possible for the time period to be suspended to allow formal pre-complaint conciliation to take place.

2.5 Third party harassment

Following consultation feedback that the UK has repealed section 40 of the 2010 Equality Act in relation to third party harassment, the Committee has agreed to move from the Irish to the UK position on third party harassment and remove the specific protection against third party harassment in the proposed Guernsey ordinance. This means that while an employer or service provider could be liable for the conduct of an employee in certain circumstances, they could not be directly responsible in the same way for harassment by a third party such as a customer, service user, student or tenant. However, employers should still take reasonable steps to prevent harassment as explained in section 3.5.

2.6 Liability

Another criticism during the consultation was that the proposals were too heavily weighted against duty bearers without offering sufficient protection for employers and service providers in situations where employees or service users acted in ways which were beyond their control.

In a workplace context, with respect to the discrimination legislation an employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment, although it is a defence if the employer can show it has taken all reasonable steps to prevent such acts or omissions from occurring. Section 25 of the Sex Discrimination Ordinance states that: "Anything done by a person in the course of his employment shall be treated for the purposes of this Ordinance as done by his employer as well as by him*",* implying that the employee and employer are jointly and severally liable for discriminatory acts done in the course of the employee's employment. The Committee's revised technical proposals extend this position to harassment and sexual harassment and victimisation as well as to discrimination. It is the intention that an employer or principal can be held responsible for the actions of an employee or agent where they had failed to take appropriate and reasonable steps to prevent the employee or agent from doing the thing complained of, or anything of that description. The employee cannot be held responsible for following a policy or decision of the employer or principal that they do not or cannot control.

In the case of discriminatory advertisements and procuring discrimination where two businesses (employers/service providers) are involved, it is also recommended that both the principal and the agent may also be liable on a joint and several basis. An agent or employee should not be responsible if their principal has told them that there is nothing wrong with what they are doing and he or she reasonably believes this to be true.

2.7 Financial compensation structure

The Committee's draft technical proposals, published for consultation in the summer of 2019, explained that because it was proposed that in the future complaints could be registered about discrimination in the provision of education, goods, services, clubs and associations and accommodation (as well as in relation to employment), it would not be appropriate to link awards to pay where the complainant was not paid by the organisation they were making the complaint about. Consequently, the Committee suggested the introduction of compensatory awards proportionate to the loss someone had experienced and potentially made up of two elements (financial loss and injury to feelings), like in the UK and Jersey. The Committee originally suggested allowing people to make both an unfair dismissal and a discrimination complaint and revising the award structure for all employment protection cases. For example, one option to achieve consistency between the discrimination awards and other employment protection awards would have been to change Guernsey's unfair dismissal awards structure to be more akin to that operated in Jersey, the UK and the Isle of Man, with a capped basic award based on length of service plus a compensatory award subject to a separate cap.

The following is an extract from the Committee's July 2019 draft technical proposals[118]:-

> "Under our proposals, if you were not sure whether your dismissal was discriminatory or whether it was an unfair dismissal but was not discriminatory, you can still register complaints of both unfair dismissal and discrimination. However, the Tribunal would not be able to award you compensation for the same financial loss or injury to feelings under both systems of compensation. The Tribunal would determine both complaints and would calculate the award that could be given. So, for example, if you were unemployed due to a discriminatory dismissal, you would only be able to claim for the financial loss that you experienced associated with that dismissal under either discrimination or unfair dismissal, not both.
>
> Because of the close relationship between discrimination awards and other employment protection awards, we also recognise the need to review the award structure for employment protection cases (like minimum wage complaints and unfair dismissal). If the States agrees that a new discrimination law which uses compensatory financial claims and non-financial remedies for discrimination, the other legislation may also be adjusted to match this, so that there is consistency across the different pieces of legislation in force."

In its response to the Committee's draft policy proposals, the Policy & Resources Committee said:

> "It should be recognised that the unfair dismissal element of any form of award is entirely separate from discrimination legislation and that there is no requirement to change the unfair dismissal regime."*[119]*

As a result, the Committee has revised its thinking and is now proposing the idea of a simple development to the award structure already in operation under the Sex Discrimination Ordinance for successful discrimination complaints in the field of employment which would work alongside the current award structure for unfair dismissal without requiring any changes to that system; and to operate a separate compensatory awards structure for non-employment complaints containing two element – firstly, actual financial loss and secondly, injury to feelings[120], recognising that awards cannot be based on pay in non-employment contexts.

For discrimination in the field of employment, the Committee recommends an upper limit of 6 months' pay plus up to £10,000 for injury to feelings based on a three banded

[118] Available at: www.gov.gg/discriminationconsultation

[119] Letter from the President of the Policy & Resources Committee to the President of the Committee *for* Employment & Social Security, dated 2nd October, 2019.

[120] Compensation for injury to feelings looks at the personal impact of the experience on the individual, whether the conduct complained of continued over a long period of time, etc.

scale akin to the Vento Scale[121] used in the UK (albeit with a much lower upper limit).

The lower band tends to be for one-off relatively minor incidents, the highest band for the most serious cases which could be an ongoing situation or series of incidents which publicly humiliate or degrade an individual.

Where a claimant makes complaints for both unfair dismissal under the Employment Protection (Guernsey) Law, 1998 and discrimination in the field of employment under the existing or new discrimination legislation, and the claims are related (i.e. discriminatory dismissal), if successful the claimant could be awarded either:

- up to 6 months' pay under the employment protection legislation if the unfair dismissal complaint is upheld but the discrimination complaint is not, or
- up to 6 months' pay plus up to £10,000 for injury to feelings if the discrimination complaint is upheld but the unfair dismissal complaint is not, or
- a combined award of up to 9 months' pay plus up to £10,000 for injury to feelings if both the unfair dismissal and the discrimination complaints are upheld.

For discrimination in all other fields, the Committee proposes an upper limit of £10,000 for financial loss plus up to £10,000 for injury to feelings.

The Tribunal's current powers to reduce awards (i.e. award less than the maximum number of months' pay) or make cost awards on application would remain (noting that costs cannot be awarded in relation to legal representation/advice).

2.8 Reasonable adjustment

Several respondents preferred the terminology "reasonable adjustment" to the Committee's original suggestion of "appropriate adjustment." The Committee is happy to use the term "reasonable adjustment" and also agrees that a reasonable adjustment need only be provided where a disabled person would suffer a "substantial disadvantage" without the adjustment, where the definition of "substantial disadvantage" is "more than minor or trivial". This would be part of the determination of whether an adjustment was necessary. There would still be a requirement for the duty bearer to consult the disabled person (when responding to an individual request) before providing an adjustment to ensure that the adjustment is appropriate.

In response to consultation feedback, the Committee has agreed that there should be a five year time delay from the legislation's commencement date before an employer or service provider would have to respond to a request for a reasonable adjustment where the removal or alteration of a physical feature is requested. After five years from the

[121] See for example, UK Equality and Human Rights Commission (2018) "How to work out the value of a discrimination claim". Available at: https://www.equalityhumanrights.com/sites/default/files/quantification-of-claims-guidance.pdf [accessed 1st March 2020].

commencement date, the organisation would need to respond in a timely manner but would only need to remove or alter the feature if doing so was not a disproportionate burden. However, if it is possible to provide the service in an alternative way such that the need to alter or remove the physical feature is avoided, then there would be a duty for the service provider to respond accordingly to the request for a reasonable adjustment as soon as the legislation comes into force. The definition of "physical features" for the purposes of this delay is given in the next paragraph – it should be noted that the Committee is proposing that it would be able to alter this definition via Regulation.

Having considered the definition of a physical feature in the UK Equality Act, 2010, the Committee intends that the definition of a physical feature would include:

- a feature arising from the design or construction of a building;
- a feature of an approach to, exit from or access to a building;
- a fixture or fitting.

It is proposed that none of the following is an alteration of a physical feature in the Guernsey legislation:-

(a) the replacement or provision of a sign or notice;
(b) the replacement of a tap or door handle;
(c) the replacement, provision or adaptation of a door bell or door entry system;
(d) changes to the colour of a wall, door or any other surface

2.9 Removal of a separate anticipatory accessibility duty

Under the UK Equality Act 2010, for education and service providers the duty to make reasonable adjustments is a duty owed to disabled people generally. The effect of this is that education providers and providers of goods and services must plan ahead by considering the accessibility needs of the wider disabled community, in order to prepare for reasonable adjustment requests and not wait for a service user to approach them before considering how to meet relatively common or predictable needs. They must anticipate the type of barriers that individuals with various impairments may face. They must also anticipate the adjustments they can make to remove these barriers. The anticipatory duty might include, for example, purchasing a portable ramp or changing a doorway to ensure access for people with mobility impairments, or ensuring that a reception desk has a hearing loop available.

The Committee tried to clarify the distinction between a responsive reasonable adjustment duty and a proactive accessibility duty in its proposals. This mirrored and made explicit what is arguably implicit in the UK reasonable adjustment duty – i.e. both a responsive and (for education and goods or services providers) a proactive element. In order to show that goods or services providers and education providers had considered how to meet the proactive/anticipatory duty, the Committee had included a requirement for them to prepare an accessibility action plan. The plan would have shown that they had undertaken an access audit, had prioritised identified issues for

action, and were implementing changes within available resources.

Some feedback from respondents to the consultation queried why the Committee was proposing to introduce an anticipatory accessibility duty when the reasonable adjustment duty could be owed to disabled people generally (i.e. that the UK anticipatory reasonable adjustment duty was sufficient and there was no need to add a requirement to develop an action plan). It was argued that the duty to develop an action plan did not add anything as an indirect discrimination complaint could be made by an individual if the design of a service aimed at the public meant that a group of people (e.g. those with a particular type of impairment) would be prevented from accessing the service. They argued that this anticipatory accessibility duty did not need to be written separately into the legislation.

The Committee feels that it should be up to the legislative drafters to decide how such a duty should be drafted into the legislation but the Committee's policy intent is that there should be an anticipatory/proactive element for education and goods or services providers (but not for employers and accommodation providers, or clubs and associations if they did not provide education or services). This could, as in the UK, be framed as an anticipatory element to the reasonable adjustment duty. The individualized, responsive duty to make reasonable adjustments upon request would apply across all fields – including to employers and accommodation providers. A service provider would be able to justify not making an adjustment, such as not making a service accessible either through the defence of disproportionate burden (in the event of a claim of denial of a reasonable adjustment) or through objective justification (in the event of a claim of indirect discrimination).

With respect to the requirement to prepare an accessibility action plan, the Committee has decided that this requirement should only be compulsory for the public sector and that the duty should apply five years after the legislation comes into force. The preparation of a plan would be voluntary (at least initially) for the private and third sectors, noting such a plan could be useful as evidence when responding to a complaint.

The Committee has agreed that no complaints relating to the removal or alteration of a physical feature can be made until five years after the commencement of the Ordinance. This is a shorter time limit than the Committee was originally recommending but has been extended to include all changes to physical features, including reasonable adjustment requests and indirect discrimination complaints.

2.10 Accommodation providers and reasonable adjustments

The Committee's technical proposals originally recommended that providers of both residential and commercial property should be under a duty to provide (and pay for) appropriate/reasonable adjustments for anything which did not involve physical alterations to the fixed features of a building. This might include adjustments in how they communicate with tenants, how they collect rent, signage or adjustments to fittings like door handles where required by the tenant (provided it was not a disproportionate

burden on them to provide such adjustments).

The Committee also proposed that accommodation providers should have a duty not to unreasonably refuse to allow a tenant to make a change to the physical features of a building for accessibility purposes. The accommodation provider would be allowed to specify that this alteration should be at the tenants own expense, and that they must agree, and have the resources available, to return the building to the original condition at the end of their tenancy. There was considerable feedback from private landlords against this proposal. Landlords also requested clarification on the definition of physical and non-physical features, who would have an obligation to pay for reasonable adjustments, and what could be reasonably refused.

In light of this, the Committee has reconsidered its proposals with respect to accommodation providers. The Committee is recommending that Regulations should be developed to specify:-

- what is and is not a "physical feature"; and
- when tenants can request improvements to accommodation when it is their principal residence.

At commencement of the legislation, the following position is suggested:-

Physical features would include: -

- a feature arising from the design or construction of a building;
- a feature of an approach to, exit from or access to a building;
- a fixture or fitting.

None of the following is an alteration of a physical feature:-

List A
(a) the replacement or provision of a sign or notice;
(b) the replacement of a tap or door handle;
(c) the replacement, provision or adaptation of a door bell or door entry system;
(d) changes to the colour of a wall, door or any other surface.

Therefore, landlords would have to pay for alterations to the things listed on List A from the commencement of the legislation providing that they were appropriate and necessary and not a disproportionate burden.

In addition to the above provision, five years after the commencement of the first phase of the legislation, the landlord could not unreasonably refuse for the tenant to carry out the type of improvements listed on List B (non-exhaustive) at the tenant's own expense as a reasonable adjustment.

This is based on section 190 of the UK Equality Act which defines (by example) the

improvements a tenant can ask for, at their own expense (provided the tenant or another person occupying or intending to occupy the premises is a disabled person and the disabled person occupies or intends to occupy the premises as that person's only or main home) as:-

> List B
> "improvement" means an alteration in or addition to the premises and includes—
> (a) an addition to or alteration in the landlord's fittings and fixtures*;
> (b) an addition or alteration connected with the provision of services to the premises;
> (c) the erection of a wireless or television aerial;
> (d) carrying out external decoration;
> *This could include, for example, grab rails and special sanitary fittings and stair lifts.

Private residential landlords would not have to consent to any other changes to physical features other than the improvements listed above.

Commercial landlords could not unreasonably refuse changes to physical features at the tenant's expense (whether included in List B or not).

Where changes to physical features (or improvements in List B) are concerned, both private residential and commercial landlords could specify a requirement for the building to be returned to its original condition at the tenant's expense. However, in many cases it is anticipated that they would not want to as the changes would be likely to make their property more marketable.

2.11 Equal pay for work of equal value

The draft policy proposals on which the Committee consulted in the summer of 2019 included a proposal to introduce a right to equal pay for work of equal value applying to all proposed protected grounds, as is the position in the Republic of Ireland. Equal pay for work of equal value provisions allow people doing different jobs to compare pay differences related to a ground of protection which might help to challenge systemic pay differences or occupational segregation. In response to feedback from representatives of the business community that the proposed scope of the provision was too wide and would be impractical to monitor in practice, the Committee recommends adopting the UK position where equal pay for work of equal value complaints could only be registered in relation to the ground of sex. Given that it is proposed that a review of existing provisions on the ground of sex will be included in phase 3 of the development of the multi-ground discrimination Ordinance, the introduction of the right to equal pay for work of equal value will be delayed and does not appear in these proposals. However, there is an equal pay for equal work provision in these proposals (this allows comparison only where people are doing the same or substantially similar jobs).

For clarity, and in response to a consultation response, the Committee did not intend that claims for equal pay for work of equal value should be able to be made using cross-jurisdictional comparators.

2.12 Landlords and children

The Committee has removed parents of dependent children (without a disability) from its proposed definition of carer status. This means that under the Committee's proposals for the first phase of the development of a new Discrimination Ordinance, landlords would not be prevented from specifying "no children" when letting residential property.

2.13 Advice and enforcement

Several respondents noted that additional resources would be required to provide advice and assistance to both rights holders wishing to make a complaint and to duty bearers with respect to their responsibilities under the new legislation. In addition, some respondents felt that additional occupational health support was required and that changes to the Employment and Discrimination Tribunal were necessary to enable it to manage a higher and more complex caseload. Section 7 of the Policy Letter describes the recommended service developments required to implement the new Discrimination Ordinance.

2.14 Definition of employee/worker

Some respondents to the consultation noted that the part of the technical consultation which described who could make claims of employment discrimination appeared to be narrower than the existing Sex Discrimination Ordinance.

The Committee has clarified that it intends that a-typical and casual workers would be protected in the employment field, but some situations of self-employed persons (where this is more like service provision than an employment relationship) would not be protected. The Committee would want the wording of the law to ensure agency workers are also protected.

2.15 Victimisation

In response to consultation feedback, the Committee's revised proposals recommend that for an individual to be protected under the law, the complaint or allegation they have made must have been made in good faith. For clarity, the law will provide protection from victimisation when an individual alleges that there has been a breach of the equality legislation, not just when someone makes or proposes to make a formal complaint.

2.16 Race

There was a request during the consultation that in defining "race" in the legislation, it is clarified that a racial group could comprise two or more distinct racial groups (e.g. a person may describe themselves as black, African or Nigerian, so the racial group they belong to would comprise of any or all three of these). The Committee has included this clarification.

2.17 Multiple and intersectional discrimination

"Multiple discrimination" refers to a situation in which a person experiences discrimination on two or more grounds, leading to discrimination that is compounded or aggravated. "Intersectional discrimination" refers to a situation where several grounds interact with each other at the same time in such a way as to be inseparable.[122] Article 6(1) of CRPD recognizes that women with disabilities are subject to multiple discrimination and requires that States parties take measures to ensure the full and equal enjoyment by women with disabilities of all human rights and fundamental freedoms. The Convention refers to multiple discrimination in Article 5(2), which not only requires States parties to prohibit any kind of discrimination based on disability, but also to protect against discrimination on other grounds[123].

Given that no provisions regarding multiple or intersectional discrimination are currently in force in the UK[124], the Committee has decided to defer consideration of this matter until phase 2 when it is envisaged that additional protected grounds will be added to the proposed new Ordinance. While it would be possible under the Committee's proposals for a person to register two separate complaints on two grounds against the same employer or service provider (for example, a race discrimination complaint and a disability discrimination complaint) these would be decided separately, though they could be combined into one hearing. For example, the complainant would have to compare their treatment to someone of a different race and then compare their treatment to a person who is not disabled or who has a different disability. A decision would be made based on each complaint – the Tribunal could not, at present, consider multiple grounds in one comparison.

2.18 Striking out claims

The Committee intends to make an order giving the Employment and Discrimination Tribunal the power to strike out (amongst other things) vexatious complaints and the power to dismiss complaints with no reasonable prospect of success.

2.19 Exceptions

It is proposed that the Committee be given the power to amend the exceptions list by regulation. The Committee has also agreed a number of changes to the exceptions which are set out in section 8 of this appendix.

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[122] UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) "On equality and non-discrimination", para. 19. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en [accessed 1st March 2020].

[123] UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) "On equality and non-discrimination", para. 21. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en [accessed 1st March 2020].

[124] Section 14 of the Equality Act 2010 seeks to prohibit "combined" discrimination based on two protected characteristics, however, this section is not yet in force.

Section 3: Discrimination

3.1 Purpose of the legislation

The purpose of the proposed new legislation is:

Purpose	To promote and protect people's rights to non-discrimination, equality of status, opportunity and treatment on the grounds of carer status, disability and race.
Vision	Everyone in Guernsey has equal access to employment, goods, services, accommodation and education, regardless of carer status, disability or race.

The Committee's objectives and performance indicators are set out in section 3 of the Policy Letter.

If legislation along the lines proposed in this document is introduced it will help Guernsey to comply with international conventions such as the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR), the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), all of which have been extended to Guernsey. It would also be likely to assist Guernsey when seeking the extension of the UN Convention on the Rights of Persons with Disabilities.

The Committee intends that the legislation will include an "Objects" section which will outline the purpose of the legislation. This will make reference to the international human rights conventions.

3.2 Who is protected from discrimination?

Policy objectives: to ensure effective protection from discrimination in relation to disability, unpaid care or support of disabled people and race.

3.2.1 Protected grounds

Discrimination legislation protects people from being treated less favourably because they have certain characteristics. It is proposed that, the protected grounds in this legislation would be:

- carer status,
- disability, and
- race.

This document will now look at what these proposed protected grounds cover in a little more depth.

3.2.2 Carer status

The Committee is proposing that a person would have "carer status" if they provide care or support (in a non-professional capacity) on a continuing, regular or frequent basis for a close relative or a person that they live with who has a disability which is of such a nature as to give rise to the need for that level of care and support.

For the purposes of this legislation, a close relative would include a spouse or partner, parent (including step-parent and parent of a spouse/partner), grandparent, child (including step-child), grandchild or sibling (including step-sibling).

This would include carers of people who had cancer, a mental health condition or people with dementia – who might not think of themselves as "disabled".

3.2.3 Disability

A person would fall within the protected ground of disability if the person has one or more long-term physical, mental, intellectual or sensory impairments.

A "long-term" impairment is an impairment which has lasted, or is expected to last, for not less than 6 months; or is expected to last until the end of the person's life. This time period would not exclude potentially relapsing/reoccurring conditions where the person is in a period of remission (e.g. cancer, multiple sclerosis, mental health conditions) or where treatment is controlling the condition (e.g. HIV, diabetes).

In order to provide greater clarity for individuals, employers and adjudicators, it is proposed that "impairment" is defined in terms consistent with the following:

a) the total or partial absence of one or more of a person's bodily or mental functions, including the absence of a part of a person's body,
b) the presence in the body of organisms or entities causing, or likely to cause, chronic 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, illness or disease which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour.

If the existence of a condition, impairment or illness or the prognosis is in doubt, medical, or other expert, evidence may be required.

Unlike the UK Equality Act 2010, there would be no requirement for the impairment(s) to have an adverse effect on the person's ability to carry out, engage or participate in normal day-to-day activities.

3.2.4 Race

The Committee intends that "race" would include colour, descent, nationality, ethnic origins and national origins. A racial group could comprise two or more distinct racial

groups (for example, a person with a particular combination of colour, nationality/ies and ethnic origin/s could seek protection on the basis of any one or the combination of all of these).

The inclusion of "descent" in the definition is intended to protect members of communities affected by forms of social stratification such as caste and analogous systems of inherited status which impair their equal enjoyment of human rights. This is in line with the interpretation given to "descent" by ICERD, which has been extended to Guernsey[125].

""National Origin" refers to a person's State, nation or place of origin."[126] Place of origin would include, for example, being of Guernsey origin.

3.2.5 Visitors and people here temporarily

Policy objective: to ensure that everyone has access to their right to non-discrimination whether they are visitors, overseas customers or residents.

If the proposals are agreed by the States, the exact scope of the legislation will be considered by the legal drafters when preparing the legislation. However, the Committee suggests that visitors, people doing business with Guernsey companies and people who are living or working in Guernsey temporarily will have equal rights to make complaints under this legislation. For visitors, rights in the field of goods or services are most likely to be relevant.

For clarity, the legislation would not extend to Sark or Alderney at this time (see section 11 of the Policy Letter).

3.3 What do we mean by "discrimination"? What is unlawful?

Policy objective: to develop a common understanding of the different forms of discrimination which effectively describe an individual's experience of arbitrary disadvantage.

[125] ICERD was extended to Guernsey in 1969. The UN Committee on the Elimination of Racial Discrimination has produced guidance on the meaning of descent in the Convention, including its 2002 General Recommendation no. 29 "on article 1, paragraph 1 of the Convention (Descent)". Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7501&Lang=en [accessed 1st March 2020].

[126] UN Committee on Economic, Social and Cultural Rights (2009) General Comment no. 20: Non-discrimination in economic, social and cultural rights, para. 24. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en [accessed 1st March 2020].

3.3.1 The protected grounds

If someone is saying that they have been discriminated against this means that they have been treated in a less favourable way than a person who does not share a particular characteristic that they have. In order to show this, they would need to make a comparison between themselves and someone (real or hypothetical) who does not share their characteristic. Note: to use a hypothetical comparator relevant evidence would be required to suggest that someone would have been treated differently in relation to a ground of protection.

The "protected grounds" explain how this comparison is made:

The carer status ground

The Committee proposes that someone with carer status may compare themselves to a person with a different carer status or someone without carer status. A person without carer status may not compare themselves to a person with carer status. This means that treating a person with carer status more favourably than a person without carer status cannot lead to the registration of a complaint from a person without carer status.

The disability ground

The Committee proposes that a disabled person may compare themselves to someone with a different disability, or to a non-disabled person. A person without a disability may not compare themselves to a disabled person. This means that treating a disabled person more favourably than a non-disabled person cannot lead to the registration of a complaint of discrimination from the non-disabled person.

If a disabled person is comparing themselves to another disabled person, the circumstances should not be considered dissimilar because one or both require a reasonable adjustment (see section 6.2).

The race ground

The Committee proposes that a person may compare themselves to a person with a different race (including people of a different colour, descent, nationality or ethnic or national origin).

3.3.2 Types of discrimination and other prohibited conduct

The Committee is proposing that there are different types of discrimination that will be unlawful. These types of discrimination are common internationally, aligning with European Law – with the addition of discrimination arising from disability, based on UK law.

The Committee intends that discrimination will include:

- direct discrimination,
- discrimination by association,
- discrimination arising from disability,

- indirect discrimination, and
- the denial of a reasonable adjustment for a disabled person.

The next sections explain in more detail what is meant by these terms.

In addition to these forms of discrimination, the Committee is proposing that the legislation will also prohibit:

- harassment or sexual harassment of a person (see section 3.5),
- victimisation of a person (see section 3.6),
- publication of discriminatory advertisements (see section 3.8),
- causing, instructing or inducing another person to undertake an act prohibited in the proposed legislation (see section 3.9),
- [employment only] failing to provide equal pay (see section 4.5), and
- [employment only] failing to provide a benefit to a person in accordance with an equality clause (see section 4.5).

3.3.3 Direct discrimination

In these proposals direct discrimination occurs where a person is treated less favourably than another person is, has been or would be treated in a similar situation because of any of the grounds of protection (see section 3.3.1).

To show that direct discrimination has occurred, a person would need to show the Tribunal that they had been treated less favourably than someone else who does not share the relevant characteristic that falls within the protected grounds (i.e. carer status, disability or race, as outlined in section 3.3.1 above).

The Committee is suggesting that the comparison could be with an actual person (or people) who is (or are) currently being treated differently. It could be with a person who has, in the past, been treated differently in a similar situation. A case of direct discrimination could also be made hypothetically on the basis that someone without the protected ground would be treated differently in a similar situation (if there were relevant circumstantial evidence).

It is intended that racial segregation on the basis of colour will always be considered unfavourable treatment and if this can be shown to have occurred, a comparator is not required.

3.3.4 Past, future and imputed direct discrimination

In the most straightforward cases direct discrimination is on the basis of a characteristic that the individual has.

Example – a characteristic that exists
A shop assistant refuses to give advice to a customer on the basis that they are a person with a learning disability. This is direct discrimination on the grounds of disability.

However, the Committee proposes that a complaint of direct discrimination could also be made:

- because of a characteristic someone had that they do not have any more

  Example – a characteristic which existed but no longer exists
  A manager knows that a job applicant suffered from depression as a teenager. The manager does not shortlist the applicant for an interview because he is concerned that the applicant has had mental health problems. The job applicant is now in his mid-twenties and has been well for a number of years, with no indication that he will become unwell again. This counts as direct disability discrimination because the manager is treating the job applicant differently on the basis of his having had a condition in the past.

- when someone is concerned that someone may have a protected characteristic in future

  Example – a characteristic which may exist in the future
  An employee is turned down for a promotion even though they are highly qualified. They overhear their line manager discussing with a colleague that this is connected to the fact that their partner has been diagnosed with a long-term condition that is likely to get worse. The manager assumes that the employee will, in future, have substantial care responsibilities that might conflict with their work. Even though they do not currently have substantial care responsibilities, the employee could make a claim of direct discrimination on the basis of carer status.

- when someone assumes someone has a characteristic that they do not have

  Example – a characteristic which is imputed to the person concerned
  A bartender refuses to serve a customer who they perceive to be of middle eastern origin. Even though the customer is, in fact, Italian they could make a claim of direct discrimination on the basis of race.

3.3.5 Direct discrimination – other clarifications

There are a couple of other points about direct discrimination which the Committee would like to clarify in respect of its current position in these proposals.

Firstly, that discrimination does not need to involve an intention to harm or discriminate - all that is required is that someone is treated differently because of a protected characteristic, irrespective of motivation. Secondly, following European practice, to make a complaint, it is enough to show that circumstances appear to be discriminatory – i.e. that a person can draw an inference of discrimination from them in the absence of an alternative explanation; thirdly, the law should recognise that unlawful discrimination can occur even if the person who discriminates and the person discriminated against share the same protected characteristic.

3.3.6 Discrimination by association

The Committee proposes that discrimination by association can occur when someone is discriminated against because of their association with a person who has a protected ground. This would be where, if the person who has the protected ground were treated in the way the person associated with them had been, it would count as direct discrimination.

This discrimination could be in relation to family members or friends who have a particular characteristic. It could also be when a person acts or speaks for the inclusion of a group with a particular characteristic, campaigns or supports an individual from a group or refuses to act in a way that would disadvantage a group.

Example – discrimination by association (1)
A local pre-school refuses to offer a place to a three year old boy on the basis that his parents are Latvian. The boy was born in Guernsey and does not have Latvian nationality himself. The pre-school is directly discriminating against the boy because of his association with his parents.

Example – discrimination by association (2)
A local business association was planning an open day for all of the shops on the high street. The board instructed the chair of the committee making the arrangements, "to avoid trouble", that she should not include any of the take-away shops, all of which are ethnic minority run businesses. When she refused to do that, the board warned her that if there was any sign of "trouble" she could be suspended from the association. Her treatment could amount to race discrimination [by association].
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.59

3.3.7 Indirect discrimination

The Committee is proposing that indirect discrimination should be prohibited. Indirect discrimination occurs where an apparently neutral provision[127] would put a person at a disadvantage compared with other persons because of any of the protected grounds,

[127] What is meant by 'provision' is not intended to differ substantially from the UK position where the phrase 'policy, criterion or practice' is used but the precise wording of the legislation is at the discretion of legal drafters.

unless the employer or service provider can show that the provision is objectively justified (see section 3.4.2).

Indirect discrimination is about provisions which are applied equally to everyone but which act to disadvantage one group of people.

The provision does not need to have been actually applied to an individual for them to make a complaint, provided they can show that it would disadvantage them.

Example – "would put"
A key government building which houses a number of core services is being redeveloped. Plans are published which indicate that during the redevelopment period there will be a time where there will be no access to the building via a level entrance. A woman makes a complaint that she regularly has to attend appointments in the building and is a wheelchair user. She believes that the planned development will disadvantage people with mobility impairments. Even though she has not been affected yet, she can make a complaint because it is likely she will be affected.

In some cases the impact of a provision on a particular group with a protected ground will be clear. In other cases the link between the provision and the group might need to be explored, or evidence provided in order to establish the link. This exploration might require personal testimony. In other cases statistics might be used to show that a group had been particularly affected. However, the Committee is not suggesting statistics would be mandatory in all cases.

The Committee is proposing that a person cannot make a complaint if they were not affected (or would not be affected) themselves. Even if indirect discrimination is shown and the individual shares the characteristic in question; they will not be able to receive compensation unless it affected (or would affect) them personally.

An employer or service provider can defend a complaint of indirect discrimination through "objective justification". This is discussed in section 3.4.2 below.

3.3.8 Discrimination arising from disability

The Committee is proposing making discrimination arising from disability unlawful. Discrimination arising from disability occurs where a person treats a disabled person unfavourably not directly because of their being disabled but because of something arising in consequence of their disability like a behaviour, symptom or their need to be accompanied by a carer, assistant or assistance animal. This is subject to a defence of objective justification (see section 3.4.2), or a defence relating to a person not knowing that the person had a disability.

Discrimination arising from disability is a concept used in the UK Equality Act, 2010. Due to the difficulty of finding suitable comparators in situations where discrimination is based on something arising in consequence of a disability, unlike direct discrimination,

no comparator is required: the person must only show that they have been treated unfavourably.

Example – no need for a comparator
A disabled person is refused service at a bar because they are slurring their words, as a result of having had a stroke. In these circumstances, the disabled person has been treated unfavourably because of something arising as a consequence of their disability. It is irrelevant whether other potential customers would be refused service if they slurred their words. It is not necessary to compare the treatment of the disabled customer with that of any comparator. This will amount to discrimination arising from disability, unless it can be justified or the bar manager did not know or could not reasonably be expected to know the person was disabled.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.87

The unfavourable treatment must be in relation to something that has arisen in consequence of a disability rather than the fact of the disability per se. The consequences of a disability include anything which is the result, effect or outcome of a person's disability. This could include, for example, situations where people are treated less favourably because of the need to have an assistance animal present, because of vocalisations they make associated with a disability, because of alterations of behaviour associated with a mental health condition or because of the effects of their prescribed medication.

Example – arising from
A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the "something" (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.
UK EHRC (2011) Equality Act 2010: Employment - Statutory Code of Practice, p.74

By contrast, direct discrimination must be based on the fact of the disability itself and requires a comparator.

The defences for the employer or service provider of not knowing that a person is disabled, and of objective justification are discussed in section 6.2.4 and 3.4.2.

3.3.9 The denial of a reasonable adjustment for a disabled person

The Committee is proposing to include a duty to provide reasonable adjustments. A reasonable adjustment (or what the UN calls a "reasonable accommodation") is an adjustment which a disabled person requires in order to be treated equally except

where it is a disproportionate burden for the employer or service provider to make the adjustment (see section 6.2.5).

Example - reasonable adjustment
A travel agent intends to provide twenty people with some key information about a group holiday they are arranging in a video format (without subtitles). The travel agent is aware that one of the group has a hearing impairment. The travel agent may need to provide the same information in a different format for the person with a hearing impairment in order for them to have an equal opportunity to access the information (perhaps a transcript, a sound recording compatible with voice to text software which they have or via sign language interpretation). This is a reasonable adjustment. If the travel agent does not check what format the individual needs and then provide an accessible alternative (if needed) this is a denial of a reasonable adjustment.

A reasonable adjustment is about treating people equally and ensuring equality of opportunity. It should not be thought of as preferential or special treatment.

Denial of a reasonable adjustment is a form of discrimination unless it would be a disproportionate burden to provide the adjustment (this is discussed further in section 6.2.5). It is also not necessary to provide an adjustment unless the disabled person would suffer a substantial disadvantage without the adjustment (in this case substantial means anything more than minor or trivial).

More detailed discussion of reasonable adjustment is included in section 6.2 below.

3.4 When can decisions, actions or unintentional disadvantage, based on the protected grounds be lawful?

Policy objective: to permit different treatment in a limited range of circumstances where this is well justified.

3.4.1 When can decisions, actions or unintentional disadvantage based on the protected grounds be lawful? - Summary

There are some circumstances in which employers and service providers can make decisions based on the protected grounds which would not be prohibited and would be lawful if the proposals are agreed.

It is worth noting that it would also be possible to defend a complaint by showing that the difference in treatment was due to some other, legitimate reason and not a protected ground. Employers would not be required to employ someone who cannot undertake the essential functions of the role (this is discussed further in section 4.1.3).

The circumstances in which employers and services providers can treat people differently in relation to the protected grounds and comply with the law include:

- The use of measures which treat some people more favourably in order to address the ongoing disadvantage of a group and promote a more inclusive society (i.e. **positive action**). There are some limits to this, discussed in more detail in section 3.7.
- Listed **exceptions**. Section 8 lists some exceptions. These are intended to cover some everyday instances where people make decisions based on the protected grounds which the Committee does not think are unfair.
- In employment, when there is a "**genuine and determining occupational requirement**" – see sections 4.6.2-4.6.3.
- Where making a reasonable adjustment to ensure equal opportunity and inclusion for a disabled person (discussed with examples in section 6.2) would be **a disproportionate burden** on the employer or service provider. Also where not providing a reasonable adjustment would not put the disabled person at a significant disadvantage (meaning anything more than minor or trivial).

There are also some lines of defence that an employer could take, should a complaint arise:

- Indirect discrimination (where an apparently neutral policy or practice results in a disadvantage for people in a particular group) and discrimination arising from disability can sometimes be justified. This is discussed further and examples are provided below in section 3.4.2 **"objective justification".**
- When an employer or service provider does not know and **could not reasonably have been expected to know that the disabled person has a disability**, then unfavourable treatment does not amount to discrimination arising from disability, and the person cannot have a complaint of a failure to provide a reasonable adjustment upheld (this is discussed further in section 6.2.4 below).

3.4.2 Objective justification

Section 3.3 explains that the Committee is proposing that indirect discrimination and discrimination arising from disability all have a defence of objective justification. It is also used in some other places in the proposals, including for genuine and determining occupational requirement. This means that if an employer or service provider has a complaint made against them, they can seek to defend their provision or action by showing that it is objectively justified. They would do this by demonstrating both that they have a legitimate aim and that the means of achieving that aim are appropriate and necessary.

If adopted, this would mean that the person who the complaint has been made against (e.g. the employer, service provider or education provider) would need to provide evidence that the provision is justified. It would not be necessary that the justification already be fully set out in writing when the alleged discrimination occurred. However, generalisations are not sufficient to stand as a defence.

If applied by the Tribunal, the Committee expects that two stages would be considered. Firstly, whether the aim is legitimate; and secondly, whether the means of achieving the aim are appropriate and necessary.

3.4.3 What is a legitimate aim?

The concept of a legitimate aim is used in European Union law. The following guidance from the UK Equality and Human Rights Commission Code of Practice on the Equality Act 2010 is helpful in understanding this concept:

> "Although reasonable business needs, and economic efficiency may be legitimate aims, an employer [or service provider] solely aiming to reduce costs cannot expect to satisfy the test."
>
> "Examples of legitimate aims include:
> - ensuring that services and benefits are targeted at those who most need them;
> - the fair exercise of powers;
> - ensuring the health and safety of [employees or] those using the service provider's service, or others, provided risks are clearly specified.
> - preventing fraud or other forms of abuse or inappropriate use of services provided by the service provider; and
> - ensuring the wellbeing or dignity of [employees or] those using a service."[128]

In employment also: "health, welfare and safety may qualify as legitimate aims provided that the risks are clearly specified and supported by evidence."[129]

If a legitimate aim is established this would not mean that the provision is objectively justified. The next stage would be to consider whether the provision is an appropriate and necessary way of achieving that aim.

3.4.4 What is appropriate and necessary?

"Appropriate and necessary" is a term coming from EU law which relates to proportionality. The more significant and serious the impact of the provision is in disadvantaging the identified group or individual, the harder it will be to justify that it is proportionate (i.e. appropriate and necessary).

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[128] UK Equality and Human Rights Commission (2011) *Equality Act 2010: Employment - Statutory Code of Practice* p 69. Available at: https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf [accessed 9th January 2019].

[129] UK Equality and Human Rights Commission (2011) *Equality Act 2010: Services, public functions and associations – Statutory Code of Practice* p 79 Available at: https://www.equalityhumanrights.com/sites/default/files/employercode.pdf [accessed 9th January 2019].

During this process the Committee anticipates that the Tribunal would look at whether there are other better ways that the person or organisation could meet the legitimate aim identified. If there is a different way of achieving the same aim that results in a more equal outcome then the provision will be regarded discriminatory.

Guidance from the UK code of practice may be useful here:

> ""necessary" does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.
>
> The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's [or service provider's] justification for the provision… if there are other good reasons for adopting it."[130]

Example – objective justification
An outdoor centre provides a variety of activities from walks on gravelled areas to those involving strenuous physical effort. On safety grounds, it requires a medical certificate of good health for all participants in any activities. Although ensuring health and safety is a legitimate aim, the blanket application of the policy is likely to be unjustified because customers with disabilities which restrict strenuous exercise could still be admitted to undertake parts of the course which do not create a safety risk. Also some conditions which doctors may not classify as "good health" do not, in practice, impede the ability to safely undertake strenuous exercise.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.80

3.5 Harassment

Policy objective: to ensure that people are treated with dignity and that behaviour arising from prejudice does not prevent individuals, or groups of people, from accessing work, housing, education, goods and services or participation in associations.

[130] UK Equality and Human Rights Commission (2011) *Equality Act 2010: Services, public functions and associations – Statutory Code of Practice* p.80 Available at: https://www.equalityhumanrights.com/sites/default/files/employercode.pdf [accessed 9th January 2019].

3.5.1 What is harassment?

The Committee is proposing that the legislation would prohibit harassment and sexual harassment.

What is meant by harassment is 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 ("hostile environment").

What is meant by sexual harassment is unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity or creating a hostile environment.

The proposals would also intend to prohibit situations where a person is treated less favourably because of their rejection of, or submission to, harassment or sexual harassment.

Sexual harassment may occur in relation to grounds other than sex (for example, if unwanted sexually explicit comments are made to someone because they are disabled). A person may be sexually harassed by someone who is the same sex as themselves.

A person may be harassed by multiple other persons.

If someone wishes to provide evidence that they have been harassed or sexually harassed, it is not necessary, like it is for discrimination, to compare themselves to a person without the characteristic. It is sufficient to show that harassment has occurred which is related to a protected ground.

3.5.2 "Unwanted"

"Unwanted conduct" includes acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures, or other material.

The Committee proposes that an individual would be able to decide for themselves what conduct is unwanted, and whether that conduct is unwanted from anyone, or is unwanted from some people (this is the approach in the UK and the EU). An individual does not necessarily need to have expressed an objection to show that the conduct is unwanted. This is because an individual may often be afraid of objecting to harassment, for fear of adverse consequences.

An individual having agreed to conduct of this nature previously would not mean that it cannot become unwanted. For example, if the parties were in a relationship which has ended.

3.5.3 "Related to"

Following the UK, the proposals would anticipate that the individual would not have to have the characteristic in question in order to make a complaint about harassment. This

includes what would be covered in the above section 3.3.6 under "discrimination by association" and also in situations where it is assumed that a person has a characteristic which they do not have (if it is imputed).

Example – harassment based on imputed characteristic
A member of staff at a neighbourhood fast food outlet calls a teenage boy "Paki" when he comes into the shop. The staff member knows the boy was born in Britain and his family comes from Turkey, and he regards this name calling as just a joke. The boy has told him to stop, and now hates coming to the shop, especially with his mates, as he dreads being insulted and verbally abused for a characteristic he does not possess.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.117

The Committee would intend to follow the UK position, that a person may consider harassment to have taken place if inappropriate derogatory comments, gestures or actions (related to one of the grounds of protection) are made in their presence. These actions may not be directed at the person concerned (i.e. violating their dignity) but may cause offence or make them uncomfortable or fearful (i.e. creating a hostile environment).

3.5.4 "Purpose or effect"

The Committee intends that if it can be shown that the **purpose** of the conduct was to violate a person's dignity or create a hostile environment for the person – this is sufficient to show unlawful harassment has occurred.

Even if the conduct was not intended to violate a person's dignity or create a hostile environment, this may still constitute harassment if it has this **effect**.

When deciding whether the conduct in question has the effect of violating a person's dignity or creating a hostile environment the Committee would expect that the Tribunal would consider the perception of the individual who feels that they have been harassed, other circumstances in the case and whether it is reasonable for the conduct to have had that effect (i.e. whether the reaction seems entirely disproportionate or hypersensitive to the circumstances in question).

3.5.5 When might an employer or service provider be responsible for harassment?

The Committee proposes that employers (and service providers[131] where they are employers) may be responsible for harassment undertaken by their employee or agent. In certain cases that employee may also be liable (see section 7.8.8).

[131] As above, this is used in this section to include accommodation providers, education providers, and clubs and associations as well as providers of goods or services.

If the employer or service provider has taken reasonable steps to address harassment which has occurred and/or to prevent harassment from occurring then it is proposed that this would be a defence. Demonstrating this would usually require that they had a policy in place that addressed harassment and that this was put into practice[132].

Example – defending against a harassment complaint (1)
An employee experiences harassment at work when a colleague repeatedly mimics their impairment in a derogatory way. They raise the issue under the existing harassment policy. The issue is investigated by Human Resources personnel and disciplinary action against the perpetrator is taken, making clear that this behavior is unacceptable. The employer can use the fact that they had a policy and responded in line with it as a defence against their liability if the individual then sought to register a complaint of harassment against the employer under the discrimination legislation.

The Committee proposes that an employer could also avoid liability if they had no reason to know or expect that harassment is, was or might be occurring.

Example – defending against a harassment complaint (2)
An employee in a shop repeatedly experiences racial abuse by another staff member because of their ethnicity. This tends to happen when the shop is relatively quiet and when other colleagues are not present. The employee does not raise a complaint with their manager or mention what is happening. The employer cannot be held responsible as they could not reasonably know that harassment was occurring and so did not have an opportunity to respond to the situation.

For very small employers who do not have written policies in place or HR staff, the Committee would suggest that what is most important is that employees understand harassment is unacceptable and know who to speak to if something of concern arises.

To be clear, the Committee is not proposing that employers or service providers could ordinarily be held responsible for harassment where the perpetrator is someone other than an agent or an employee of theirs (for example, a customer, tenant, student or service user). This is called third-party harassment. However, the absence of a third party harassment provision does not necessarily remove the possibility of someone raising a discrimination complaint or a complaint under another section of the legislation if they feel that an employer or service provider's handling of a situation included different treatment or harassment on the basis of one of the protected grounds.

[132] Employers seeking further guidance on introducing a harassment policy could refer to the Employment Relations Service (2016) Employment Guide: Bullying and Harassment at Work. While this was drafted ahead of these proposals, the principles around introducing and implementing a harassment policy would be similar: https://www.gov.gg/employmentrelations

Example – harassment by third parties
A Black shop worker is subjected to a racially offensive term by a customer. When the worker complains to the shop owner, the owner says, "Sorry mate, but your lot have got to expect a bit of that around here now and again". The customer returns and continues to use the same term towards the worker. The shop owner may be liable for harassment related to race as his comments to the worker suggest that he thinks Black people should put up with racial abuse. Therefore, his lack of action, which has created an offensive environment for the worker, is motivated by the worker's race.
UK Equality and Human Rights Commission (2020) Sexual harassment and harassment at work – technical guidance, p.48

3.6 Protecting people from retribution (victimisation)

Policy objective: to ensure that people have access to their rights without fear of retribution.

It is important that people who seek to enforce their rights, or support others to do so, are not treated worse because of this.

The Committee is proposing that "victimisation" would be unlawful under the legislation. By victimisation the proposals mean situations where a person is dismissed, penalised or subjected to or threatened with any detriment on the grounds that they have sought to enforce their rights under this legislation or helped someone else to do so.

It is intended that protection from victimisation should apply from the earliest point at which something unlawful is alleged. It would include where a person had made a complaint; brought proceedings; represented or otherwise supported someone else to bring a complaint or proceedings; if they had given information to a person exercising a function under the legislation; or appeared as a witness or comparator in a proceeding; if they had opposed, by lawful means, an act which is unlawful in the legislation; or if they had given notice that they intended to undertake any of these actions.

This protection would not apply if the allegation was not made in good faith.

The Committee intends that if a person does show in a Tribunal that they have experienced victimisation this would be likely to attract a higher compensatory award than discrimination. This is because behaving in a way that discourages people from bringing complaints of discrimination undermines the legislation – and this is likely to be done knowingly.

Anyone can experience victimisation – it may not be on the basis of having a protected ground, it could be because a person has supported a complainant, for example.

Example – victimisation
An employee gives evidence on behalf of their colleague who is from an ethnic-minority in a racial discrimination hearing. Their employer then refuses to consider the employee for a promotion because of their support for their colleague. This could amount to victimisation, regardless of the ethnicity of the employee.

A restaurant owner refuses to serve a person who has registered a complaint of discrimination against the restaurant in relation to a previous event. This refusal is because of the complaint. This could amount to victimisation.

However, the Committee proposes that a mere sense of grievance would not be enough to establish a "detriment" to make a complaint of victimisation.

Example – unjustified grievance
A woman complains of sex discrimination when a trade union refuse to nominate her as a representative. She loses the case and the Tribunal decides that she was not nominated as a representative because another candidate was better qualified for the role. At a union meeting after this ruling, she asserts that she has been discriminated against. People respond to her comments saying that the reason for her not being selected was not her sex. Her sense of grievance does not amount to a detriment, so she could not complain she has been victimised.

3.7 Positive action to promote a more inclusive society

Policy objective: to allow people to take action to promote equality and address systemic disadvantage, while balancing this against fair treatment for all individuals.

3.7.1 Positive discrimination

It should be noted that positive discrimination (i.e. treating a person preferentially because of a characteristic) could not be challenged if a disabled person was treated more favourably than a non-disabled person because of their disability, or if a person who has carer status were treated more favourably than a person who does not have carer status. This is because people who are not disabled and people who do not have carer status cannot register complaints based on those grounds (see section 3.3.1). This reduces the risk for employers or service providers who make adjustments to include carers and disabled people that formal complaints will be made by others who misinterpret necessary adjustments to provide equal opportunity as unfair preferential treatment.

However, this does not mean that the Committee recommends using disability or carer status as a sole determining factor in recruitment or selection.

3.7.2 What positive action would be permitted?

The Committee proposes that positive measures based on any of the protected grounds is permitted (but not required) provided that the action is adopted with a view to ensuring full equality in practice and that one of the following is true:

- it is intended to prevent or compensate for disadvantages linked to any of the protected grounds.
- it is intended to promote equality of opportunity on any of the protected grounds.
- it is intended to cater for the special needs of persons, or a category of persons, who, because of something related to a protected ground may require facilities, arrangements, services or assistance not required by others.
- it is intended to remove existing inequalities that affect people's opportunities.

However, the Committee does not intend that positive action should go so far as the use of quotas in recruitment or appointments, though targets may be set. By quotas it means that a certain proportion of the appointments will be reserved for people with a particular characteristic and that these spaces are reserved no matter how qualified other candidates are. By targets it means a system by which an organisation might aspire to a specified level of diversity - trying to achieve this through attracting applications from people in under-represented groups who are qualified candidates. In a target system, the characteristic is only one factor considered in the appointment amongst many, and not the determining factor, which means that a target might not be met.

The Committee also does not intend that a person's protected characteristic should be the sole criteria for selection for a role, job, place or position (unless this is a genuine and determining occupational requirement, see section 4.6.2). Diversity may be considered as one criterion amongst others in applications, and may be the determining factor in an appointment, other things being equal. However, employers and others seeking to recruit, select or appoint someone to a role or position must not automatically and unconditionally give priority on the basis of a ground of protection.

3.7.3 Challenging a positive action policy

If a person thinks that they have been discriminated against in the operation of a positive action policy and that the policy is not reasonably founded on one of the points outlined in 3.7.2 above (and, as explained in 3.7.1, they are not a non-disabled person or a person without carer status trying to make a claim on those grounds), then it is intended that they could bring a complaint of direct discrimination.

The person or organisation who operates the policy would have to show evidence that their scheme fits within the criteria outlined above in section 3.7.2. This evidence should be reasonably up to date. If circumstances change and a group no longer face the same disadvantage that the action was set up to address, then the action should be reviewed as it may no longer be necessary. Evidence that the scheme is having a positive impact towards its stated aims would also be likely to be beneficial in defending the scheme

should it be challenged at a Tribunal or a complaint be brought forward (provided the stated aims are sound).

It may be advisable, if this legislation is progressed, for any organisation considering positive action to produce a brief action plan before doing so. The plan should outline: the circumstances which led the organisation to think that the action is necessary; the justification and reasons for the action and any rationale which led to the justification including the desired outcomes; what options were considered; what steps will be taken; how this will be monitored and what the review period is.

3.7.4 Examples of Positive Action

Positive action could include (but is not limited to):

- stating in advertisements that applications from under-represented or otherwise disadvantaged groups are welcomed (for example, “disabled people are welcome to apply”).
- advertising in places which are likely to be seen by the target group or undertaking outreach work to particular communities to raise awareness of opportunities.
- providing opportunities for a target group to find out more – internships, open days, management shadowing, taster sessions or targeted measures to increase uptake of a service.
- providing training opportunities or services for a target group to meet particular needs (i.e. English as a Foreign Language to workers of other nationalities; IT skills for older people).
- providing crèche facilities.
- mentoring.
- work-based support groups for employees that share needs.
- setting targets for increased participation (but not quotas).
- providing targeted grants or bursaries to obtain qualifications or participate in events, competitions, etc.
- providing networking opportunities for people with a particular characteristic.
- providing services aimed specifically at disadvantaged groups.
- providing services in different times or locations.
- reallocating resources to make services available at a different time or place.
- improving the content of information or advice to make it more relevant for a particular group.

Positive action does not include: making existing staff redundant for the purposes of hiring under-represented groups; using quotas or reserving jobs for particular groups; or appointing a person to a role on the basis of a protected characteristic where someone else is better qualified.

3.8 Discriminatory advertisements

Policy objective: to ensure that advertising aligns with the aim to promote equality of opportunity.

3.8.1 Unlawful advertising

The Committee proposes that advertisements which indicate an intention to discriminate will be unlawful.

Anything which could be reasonably understood to indicate an intention to treat a person differently based on one of the protected grounds in recruitment, at work or when providing a service would be unlawful. This would apply unless there is a legal and legitimate reason to reference a protected ground (for example, if there is a genuine and determining occupational requirement – see section 4.6.2 below).

This includes advertisements which imply certain requirements (such as implying someone must have a certain nationality when the job requirement is that they are fluent in a certain language), or where pictures or photographs are required.

The Committee expects that people that are in the business of publishing advertisements would make themselves aware of the discrimination legislation. Consequently, it is proposing to retain the position in the Sex Discrimination Ordinance, that they may be liable if they publish something which they should have realised was discriminatory. However, if someone makes a statement to them which leads them to think that an advert is legal and they publish it - providing that it would be reasonable for them to rely on that statement - they will not be liable (see section 7.8.8 on joint liability below).

The Committee is proposing that a person who knowingly makes a false statement in order to get a discriminatory advert published could be subject to a civil penalty, that could be issued by the head of the Employment and Equal Opportunities Service (see section 7.2.1).

Example – publishers of advertisements

A media company is asked to publish a job advert on their website and in a local business magazine. The advert specifies that only local, Guernsey applicants need apply. The company queries whether this is discriminatory, but the writer of the advert says that they have confirmed that this is a genuine and determining occupational requirement for this role and have sought legal advice on this. The writer of the advert knows that this is not correct. It is true that it is an essential requirement of the role that the person appointed have an employment permit under the population management regime. Having an employment permit is not the same as being a “local, Guernsey person”. The recruiter knows this and does not want to hire

a person that, they feel, is not a person of Guernsey origin due to concerns that they might not "fit in", so they have purposefully phrased it in this way. Unaware, the media company publish the advert. When the advert is published a complaint is made that it constitutes race discrimination.

If the Tribunal feel that the statement about the genuine and determining occupational requirement could be reasonably relied upon, then the media company would not be liable. However, the person who wrote the advert and sought to have the advert published by giving false information could be issued with a civil penalty, regardless of whether an individual brings a complaint.

3.9 Causing, instructing or inducing another person to undertake a prohibited act

Policy objective: to ensure people who cause, instruct, or induce another person to carry out discriminatory behaviour can be held appropriately responsible.

3.9.1 Causing, instructing or inducing discrimination

The Committee intends that the legislation would prohibit anyone causing, instructing, or inducing another person to do anything prohibited by the legislation in relation to a third person, or attempting to do so. It does not matter whether the cause, instruction or the inducement is direct or indirect. It does not matter whether the prohibited behaviour actually happened or not.

Example – procuring discrimination
When recruiting to a post a manager instructs a recruitment agency not to refer anyone with care responsibilities. This is unlawful.

The Committee expects that people should make themselves aware of the discrimination legislation. Consequently, an individual who acts on an inducement or instruction of another person may be liable if they do something that they should have realised was discriminatory. However, if they were misled - providing that it would be reasonable for them to rely on that misleading information - they will not be liable (see section 7.8.8 on joint liability below).

In some cases the fact that someone has caused, instructed or induced another person to undertake a prohibited act will become apparent when an individual who has been discriminated against makes a complaint. However, even in the absence of a complaint, the head of the Employment and Equal Opportunities Service could issue a civil penalty if they become aware of this occurring. This would cover situations where it is clear someone has sought to cause, instruct or induce discrimination but no individual makes (or is able to make) a complaint.

Section 4: Employment

This section provides more detail about how and when the proposed legislation applies to employment.

4.1 Who counts as an employer?

4.1.1 Who counts as an employer?

The Committee intends to take a wide definition of employment which extends to a-typical and casual workers. This might extend to certain contexts where a person is described as self-employed but would not extend to cases where self-employed persons are better understood as having a customer to service provider relationship with their clients.

Protection also includes recruitment situations where someone is seeking to enter into a contract of employment with someone who will work for them even if they have not commenced employment.

The Committee intends that the legislation would apply to businesses of all sizes, including small businesses. It would also apply to situations where an individual employs another person to do work for them (such as hiring a personal care assistant). However, it is recognised that small businesses often function differently. The Tribunal will take into account the size of a business when adjudicating complaints, noting that small businesses might use more informal practices to manage staff, with fewer written policies. Small businesses may have less access to HR and occupational health advice. They might also have less available funding for adjustments or support for employees. All of these factors should be taken into account when adjudicating cases.

As is the case at present, a person should be able to make a complaint against an employer if they no longer work for that employer, provided this is within the time-limits given in section 7.6.5 below.

4.1.2 Probationary periods

Unfair dismissal legislation may only apply once a person has been employed by their employer for a year. This is unless the circumstances of the dismissal fall within one of the categories which are considered to be “automatically unfair” (such as dismissal on the ground of being pregnant), in which case a year’s service is not required. The Committee proposes that the discrimination legislation should also apply immediately, without the need for a claimant to have reached a qualifying period. It will also apply in relation to recruitment and advertising. This would be the same as under the existing Sex Discrimination Ordinance.

4.1.3 Different treatment for legitimate reasons not discrimination

Nothing in the proposals shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual is not, or is no longer, fully competent and available to undertake, and fully capable of undertaking, the essential functions of the job (see section 4.2.4), having regard to the conditions under which those functions are, or may be required to be, performed.

Therefore, it would not be discriminatory to dismiss a person in the circumstances outlined in the paragraph above, provided that proper procedures were followed. However, if the employee had a disability, the employer would need to check whether the person could do the job with a reasonable adjustment.

4.2 When must employers not discriminate?

Policy objective: to ensure that everyone has equality of opportunity to access, progress in and retain work.

4.2.1 Discrimination in employment

These will be discussed in more detail below, but as an initial outline – the Committee proposes that an employer should not discriminate on any of the protected grounds in relation to:

- job advertising (discussed in section 3.8),
- access to employment (including recruitment),
- terms and conditions of employment,
- equal pay (discussed in section 4.5),
- vocational training and work experience,
- promotion or re-grading,
- classification of posts, and
- dismissal.

This means that an employer should not have rules or give instructions which would result in discrimination in any of these areas. They should also not apply or operate a practice which results or would be likely to result in discrimination.

An employer would have a responsibility not to discriminate against both their existing employees and also job applicants when they are recruiting.

Employers would also be required not to harass or sexually harass employees or job applicants; not to victimise employees or job applicants; not to issue discriminatory advertisements; and not to cause, instruct or induce another person to do something prohibited under the legislation (as outlined in sections 3.5, 3.6, 3.8 and 3.9 above).

4.2.2 Access to employment

It is suggested that access to employment is framed broadly.

The Committee intends that this would include (but would not be limited to):

- not issuing advertisements which are discriminatory,
- not setting standards that a category of people have to meet to get a job that others do not have to meet to get the same job, promotion or training opportunity,
- not discriminating in application processes, interviews or any other processes which are used to determine who should be offered a job, promotion or training opportunity, including in the job specification and in the application of selection criteria which indirectly discriminate,
- not making enquiries about an applicant which could be reasonably understood as indicating an intention to discriminate, and
- not using or circulating an application for employment in a way which could be reasonably understood as indicating an intention to discriminate.

The Committee intends that during the recruitment process, reasonable adjustments should be made for disabled people, where appropriate and necessary, and where the adjustments are not a disproportionate burden on the employer to provide. The provision of a reasonable adjustment would not be considered discrimination against an applicant who did not need that adjustment.

4.2.3 When can an employer ask about the protected grounds in recruitment?

What the Committee is proposing does not specify all of the circumstances in which an employer can ask about protected grounds in recruitment but if they are asking about a protected ground, it is suggested there should be either: a legitimate reason covered by the new legislation for them to ask about it; or it should be for diversity monitoring purposes. However, for diversity monitoring an employer should be able to show that the part of the application asking about grounds is kept confidential and not used in the selection process or seen by the members of the interview panel. A person must not ask something which could be reasonably understood as indicating an intention to discriminate.

Legitimate reasons to ask about protected grounds under these proposal would include:

- information about a person's employment permit or immigration status,
- information needed to make a reasonable adjustment to the recruitment process (if an adjustment is requested),
- questions that need to be asked in order to implement positive action measures (see section 3.7),
- information needed to determine whether someone meets a genuine and determining occupational requirement (see section 4.6.2 below), or
- information needed to determine if someone can undertake one of the essential functions of the job.

Example – essential functions of the job
A scaffolding company asks applicants whether they can climb ladders (with a reasonable adjustment, if necessary) to a significant height (including if there is any reason why climbing ladders would put the individual or others at risk). The ability to climb ladders and scaffolding is intrinsic to the job. This is not discrimination against disabled people who cannot climb ladders.

If a person discloses a disability they may be asked questions about their disability only in relation to legitimate reasons under this legislation (including the above). Questions should focus on what reasonable adjustments are needed and if a person can undertake the essential functions of the job. Recruiters should not stray into questions unrelated to this.

Example – disclosing a need for a [reasonable] adjustment
At a job interview for a research post, a disabled applicant volunteers the information that as a reasonable adjustment he will need to use voice activated computer software. The employer responds by asking: "Why can't you use a keyboard? What's wrong with you?" This would be an unlawful disability-related question, because it does not relate to a requirement that is intrinsic to the job – that is, the ability to produce research reports and briefings, not the requirement to use a keyboard.
UK EHRC (2011) Equality Act 2010: Employment - Statutory Code of Practice, p.130

This means that under these proposals, apart from in the circumstances listed in bullet points above, asking employees general questions about health (including about sickness absence) before offering them a job could indicate an intention to discriminate – whether on an application form or in an interview. This includes referring someone to a doctor or occupational health professional before offering a person a job.

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

It would be permissible under these proposals to conditionally offer a job to a person subject to pre-employment health enquiries. However, it should be noted that if a disability has no impact on the ability of the person to do the essential functions of the job, or to do the job safely, there should be no obligation to disclose it. Health enquiries should not be used to directly discriminate against people who are found to have disabilities. They may be used to help to identify required reasonable adjustments. Offers of employment may be withdrawn if it is found that an individual could not undertake one or more of the essential functions of the role – but reasonable adjustments must be considered prior to doing so.

Example – pre-employment health enquiries
A job applicant is conditionally offered a job and referred to occupational health before that offer is confirmed. Occupational health identify that the applicant experiences significant anxiety. The offer of the employment is immediately withdrawn without considering whether the individual could do the job or if reasonable adjustments are needed. This is likely to constitute direct disability discrimination.

4.2.4 Essential functions of a job

As outlined in 4.1.3, nothing in the proposals shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual is not, or is no longer, fully competent and available to undertake, and fully capable of undertaking, the essential functions of the job, having regard to the conditions under which those functions are, or may be required to be, performed.

It is important that for any jobs advertised, careful thought is given to what the essential functions of the job are. It is suggested that consideration should be given to the employer's judgement as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description should be considered evidence of the essential functions of the job.

It may be possible for a person to challenge an organisation if they exclude a person because they cannot fulfil the essential functions of a job, when it seems that those functions are not, in fact, essential. If the Tribunal is considering a complaint where a job function is challenged the Committee would expect them to consider: if the function is essential; if the job description was written before the job was advertised; how much time is spent performing the function in question; what the consequences of not requiring the person to perform the function would be; the terms of any relevant collective bargaining agreements held between the employer and trade unions; and the work experience of others who have held, or currently hold, the same or similar positions.

Example – essential functions of a role
A company advertise for a person to join a team in the post-room of their office. They include in the job description that the individual must be able to climb ladders. This is for the purpose of accessing the top shelf of the stationery store. They reject an applicant who is unable to climb ladders. This is despite the fact that there is space in the cupboard to rearrange stationery to a lower shelf. The applicant may be able to register a complaint of disability discrimination as climbing a ladder is not, as is claimed, an essential function of the role.

A disabled person should be considered to be able to do the essential functions of the role if they can do so with a reasonable adjustment and where these adjustments are not a disproportionate burden on the employer to provide (see section 6.2).

4.2.5 Terms and conditions of employment

The Committee proposes that employers should make sure that all employees, in circumstances which are not materially different, should have the same terms of employment, working conditions and treatment in relation to overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals, and disciplinary measures.

"Terms and conditions" include working hours, leave entitlements, bonuses, and access to health insurance, benefits in kind or occupational pensions.

Variations in terms and conditions which are reasonable adjustments will not be considered discrimination against employees who do not need those adjustments.

Equal pay is discussed in section 4.5 below.

4.2.6 Vocational training and work experience

The Committee proposes that employers should make sure that employees, in circumstances which are not materially different, have the same opportunities or facilities for employment counselling, training (whether on or off the job) and work experience.

Reasonable adjustments to support a person to access training will not be considered discriminatory against employees who do not need those adjustments.

4.2.7 Promotion or re-grading

The Committee proposes that if an employer is offering an opportunity for promotion they should allow all employees equal access to these opportunities through the same routes, regardless of their characteristics falling within the protected grounds.

Reasonable adjustments to support people to participate in an opportunity for promotion will not be considered discrimination against people who do not need those adjustments.

4.2.8 Dismissal

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

4.3 Contract workers

4.3.1 What is a contract worker?

By "contract worker" the proposals mean a person who is supplied to work for "a principal" but is employed by someone other than the principal. This would include a range of situations including secondments of staff from one company to another organisation, where the original organisation still employs the staff member (in which case, the organisation seconded to is the principal, and the organisation providing the secondee is the employer) and agency workers who are employed and paid by an agency but work for an organisation who contracts with the agency (in which case, the organisation that they work for that contracts with the agency is the principal and the agency is the employer).

The Committee proposes that employers of contract workers are subject to the same duties as other employers (as outlined above).

4.3.2 Duties of principals

The Committee proposes that a principal should not discriminate against or victimise a contract worker on the basis of any of the grounds of protection:

- in the terms on which the principal allows the contract worker to work,
- by not allowing the contract worker to do, or continue to do the work,
- in the way the principal affords the contract worker access to benefits in relation to contract work, or by failing to afford the contract worker access to such benefits, or
- by subjecting the contract worker to any other detriment.

The Committee also intends that it would be unlawful for a principal to harass or victimise a contract worker as outlined in section 3.5 and 3.6 above.

4.3.3 Reasonable adjustments for contract workers

The Committee proposes that an employer of a disabled contract worker would have a duty to make reasonable adjustments in relation to their own policies, practices, premises, etc. where a contract worker would be substantially disadvantaged by these. The employer (e.g. agency, seconding organisation) would also be responsible for reasonable adjustments in situations which would be common across principals for which the contract worker is working.

Example – reasonable adjustments for a contract worker

A blind secretary is employed by a temping agency which supplies her to other organisations for secretarial work. Her ability to access standard computer equipment places her at a substantial disadvantage at the offices of all or most of the principals to whom she might be supplied. The agency provides her with an adapted portable computer and Braille keyboard, by way of reasonable adjustments.

UK EHRC (2011) Equality Act 2010: Employment - Statutory Code of Practice, p.143

The proposals suggest that principals would also have responsibility to provide reasonable adjustments which go beyond what the employer should provide as outlined above. This could be for circumstances which require adjustment which are specific to the principal (for example, ensuring specialist software can interface with an IT system or the arrangement of furniture in an office being adjusted slightly to allow wheelchair access). If a contract worker is only working with a principal for a very short time, this might influence what adjustments are considered a disproportionate burden for that principal to provide. It would be good practice for the principal and employer to cooperate in ensuring that reasonable adjustments are made as needed.

4.4 Employment agencies, trade unions and others with responsibilities

Policy objective: to ensure that everyone has fair access to opportunities, training, professions and positions of responsibility.

4.4.1 Introduction: other parties not to discriminate in employment

The proposed duty not to discriminate in employment would be intended to extend beyond employers. Duties not to discriminate also extend to (discussed in more detail below):

- employment agencies,
- people or organisations providing vocational training,
- trade unions,
- organisations of employers,
- professional bodies or professional associations,
- organisations controlling entry to professions, vocations or occupations,
- partnerships,
- personal office-holders (e.g. company directors), and
- public office-holders.

4.4.2 Employment agencies

In these proposals the Committee intends that employment agencies include people or organisations who provide services to help prospective employees find employment (e.g. recruitment agencies) and also those who supply employees to others (e.g. temp agencies). Employment agencies who employ and supply workers to others would have duties as employers as outlined in section 4.2 and 4.3 above.

In addition, it is proposed that employment agencies should not discriminate against people who seek their services to help them to obtain employment with another employer. They should also not discriminate against anyone who seeks career guidance or other services in relation to employment from them, including training.

Employment agencies would have an additional defence. If an employment agency is given a statement by an employer (which they could reasonably rely on) that an action they were taking on behalf of an employer (e.g. in relation to a job that they were recruiting for) was lawful under the discrimination legislation when in fact it was not, the employment agency would not be liable for any resulting discrimination, so long as it was reasonable for the employment agency to rely on the statement. However, if the employer knowingly made a false statement in order to make the employment agency act in a discriminatory way this could result in the employer being issued with a civil penalty by the head of the Employment and Equal Opportunities Service (see section 7.2.1). This might be in addition to having to respond to a discrimination complaint, if one were brought forward.

This defence is unlikely to apply in cases where the instruction to discriminate is blatant. For example, if an employer told an employment agency that they wanted a new receptionist who was British, this would clearly be discriminatory and if the employment agency complied with this wish they may also be liable since it is reasonable to assume that they should be able to identify this as discrimination and have some awareness of their obligations under the legislation (see section 7.8.8 on joint liability). The defence could apply to more complex situations where the employment agency may not have all the information available to know whether, for example, there was a genuine and determining occupational requirement (see section 4.6.2 below) in relation to a role and they are relying on a statement from an employer that there is.

The proposed legislation would permit employment agencies to provide services specifically for disabled people or a particular category of disabled people without this being considered discriminatory.

4.4.3 Vocational training

The Committee proposes that people or organisations who offer vocational training should not discriminate on the basis of any of the protected grounds:

- by offering the course on different terms,
- by giving access to a facility on different terms,
- by refusing (or omitting to offer) access to a course or facility,
- in the way in which a course or facility is provided,
- by terminating the training,
- by subjecting a person to any detriment during the course of the training, or
- by publishing discriminatory advertisements in relation to a course or facility (see section 3.8).

The provision of a reasonable adjustment would not amount to discrimination against a person who does not need an adjustment.

Vocational training providers may also have duties not to discriminate as an education provider (see section 5.3 below).

It would not be a defence for a vocational training provider to say that they were instructed to discriminate by an employer or trade union.

4.4.4 Trade unions, employer organisations and professional bodies

The Committee proposes that any organisation of employees or employers, professional organisation, trade union or organisation that controls entry to a profession should not discriminate on the protected grounds in relation to:

- membership,
- benefits provided by the organisation related to entering or carrying on in that profession, vocation or occupation, or
- advertising (see section 3.8).

4.4.5 Partnerships

Partners in a partnership have the same rights from the partnership as employees do from employers (as laid out in section 4.2).

4.4.6 Personal office holders (e.g. Company Directors)

In some situations someone will be appointed to an office through a formal mechanism that does not fall easily within the usual employer/employee relationship.

A personal office holder is someone who is appointed to discharge a function, for which they receive some remuneration (rather than just for travel expenses, for example). Examples of personal office holders might include directors or non-executive directors, sometimes company secretaries, and sometimes ministers of religion. Personal office holders might not be "an employee" of the organisation. If a personal office holder is also an employee, they should be treated as such for the purpose of these proposals.

Those responsible for appointing to personal offices must not discriminate on any of the protected grounds, victimise or harass prospective office holders:

- when making arrangements for deciding whom to offer the appointment,
- in the terms on which the appointment is offered, or
- by refusing to offer a person an appointment.

Similarly, if others are responsible for recommending names for appointment they should not discriminate in the process of recommendation.

Once appointed, those responsible should ensure that office-holders are not discriminated against based on the protected grounds:

- in the terms of the appointment,
- in the opportunities which are afforded (or refused) for promotion, transfer, training or receiving any other benefit, facility or service,
- by terminating their appointment, or
- by subjecting the person to any other detriment.

As with other sections, when considering personal office holders these proposals take "discrimination" to include a failure to provide a reasonable adjustment for a disabled person to hold an office.

4.4.7 Public office holders

A public office holder is a person appointed to undertake a public function by the States of Deliberation, States of Election, a Committee of the States of Guernsey, or the Royal Court, where the person may receive some remuneration or compensation but is not "an employee" of the States of Guernsey. This might include people appointed to Tribunal positions or directors of arms-length public bodies. This is not intended to include States Members.

The duties of those that appoint or make arrangements for public office holders are the same as outlined above for personal office holders. This is with the exception that it is not discriminatory where the States of Election, States of Deliberation or Royal Court terminate an appointment.

As with other sections, when considering public office holders these proposals take "discrimination" to include a failure to provide a reasonable adjustment for a disabled person to hold an office.

4.5 Equal work, equal pay and equal treatment

Policy objective: to ensure that people are not disadvantaged in the terms and conditions of their employment because of a protected ground.

4.5.1 Introduction

The Committee proposes that the legislation allows employees to compare themselves to others working for the same, or an associated, employer in Guernsey. If an employee can identify other employees doing equal work who differ in respect of a protected ground and also have higher pay, the person can seek to have their pay increased to that level. It will be unlawful for an employer to establish or maintain differences in pay between employees based on any of the protected grounds. If a pay discrepancy is found and the employer reduces the pay of the comparator as a consequence, rather than increasing the pay of the complainant, this would be considered victimisation of the comparator.

This section explores the detail of what this means. Please note that this section does not cover equal pay for work of equal value which the Committee is not proposing to introduce until a later phase and which would only be introduced in relation to the ground of sex.

4.5.2 What is equal work?

The relevance in the proposals of defining "equal work" is exclusively to do with how equal pay complaints are determined. The Committee is proposing that people are considered to do equal work when they do the same work in the same or similar conditions.

Example – equal work (1)
Two employees work for the same cleaning company in the same office under the same contract of employment. There are no significant differences in what they do or in the conditions under which they work. They do equal work.

However, the concept goes further than this. It would also be considered equal work where two people are doing work of a similar nature and the differences in the work performed or the conditions under which it is performed are either of small importance or the different duties are performed infrequently when considering the work as a whole.

Example – equal work (2)
In a team of employees working in a supermarket, men are paid more. The work that they do involves the same tasks as their female colleagues. However, the men occasionally lift heavier items than the women. This may be found to be equal work.

An employer might be able to defend a case where an employee is paid more for similar work if this work involves more responsibility, additional duties, additional skills, if it is work carried out at different (e.g. more unsociable) hours, if it requires further training or more physical effort. Workload in itself does not necessarily mean that work is not similar if responsibility and other factors are the same. As above, a lot may depend on how frequently these differences arise in practice – if someone technically has an additional duty, but in practice is rarely asked to perform that duty, it may not be a significant difference.

To be clear, the Committee is not proposing introducing equal pay for work of equal value in relation to carer status, disability or race. The concept of equal work included here does not go so far as to compare the value of roles which might be substantially different.

4.5.3 What is equal pay?

For these proposals pay includes pay and also any other financial benefits associated with a job. This could be cash benefits (such as bonuses) but could also be benefits in kind (such as accommodation or a company car) and pension contributions or rights.

The duty to provide equal pay is a duty to make sure that employees who are doing equal work (as defined in section 4.5.2) have equal pay. The Committee proposes that employers should not establish or maintain differences in pay between employees on the basis of any of the protected grounds.

For equal pay complaints, it does not matter whether the difference is intentional, the effect is what is important. The difference in pay may be due to indirect discrimination (as in the example given below).

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

4.5.4 What is equal treatment?
Equal treatment is making sure that staff who are doing work that is not materially different have the same terms and conditions. The Committee intends this to cover, for example, working hours, holiday entitlement, rest breaks and so on. It is proposed that employers should not establish or maintain differences in terms and conditions between employees on any of the protected grounds (unless this is the result of positive action (see section 3.7), reasonable adjustment or other situations specified as legitimate in these proposals).

As with equal pay, when it comes to equal treatment the Committee proposes that it should not matter whether the difference is intentional, the effect is what is important.

Note that the standard for equal treatment outlined is different from equal pay. For equal pay, equal work is defined in section 4.5.2. For equal treatment it must be established that work "is not materially different".

4.5.5 Who can an employee compare themselves to?
In order to make an equal pay or an equal treatment complaint an employee must compare themselves to another person "the comparator". It is proposed that a comparator should meet certain criteria:

- The complaint should be based on one of the protected grounds, so the comparator should have a different characteristic to the person making the complaint (i.e. a person from Guernsey could compare themselves with someone of a different national origin).
- They should both work for the same employer or an associated employer operating in Guernsey. Associated employers would cover different branch offices of a parent company, for example – if both branches are in Guernsey.
- For equal pay only (but not equal treatment) the complainant and comparator should have been employed within three years of each other. This would mean that someone's predecessor or successor in the role (providing the role description and work conditions were unchanged) could be used as a comparator.
- Usually in direct discrimination cases it is possible to use a "hypothetical

comparator". "Hypothetical comparators" can be used in equal treatment cases. However, in equal pay complaints, it is proposed that the comparator must be a real person.

4.5.6 What is an equal pay clause or an equal treatment clause?

Usually pay and conditions would be included in a contract of employment. The Committee proposes that the legislation should prevent people from contracting out of their right to non-discrimination.

An equal pay clause is one which states that it is unlawful for the employer to establish or maintain differences in pay between employees on any of the protected grounds.

An equal treatment clause is one which states that it is unlawful discrimination for an employer to establish or maintain differences in terms and conditions between employees on any of the protected grounds.

The proposal is to allow the Tribunal or Court to read a contract as if it included both an equal pay clause and an equal treatment clause, whether or not it did actually include one. The Tribunal or Court could allow the equality clauses to override any clause which conflicts with equal pay or equal treatment.

4.5.7 What happens if someone's complaint is upheld by the Tribunal?

If someone's complaint were to be upheld by the Tribunal or Court, the order that they issue might vary by case, but the Committee is proposing that this could include a requirement to improve the pay or terms and conditions of the complainant(s) so that they are the same as the person that they are comparing themselves with. It may also involve paying arrears for the difference in pay, where relevant, for up to six years prior to the complaint being registered. However, pay or arrears could not be claimed for any time before the law came into operation (so, for example, if the relevant part of the law had only been in force for two years, a person could only claim two years arrears, not six).

4.5.8 When can you pay people differently or have different terms and conditions for staff?

The Committee would like to clarify when these proposals would not affect differences in pay, terms and conditions:

Firstly, if two people are not doing equal work (regarding pay) or if they are doing work which is "materially different" (regarding equal treatment) then it is intended that this can provide a basis for different pay or terms and conditions respectively.

Secondly, it is proposed that the kinds of discrimination outlined in section 3 apply to equal pay and equal treatment. This means that there are differences in how an employer might defend against a complaint. The difference in pay, or terms and conditions, could be based on a protected ground (direct discrimination), or the result

of an apparently neutral provision resulting in a disadvantage which is related to a protected ground (indirect discrimination). There would be nothing to prevent an employer paying different rates of pay so long as it is not related to one of the protected grounds, and that it does not amount to indirect discrimination (see below).

For direct discrimination – where the difference in pay or terms and conditions is clearly linked to a protected ground – this should only be permissible where there is an "exception" - the proposed exceptions are listed in section 8 of this appendix. However, there are currently no exceptions in relation to pay on the grounds of race, carer status or disability.

For indirect discrimination, if an apparently neutral rule is applied but this has the effect of being discriminatory it must be objectively justified (see section 3.4.2 for details). This means that there must be a legitimate aim and that the rule applied is a proportionate means of achieving that aim. This may permit the use of incremental pay increases in relation to length of service or performance related bonuses, for example. However, if challenged, whether or not these are lawful will depend on the circumstances and whether, in that context, they are objectively justified.

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

4.5.9 What about part time staff?

Carers and disabled employees might be over-represented in part time work. This means that if an employer pays part time staff less pro-rata than a full time staff member, or if they have different, less favourable, terms and conditions this could be indirect discrimination.

This is already implicit within the existing Sex Discrimination Ordinance. For this reason the Employment Relations Service currently recommend that employers ensure part time employees' pay, and terms and conditions are the same (pro-rata) as for full time employees[133]. These proposals, if accepted, would strengthen but not change that advice.

[133] Employment Relations Service (2016) "Employment Guide: Sex Discrimination in the Workplace", available at: https://www.gov.gg/employmentrelations

4.5.10 Discussing pay with colleagues or trade union representatives

Employers sometimes write pay secrecy clauses into contracts to prevent employees from disclosing their pay. The Committee believes that there are limits to the extent that employers should be able to enforce pay secrecy clauses in contracts. It is intended that anyone who discusses their pay with a colleague, former colleague or trade union rep in order to understand the extent to which a difference in pay is linked to a protected ground would not be subject to such clauses.

Example – discussing pay

A worker [from a minority ethnic background] thinks he is underpaid compared to a white colleague and suspects that the difference is connected to race. The colleague reveals his salary, even though the contract of employment forbids this. If the employer takes disciplinary action against the white colleague as the result of this disclosure, this could amount to victimisation. But if he had disclosed pay information to the employer's competitor in breach of a confidentiality obligation, he would not be protected by the [Ordinance].

UK EHRC (2011) Equality Act 2010: Employment - Statutory Code of Practice, p.192

4.6 When is it lawful for an employer to make a decision or base an action on a protected ground? What defences do employers have if a complaint is made against them?

Policy objective: to ensure that employers can make appropriate employment decisions based on performance, capability and other relevant factors and take into account personal characteristics in appropriate circumstances.

4.6.1 When is it lawful for an employer to make a decision or base an action on a protected ground? What defences do employers have if a complaint is made against them?

As outlined in section 3.4 the Committee is proposing that there would be a number of legitimate ways in which an employer could make a decision or take action based on the protected grounds. These include in relation to:

- positive action (see section 3.7),
- the provision of a reasonable adjustment (which is not discrimination against a person who does not need that adjustment),
- where the difference between employees is a result of the fact that the essential functions of their respective roles are different (see section 4.2.4) or where someone is unable to fulfil the essential functions of a job,
- where there is a genuine and determining occupational requirement (see section 4.6.2 below), and
- where the action falls within one of the listed exceptions (see the exception list in section 8).

There are also some lines of defence that an employer could take, should a complaint arise:

- a failure to provide a reasonable adjustment, or discrimination arising from disability where an employer did not know and could not be reasonably expected to know the person was disabled (see section 6.2.4),
- a denial of a reasonable adjustment that would be a disproportionate burden for the employer to provide (see section 6.2.5),
- indirect discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2), and
- In harassment cases, an employer can use as a defence that they sought to prevent their employees from being harassed and responded appropriately to harassment when it arose – this may involve the introduction and implementation of a harassment policy (see section 3.5).

The Committee intends that an employer would never be expected to employ or retain someone who does not have the capacity and capability to undertake the essential functions of a role (with a reasonable adjustment, where applicable) – see section 4.1.3.

4.6.2 Genuine and determining occupational requirement

There are a limited range of circumstances in which an employer may have a strong and justifiable reason why a job must be done by a person of a particular description, which requires selection based on one of the protected grounds. Where justification for this does not fall within the specified list of exceptions in section 8 of this appendix, it is proposed an employer would need to demonstrate a "genuine and determining occupational requirement".

Genuine and determining occupational requirements can be used in relation to recruitment, and who is offered a job or promotion. In a very limited range of circumstances they might be used in a dismissal – usually if a characteristic is demonstrably required and the person, when hired, had that characteristic but no longer has it. Genuine and determining occupational requirements should never be used to justify differences in terms and conditions or pay between people doing jobs where the role is not materially different or (for pay) where it is deemed "equal work" (as defined above).

The Committee suggests that genuine and determining occupational requirements should be applied sparingly. For example, if there are some duties of a job which require a person with a particular characteristic to undertake them, but this is required infrequently, and someone in the team already has the required characteristic and can undertake the role, then it may not be necessary to apply this requirement to a new recruit.

4.6.3 Objective justification for genuine and determining occupational requirements

The Committee proposes that in order to justify a genuine and determining occupational requirement it would be necessary to show that it is:

- required in pursuit of a legitimate aim, and
- is a proportionate (i.e. appropriate and necessary) way of achieving that aim.

Example – genuine and determining occupational requirement

A charity that supports people with visual impairments seeks to recruit an outreach worker who currently has or previously has had a substantial visual impairment. They consider this crucial to the job because they feel that the needs of their clients can only be met by an outreach worker who has shared their lived experience. It is likely that this would be considered a genuine and determining occupational requirement because there is a legitimate aim and lived experience is not easy to replicate – so requiring it is a proportionate way of achieving that aim.

More about the use of objective justification can be found in section 3.4.2.

Section 5: Goods, services, education, accommodation, clubs and associations

5.1 Introduction

In addition to employment, the Committee intends that the legislation will make discrimination unlawful in service provision contexts.

In order to make it easier to find the section which is relevant to readers, this section is split into four areas. In each area consideration is given to who falls within the scope of the proposals in that area, what duties they might have, and what the defences might be for that area. The four areas are:

- providers of goods or services,
- education providers (noting that education provisions will not come into force until there is clarity on the adjudication route),
- accommodation providers, and
- clubs and associations.

In these sections, as in the rest of this document, when the term "service provider" is used it refers to anyone providing or selling any of the above goods, services, education or accommodation or to anyone running a club or association. "Providers of goods or services" is used to distinguish a group of service providers which excludes accommodation providers, educational institutions, membership associations and so on as specified in section 5.2.

The legislation would be intended to ensure that everyone has equal treatment in services accessible to all or part of the public. It is not intended to apply to private relationships (such as within the family home or gift-giving between friends, for example).

If it is a service provided to the public, it does not matter whether someone is providing a service for profit, whether they are providing a service as part of the government or if they are providing a service as a charity or community organisation. It does not matter for the purposes of the legislation whether the service is paid for or is provided for free.

This document will now explain the scope of what is prohibited in each of the four areas in more detail.

5.2 What duties would providers of goods or services have?

Policy objective: to ensure that everyone has equal opportunity to participate in society and access the goods and services they need.

5.2.1 Who is a provider of goods or services?

The Committee proposes that this be a broad definition covering all kinds of provision of goods or services to the public (or part of the public). This would be anticipated to include (but is not limited to) services in relation to:

- banking, insurance, superannuation and the provision of grants, loans, credit or finance,
- entertainment, recreation or refreshment,
- transport or travel,
- telecommunications,
- the services of professionals or tradespersons, or
- the provision of services by the government.

5.2.2 When would the States of Guernsey be considered a provider of goods or services?

With the exception of judicial or adjudication functions in Courts and Tribunals it is intended that most of the activity of the States of Guernsey could be challenged under this legislation.

The States of Guernsey services that the Committee proposes would fall under this legislation include what might more commonly be thought of as services (such as museum services or health services). It would also include public functions where the government is enforcing or regulating law (such as the police, planning or tax). In most cases this legislation could not be used to challenge the frameworks which are being enforced in and of themselves. For example, someone would be unable to challenge population management where the policy and/or law requires that staff administrating the population management regime treat people differently on the basis of national origin. However, the legislation could be used to challenge situations where a person is being treated differently on the basis of a protected ground when trying to access a public service if this is not directly related to a legislative framework.

It is important to note that, while the Committee proposes that an existing service can be challenged if it is provided in a discriminatory way:

- it is not the Committee's intention that this legislation would be used to challenge situations where there is the absence of a service. The legislation is intended to cover discrimination in the operation of existing services.
- it is not the Committee's intention that this legislation would require anyone, including government services, to fundamentally alter the nature of their service or business model.

If a person feels that there is a significant gap in services which means that their needs are not met they could seek to address this through speaking to their Deputies or to the government service in question. In some cases they may also be able to bring a case under the Human Rights (Bailiwick of Guernsey) Law, 2000 if a public authority has acted in a way which is incompatible with a convention right.

5.2.3 When must providers of goods or services not discriminate?

Anyone who provides goods or services should not use any of the protected grounds to discriminate by:

- refusing to provide a person with goods or services or access to facilities.
- providing goods or services to a person on different terms or conditions.
- providing goods or services in a manner which is discriminatory (for example, making people wait longer to access a service or only offering a service on altered terms and conditions).
- issuing advertisements about their goods or services which could be interpreted as displaying an intention to discriminate (see section 3.8).
- refusing access to their premises or vehicles (see section 5.2.4).
- harassing or sexually harassing a service user (see section 3.5).
- victimising a person who tries to enforce their rights, or support someone else to enforce their rights, under the proposed legislation (see section 3.6).
- causing, instructing or inducing another person to undertake a prohibited act (see section 3.9).

5.2.4 Access to premises or vehicles

The Committee proposes that it would be discriminatory for a provider of goods or services to refuse to allow someone access to a premises (including buildings, structures, places) or a vehicle which is generally open to the public (or part of the public) based on any of the protected grounds.

This means the provider of goods or services must also not, based on a protected ground:

- allow access to premises or a facility only under different terms and conditions.
- refuse a person use of facilities available to the public.
- require a person to leave a premises or cease using a facility.

The Committee would consider areas generally open to the public to include buildings where the government provides services to the public, parks, sports facilities, public transport, toilet facilities, shops, restaurants, pubs, post offices, banks, market stalls, cinemas, theatres, hairdressers, the airport, the harbour, the hospital and other medical facilities and so on.

Note that this particular section does not necessarily include a requirement to change a space to make it accessible to disabled people in terms of design of the space. Accessibility and inclusive design are covered in section 6.

5.2.5 When can a person register a complaint against a provider of goods or services?
Ordinarily, a person can register a complaint against a provider of goods or services when they are a service user or when they attempt to or intend to access a service. It is expected that a person registering a complaint has been treated less favourably than another person (based on a protected ground) when trying to access goods or services.

The proposed legislation would not permit someone to register a complaint about something that they believe is unfair to people of a certain description if they do not have the characteristic in question themselves, and it has not, and is not likely to, personally affect them. However, a person could register a complaint in relation to a protected ground if they had been personally affected (see discrimination by association section 3.3.6), or if they had been victimised for attempting to assist another person to register a complaint (see section 3.6).

5.2.6 When can a provider of goods or services make a decision or act based on the protected grounds? What defences do providers of goods or services have?
As outlined in section 3 there are a number of legitimate ways in which a provider of goods or services could treat people differently based on the protected grounds. These include in relation to:

- positive action (see section 3.7),
- the provision of a reasonable adjustment (which is not discrimination against a person who does not need that adjustment), or
- where the action falls within one of the listed exceptions (see section 8 of this appendix).

There are also some lines of defence that a provider of goods or services could take, should a complaint arise:

- a failure to provide a reasonable adjustment, or discrimination arising from disability where a provider of goods or services did not know and could not be reasonably expected to know the person was disabled (see section 6.2.4),
- a denial of a reasonable adjustment that would be a disproportionate burden for the provider of goods or services to provide (see section 6.2),
- indirect discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2), and
- In harassment cases, a provider of goods or services can use as a defence that they sought to prevent their service users from being harassed by their agents or employees and responded appropriately to harassment when it arose (see section 3.5).

5.2.7 Goods or services exceptions
There are a number of exceptions which relate to goods or services provision. These are set out in section 8 of this appendix.

5.3 What duties would education providers have?

Policy objective: to ensure there is equality of opportunity in education.

NOT IMMEDIATELY EFFECTIVE
Please note, as outlined in the Committee's Policy Letter, the Education field would be drafted into the legislation but would not be brought into force until there is clarity about how adjudication of complaints will align with other kinds of appeal related to the forthcoming Education Law revisions. This would mean that people may not be able to register complaints when the proposed discrimination legislation first comes into force.

5.3.1 Education providers
The Committee envisages that "education providers" with duties under this legislation should include States of Guernsey Education Services; educational institutions (such as pre-schools, schools, colleges, training institutions and tertiary education providers) and any organisation who develop or accredit curricula or training courses used by other education providers.

5.3.2 When can a person register a complaint against an education provider?
Ordinarily, a person can register a complaint against an education provider when they are a student; when they have applied to study or if they wish to study but have been unable to apply, or have not yet applied.

The proposed legislation would not permit someone to register a complaint about something that they believe is unfair to people of a certain description if they do not have the characteristic in question themselves, and it has not, and is not likely to, personally affect them. However, a person could register a complaint in relation to a protected ground if they had been personally affected through their association with a person who has a protected ground (see discrimination by association, section 3.3.6), or if they had been victimised for attempting to assist another person to register a complaint (see section 3.6).

5.3.3 When must education providers not discriminate?
The Committee proposes that it should be unlawful for education providers to discriminate against a person, based on any of the protected grounds, in admissions, in the delivery of education to students and in the development of curricula.

In admissions, an education provider should not refuse or fail to admit someone based on any of the protected grounds. They should also not admit someone on different terms and conditions based on any of the protected grounds.

Education providers should not discriminate against students on the basis of any of the protected grounds by:

- denying or limiting a student's access to any benefit provided by the provider,
- expelling the student,
- subjecting the student to any other detriment,
- issuing advertisements about their services which could be interpreted as displaying an intention to discriminate (see section 3.8),
- refusing access to their premises or vehicles (see section 5.2.4),
- harassing or sexually a student (see section 3.5),
- victimising a person who tries to enforce their rights, or support someone else to, under the proposed legislation (see section 3.6), or
- causing, instructing or inducing another person to undertake a prohibited act (see section 3.9).

Education providers should not develop curricula or training courses that have content that will exclude a person from participation or subject them to a detriment based on any of the protected grounds. They should also not accredit curricula which have such content.

5.3.4 Access to premises or vehicles

As with providers of goods or services, it would be discriminatory for an education provider to refuse to allow someone access to a premises (including buildings, structures, places and vehicles) which are generally open to the public based on any of the protected grounds.

5.3.5 When can an education provider use the protected grounds to act on or make a decision? What defences do education providers have?

As outlined in section 3 there are a number of legitimate ways in which an education provider could treat people differently based on the protected grounds. These include in relation to:

- positive action (see section 3.7),
- the provision of a reasonable adjustment (which is not discrimination against a person who does not need that adjustment), or
- where the action falls within one of the listed exceptions (see section 8 of this appendix).

There are also some lines of defence that an education provider could take, should a complaint arise:

- a failure to provide a reasonable adjustment, or discrimination arising from disability where an education provider did not know and could not be reasonably expected to know the person was disabled (see section 6.2.4), and
- a denial of a reasonable adjustment that would be a disproportionate burden for the education provider to provide (see section 6.2),
- indirect discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2).
- In harassment cases, an education provider can use as a defence that they sought

to prevent their students from being harassed by an employee or agent and responded appropriately to harassment when it arose (see section 3.5).

5.3.6 Education exceptions

There are some exceptions in relation to Education which have been included in section 8 of this appendix.

5.4 What duties would accommodation providers have?

Policy objective: to ensure that people have equal opportunity to access residential and commercial property.

5.4.1 Accommodation providers

The Committee would anticipate that accommodation providers would include people who sell, rent or lease commercial or residential property or land to others. This includes estate agents, landlords and individuals who rent or sell property. It also includes government services and charities who provide accommodation or accommodation services.

5.4.2 When can a person register a complaint against an accommodation provider?

Ordinarily, a person can register a complaint against an accommodation provider when they are a tenant; or when they are a prospective tenant or buyer.

The proposed legislation would not permit someone to register a complaint about something that they believe is unfair to people of a certain description if they do not have the characteristic in question themselves, and it has not, and is not likely to, personally affect them. However, a person could register a complaint in relation to a protected ground if they had been personally affected through their association with a person who has a protected ground (see discrimination by association, section 3.3.6), or if they had been victimised for attempting to assist another person to register a complaint (see section 3.6).

5.4.3 When must accommodation providers not discriminate when renting or leasing property?

Accommodation providers must not discriminate on any of the protected grounds in the decisions that they make about who the property (or land) is provided to (including by sale, rent, lease or other agreement). They must also not discriminate against existing tenants.

The Committee proposes that, in making decisions about who to provide accommodation or sell property to, people must not refuse a person's application, or refuse to sell to a person, in relation to a protected ground. They must not offer the accommodation or land on different terms and conditions in relation to a protected ground. They also must not use a ground of protection to give a person a lower priority

on a waiting list for accommodation (unless this is covered in the exceptions in section 8).

The Committee intends that when a person has a tenant then they should not discriminate based on any of the protected grounds:

- by denying or limiting access to a benefit associated with their accommodation,
- by evicting them,
- by subjecting them to a detriment, or
- by refusing to allow reasonable alterations to a property.

The accommodation provider may refuse to allow alterations to the property for a reason which is not related to a ground of protection. Tenants should not be treated differently in the acceptance or refusal of requests to make alterations on the basis of the grounds of protection. They would only be expected to allow a tenant to alter a property if the tenant has undertaken to make the changes at their own expense and restore it to its original condition before leaving. They would also only be expected to allow a person to alter a property if it would be practical to restore the property to its former condition and it is likely that the person will restore the property to its former condition.

The proposals would also say that accommodation providers should not:

- harass or sexually harass tenants/prospective tenants (see section 3.5),
- victimise a person who tries to enforce their rights or support someone else to under the proposed legislation (see section 3.6),
- issue advertisements which could be interpreted as displaying an intention to discriminate (see section 3.8), or
- cause, instruct or induce another person to undertake a prohibited act (see section 3.9).

It should be noted that there are some specific provisions for accommodation providers in relation to the provision of reasonable adjustments - see section 6.3.

5.4.4 When can an accommodation provider use the protected grounds to act on or make a decision? What defences do accommodation providers have?

As outlined in section 3 there are a number of legitimate ways in which an accommodation provider could treat people differently based on the protected grounds. These include in relation to:

- positive action (see section 3.7),
- the provision of a reasonable adjustment (which is not discrimination against a person who does not need that adjustment),
- or
- where the action falls within one of the listed exceptions (see section 8 of this appendix).

There are also some lines of defence that an accommodation provider could take, should a complaint arise:

- a failure to provide a reasonable adjustment, or discrimination arising from disability where an accommodation provider did not know and could not be reasonably expected to know the person was disabled (see section 6.2.4),
- a denial of a reasonable adjustment that would be a disproportionate burden for the accommodation provider to provide (see section 6.2.5),
- indirect discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2), and
- In harassment cases, an accommodation provider can use as a defence that they sought to prevent their customers or tenants from being harassed by their employees or agents and responded appropriately to harassment when it arose (see section 3.5).

5.4.5 Accommodation exceptions

There are some exceptions in relation to accommodation provision which are included in section 8 of this appendix.

5.5 What duties would clubs and associations have?

Policy objective: to ensure that clubs and associations do not exclude people from membership or participation, or treat members unfavourably because of any of the grounds of protection.

5.5.1 Clubs and associations

By "association" the Committee intends to refer to any group of 25 or more members which has rules to control how someone becomes a member, involving a genuine selection process. The rules may be written down, like a constitution, or may be unwritten, having developed over time by custom and practice. It does not matter if the association is run for profit or not, or if it is legally incorporated[134] or not.

Clubs are associations who provide and maintain facilities (at least partially) from the funds of an association.

Clubs and associations can include:

- organisations established to promote the interests of their members, such as an association of disabled people with a particular impairment or condition, or a club for parents.
- private clubs, including sports clubs, clubs for ex-service personnel, working men's clubs and so on.

[134] Incorporation is a particular legal status which means the law treats an organisation as if it is a person rather than a group of people.

- associations for people with particular interests such as fishing, music, gardening or wine tasting.
- young people's organisations, or children's clubs.
- membership organisations with a community or charitable purpose.
- political associations.
- associations for sports, literary, social or cultural purposes.

This list is for illustration purposes only and many more types of associations would be covered by the legislation.

If a club or association has no formal rules or process for selection of members and its "membership" is, effectively, open to the public, then for the purposes of this legislation, it is proposed that it is considered a provider of goods or services and not a club or association. This would include, for example: a film rental service which a person needs a "membership" for, but which anyone can sign up to online; "friends of" a cultural venue who receive information about events in exchange for an annual "membership fee" but which is open to anyone who wishes to pay the fee.

5.5.2 When can a person register a complaint against a club or association?
Ordinarily, a person can register a complaint against a club or association when they are a member; or when they are a prospective member.

If a club or association also provides education, goods, services or accommodation a person may also register a complaint against the club or association as a provider of these services (see sections 5.2-5.4).

The proposed legislation would not permit someone to register a complaint about something that they believe is unfair to people of a certain description if they do not have the characteristic in question themselves, and it has not, and is not likely to, personally affect them. However, a person could register a complaint in relation to a protected ground if they had been personally affected through their association with a person who has a protected ground (see discrimination by association, section 3.3.6), or if they had been victimised for attempting to assist another person to register a complaint (see section 3.6).

5.5.3 When must a club or association not discriminate?
The management committees of clubs and associations should not discriminate on any of the protected grounds, when managing membership applications, and should not treat existing members differently based on any of the protected grounds.

This includes not treating people differently based on any of the protected grounds, by:
- refusing or failing to accept someone's application for membership, or acceptance to a type or class of membership,
- offering different terms and conditions to someone,

- limiting or denying access to member's benefits,
- subjecting a member to a sanction or detriment, or
- terminating membership.

It is proposed that clubs and associations should not:

- harass members/prospective members (see section 3.5),
- victimise a person who tries to enforce their rights, or support someone else to enforce their rights, under the proposed legislation (see section 3.6),
- issue advertisements which could be interpreted as displaying an intention to discriminate (see section 3.8), or
- cause, instruct or induce another person to undertake a prohibited act (see section 3.9).

5.5.4 When can a club or association use the protected grounds to act on or make a decision? What defences do clubs or associations have?

As outlined in section 3 there are a number of legitimate ways in which a club or association could treat people differently based on the protected grounds. These include in relation to:

- positive action (see section 3.7),
- the provision of a reasonable adjustment (which is not discrimination against a person who does not need that adjustment), or
- where the action falls within one of the listed exceptions (see section 8).

There are also some lines of defence that a club or association could take, should a complaint arise:

- a failure to provide a reasonable adjustment, or discrimination arising from disability where a club or association did not know and could not be reasonably expected to know the person was disabled (see section 6.2.4),
- a denial of a reasonable adjustment that would be a disproportionate burden for the club or association to provide (see section 6.2.5),
- indirect discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2), and
- In harassment cases, a club or association can use as a defence that they sought to prevent their members from being harassed by an employee or agent and responded appropriately to harassment when it arose (see section 3.5).

5.5.5 Clubs and associations exceptions

There are some exceptions relevant to the membership of clubs and associations included in section 8 of this appendix.

5.6 What about transport?

5.6.1 Transport providers

While some countries have separate sections covering the obligations of transport

providers, for the purposes of these proposals transport providers would be considered to have the same obligations as other providers of goods or services (as outlined in section 5.2).

Section 6: Reasonable adjustments and accessibility for disabled people

6.1 Overview of proposals

These proposals include both responsive and proactive elements to ensure that disabled people have equal opportunity.

- **Responsive** - reasonable adjustments are about doing things differently or making changes to ensure that disabled people have equal opportunities and are included. In most cases it is about responding to the particular needs of an individual (i.e. responding to the needs of a tenant, a student, a member, a service user or an employee).
- **Proactive** – some aspects of the proposals imply the need to proactively consider whether disabled people can access services - there are three relevant aspects to this:
    - firstly, as in the UK, for education and goods or services providers it is important to consider the needs of disabled people in general in advance of any individual making a request for an adjustment, which makes the duty to provide reasonable adjustments anticipatory.
    - secondly, disabled people may bring indirect discrimination complaints that could challenge apparently neutral provisions (including, for example, building or website design) that put groups of disabled people at a disadvantage. Note that changes required in order to avoid indirect discrimination could be, in some cases, responsive to a request made by an individual or group of individuals. However, having thought about accessibility in advance may reduce the chance of a complaint being made in the first instance.
    - lastly, the Committee is proposing that there would be a particular duty on the public sector to develop accessibility action plans to show how services will be made more accessible over time.

In light of the fact that employers and service providers require time to consider what adaptations they might need to make to infrastructure and buildings, the Committee is proposing that a person could not register a complaint relating to the "physical features" of a property until five years after the legislation enters into force (see section 6.2.8).

This section explores what is required and what defences employers and service providers have in relation to a reasonable adjustment in more detail. It also defines what a physical feature would be.

NOT IMMEDIATELY EFFECTIVE
Please note, as outlined in the Committee's Policy Letter, the requirement to make alterations to physical features in response to reasonable adjustment, indirect discrimination or other kinds of complaint would not come into force until five years after the legislation is first introduced.

6.2 Responding to people's needs through reasonable adjustments

Policy objective: to develop a culture where the needs of disabled people are routinely considered, leading to greater inclusion of disabled employees and service users in all areas of society.

6.2.1 What is a reasonable adjustment?

The Committee is proposing including a duty to provide a reasonable adjustment to a disabled person.

Reasonable adjustment is a common international concept used in Jersey, the UK and elsewhere. The UN call the concept "reasonable accommodation".

The Committee is proposing that reasonable adjustments should be understood as necessary and appropriate modifications or adjustments for a disabled person, where needed in a particular case. A reasonable adjustment should not impose a disproportionate burden on the person providing the adjustment. The duty to provide adjustment only applies where not providing the adjustment would put the disabled person at a substantial disadvantage (meaning more than minor or trivial). Implementation of a reasonable adjustment should always follow consultation with the individual concerned.

It should be noted that the title "reasonable" is not, in itself, a qualifier on whether an adjustment should be made. The test of whether the adjustment should be made follows the steps outlined below – firstly whether it is appropriate and necessary, and secondly whether it is a disproportionate burden to provide.

Where usually discrimination legislation requires that duty bearers treat people in a similar way, in some cases an employer or service provider might need to treat disabled people differently in order for them to have equal access and opportunity or for them to be included. When a disabled person needs an adjustment in order to have equal access and opportunity, then denying them this constitutes discrimination unless making that adjustment would be a disproportionate burden.

Example – reasonable adjustment
A person with cerebal palsy orders a pint in a pub. They ask for a straw because they find it easier to drink with a straw when their hand shakes. The person behind the bar would not usually put straws in beer, but provides a straw for them. This is a reasonable adjustment.

6.2.2 Is the adjustment requested appropriate?

One of the first questions that someone might ask if considering requesting, or making, an adjustment is whether the adjustment is appropriate. A reasonable adjustment is one that will enable the individual to have equal access and opportunity or will include the person where they would otherwise be excluded.

It is important to discuss reasonable adjustments with the employee, customer, service user, student or tenant who needs the adjustment so that it meets their needs.

Example – consultation about reasonable adjustments
An employer has recently recruited a person with a visual impairment. In order to try to meet the needs of their employee, the manager orders a staff handbook printed in braille. When they provide this to the employee, they discover that the employee uses a screen reader and does not read braille. The employer could have avoided the unnecessary expense by asking their employee how best to meet their needs before attempting to provide an adjustment.

It is also possible that a person might request an adjustment that is not the best way to meet their need. The employer or service provider must consult with the person who the adjustment is for, and should give appropriate weight to the knowledge of the individual about their own needs and conditions. However, they may also take independent expert advice about what adjustment would be appropriate to meet that person's needs (for example, occupational health advice).

If the individual would not be at a substantial disadvantage (meaning more than minor or trivial) without the adjustment, then there is not a requirement for the employer or service provider to provide it.

6.2.3 What kinds of adjustment might someone request?

It would not be possible to list all of the reasonable adjustments a person might need or request because everyone is different. However, it is anticipated that reasonable adjustments might include:

- making changes to facilities or buildings to make them more accessible,
- making information accessible,
- modifying equipment,
- reorganising activities,
- rescheduling work,

- adjusting curricula, learning materials and teaching strategies,
- adjusting medical procedures, or
- enabling access to support personnel or assistance animals.

If a person would ordinarily have a piece of equipment (e.g. a white stick, or a wheelchair), which is not specific to the workplace or to a particular service, the employer or service provider would not be expected to take on responsibility for providing this.

6.2.4 How do I know if someone needs a reasonable adjustment?

An employer or service provider should take into account disabilities that they are aware of, without necessarily requiring a person to ask each time that they need an adjustment. For example, if an employer has an employee who is a wheelchair user, they should always arrange meetings with them in accessible rooms without their having to ask on each occasion.

Sometimes it might not be obvious that a person has a disability and so may need a reasonable adjustment, or it might not be clear what adjustment the person needs. If unclear, it would be inappropriate to guess or predict what someone needs. But if a person has asked for an adjustment because they have a disability, then it is appropriate to act on that.

If a person has not told an employer or service provider that they have a disability or asked for a reasonable adjustment, but they can see they are experiencing some kind of difficulty, it is sensible to try to sensitively find out if there is an adjustment that they need, for example, by asking if there is anything someone can do to assist.

Example – enquiring if someone requires assistance
In a busy café with only counter service, one of the staff notices a customer is sitting at a table without ordering. It is the café's policy to ask people who are taking up tables without having ordered anything to leave. The staff member goes up to the customer's table and asks if he needs any help. The customer discloses that he has diabetes and his legs are hurting him, meaning that it would be difficult for him to go up to the counter and order food and drink himself.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.89

It is usually a good idea when arranging an appointment or event or recruiting, for example, to ask everyone to advise if they need a reasonable adjustment early on in the planning process. If a person is running a service or event which is open to the public it is a good idea to include an offer of adjustments on any invites, and to offer alternative formats for any information given.

If one of an employer or service provider's employees or agents knows of a disability,

the employer or service provider would not normally be able to claim that they did not know of the disability.

Example – knowing about a disability
A pub employee orders a customer who is lying prone on a bench seat to leave the premises. However, the customer has Chronic Fatigue Syndrome and is lying down because she needs to as a result of her disability. The pub employee refuses to accept her explanation and makes no attempt to talk to the bar staff, who had served her with only one drink. Because relevant information was available about the disabled person, the service provider could reasonably have been expected to know that she was disabled. As a result, the pub is likely to be liable for discrimination arising from disability, unless it can show that the treatment is objectively justified.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.88

6.2.5 What is a disproportionate burden?

The Committee is proposing that an employer or service provider does not need to provide a reasonable adjustment if doing so would be a disproportionate burden. However, what is disproportionate depends on the context. This means that whether or not an employer or service provider would be required to make a reasonable adjustment depends on a judgement call and cannot be viewed in the same way as compliance with a hard and fast rule. The employer or service provider needs to decide whether what is being asked for is disproportionate.

Examples – disproportionate burden
A small café in town is run by a family. The front door is on a level and customers with mobility impairments do come to the café. One of the regular customers registers a complaint of discrimination because there is not a wheelchair accessible toilet at the café. However, it has limited floor space and while they have considered installing an accessible toilet, having a wheelchair accessible toilet fitted would take up a significant amount of the floor space. This would mean a 40% reduction in the number of tables available, which would significantly impact the viability of the business. There are other accessible toilets close by, and while this is not ideal, the café owners feel that they cannot reasonably do more without moving to a different premises or fundamentally changing their business model. It is likely that fitting a wheelchair accessible toilet in the premises would be considered a disproportionate burden.

A large conference and hospitality venue with a high footfall and a reasonably high turnover has not yet fitted a wheelchair accessible toilet due to the expense of alterations. There would be space available if the cloakroom area was redesigned, without significant impact on the functionality of the space. A regular customer requests that an accessible toilet be fitted. If fitted, the toilet would benefit many individuals attending weddings, conferences and community events, as well as people using the on-site restaurant. It is much more likely to be considered a proportionate cost for this venue than for the small café.

When considering whether providing an adjustment is a disproportionate burden, if a complaint were to be made, it is proposed that the Tribunal would consider:

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 reasonable adjustment, and
c. the availability of financial and other assistance to the employer or service provider (for example, grant funding from the States of Guernsey or support from the third sector).

While there is often a focus on expensive changes to buildings, it should be remembered that reasonable adjustments often cost nothing or relatively little. Many reasonable adjustments will, therefore, not be considered disproportionate.

Example – reasonable adjustments with a low cost
A team of three employees co-work closely and need to communicate during the course of the day. One of these employees has a hearing impairment and lip reads. The arrangement of desks means that the person cannot easily see their team members' faces when they are talking. This puts the staff member at a significant disadvantage and affects their performance and access to performance related bonuses. After discussing with the team (with the permission of the person with the impairment), the manager asks the facilities department to help to re-arrange the desks so that staff can see each other's faces when they talk.

See also – section 4.3.3 on reasonable adjustments for contract workers.

6.2.6 – Clarification – when service providers are not required to make reasonable adjustments

Whether or not the adjustment is a disproportionate burden, a service provider would not be expected to make a reasonable adjustment which it is beyond their powers to make (for example, if they have been refused planning permission) or which would fundamentally alter the nature of the service that they provide.

Example – adjustments which fundamentally alter the nature of the service
A restaurant that offers a "dining in the dark" experience is unlikely to have to make the reasonable adjustment of leaving its lights on for a deaf customer who needs to be able to lip read to communicate as this would fundamentally alter the nature of the service being offered.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.157

They would also not be required to make a change where the person is not at a substantial disadvantage without the adjustment (where substantial means more than minor or trivial).

6.2.7 Is it all about buildings?

The scope of reasonable adjustments includes the physical built environment, but also includes a lot of other things. For example, signage, lighting, how busy a space is, the way that people behave, or the way information is provided can all be very important in making a service or space accessible to a disabled person.

The Committee is proposing that reasonable adjustments can include:

- fundamental changes to make a service, facility or information source more accessible for everyone

> **Example – accessibility**
> A law firm receives a request for information in a different format because their website uses text embedded in pictures which is difficult to access for people with visual impairments. The firm decides that rather than provide the information in a separate document to the enquirer, they will ask their IT staff to replace the text which is causing a problem with text that is easier to read. This means that in future anyone who goes onto their website will have access to the information on it.

- providing a modification

> **Example – modifying services**
> A leisure boat service say that they can provide access to people with mobility impairments but, while the service usually allows people to arrive and purchase tickets on the day, advanced notice is needed for people with mobility impairments so that the tide level can be taken into account and special equipment set up.

- doing things differently to meet someone's need

> **Example – different ways of providing a service**
> A wheelchair user wishes to purchase a book from a local shop. The shop is not wheelchair accessible and is on the second floor of an old building. The shop offers the person two options: either to discuss their needs with a shop assistant who can come out of the shop onto the street to serve the customer, or that they will provide a catalogue which the person can order books from over the phone.

The Committee suggests that employers and service providers should always (in consultation with the individual(s) concerned, where appropriate) try to make the adjustment which treats their staff, customers or service users in the same way as everyone else. Where this is not possible, providing modification should be considered second, and then providing services in a different way. It may be possible to use an

adjustment which is not as effective temporarily until more substantial changes can be made to provide more equal treatment.

Example – better access
An office building has steps up to the main entrance but one of their regular customers is a wheelchair user. When the facilities team review the accessibility of the building they decide that as a temporary measure they will put signposting and a bell on the accessible side-door of the building. If a customer rings the bell a staff member will unlock the door to let them in. However, the facilities team plan that in the next redevelopment of the building they will incorporate a ramp at the front of the building so that everyone can use the main entrance.

6.2.8 What is a physical feature?

NOT IMMEDIATELY EFFECTIVE
Please note, as outlined in the Committee's Policy Letter, the requirement to make alterations to physical features in response to reasonable adjustment, indirect discrimination or other kinds of complaint would not come into force until five years after the legislation is first introduced.

It is proposed that exactly what is to be treated as an alteration of a physical feature can be modified by the Committee by Regulation.

Having considered the UK position, the Committee intends that the definition of a physical feature would include:

- a feature arising from the design or construction of a building;
- a feature of an approach to, exit from or access to a building;
- a fixture or fitting.

Physical features do not include:

- the replacement or provision of a sign or notice;
- the replacement of a tap or door handle;
- the replacement, provision or adaptation of a door bell or door entry system;
- changes to the colour of a wall, door or any other surface.

6.2.9 Who has to pay for reasonable adjustments?

In most cases, the Committee is proposing that the employer or service provider should pay for the reasonable adjustments, provided it is not a disproportionate burden on them to do so.

The Committee intends that the States should consider establishing an equivalent to the UK Access to Work scheme which can provide some funding for adjustments where they would otherwise be a disproportionate burden for the employer to provide. This would be subject to further policy consideration.

It is proposed that the situation is slightly different for accommodation providers (see below).

6.3 Reasonable adjustments and accommodation providers

6.3.1 Reasonable adjustments that do not involve physical features

For accommodation providers, how to respond to a request for a reasonable adjustment will depend on whether that adjustment requires an alteration to a physical feature (see section 6.2.8).

Where a reasonable adjustment does not require an alteration to a physical feature, accommodation providers should make the adjustment required and pay for it (provided that it is not a disproportionate burden to provide). This might include adjustments in how they communicate with tenants, how they collect rent, etc.

Where a reasonable adjustment does require an alteration to a physical feature, the accommodation provider may not have to fund the alteration but might be under a duty not to unreasonably refuse to allow an alteration at the tenant's expense. To understand more about how and when this applies, see sections 6.3.2 and 6.3.3 below.

6.3.2 When would a residential accommodation provider be required not to unreasonably refuse changes to a physical feature?

There will be a list (that the Committee could amend by Regulation) of "improvements" for which residential accommodation providers cannot unreasonably refuse permission for a tenant to carry out at the tenant's own expense as a reasonable adjustment. Note, this would only apply where the disabled person who the adjustment is for occupies or intends to occupy the premises as their only home.

The Committee would anticipate that this list would include:

a. an addition to or alteration in the landlord's fittings and fixtures (this could include, for example, grab rails, special sanitary fittings and stair lifts.)
b. an addition or alteration connected with the provision of services to the premises;
c. the erection of a wireless or television aerial;
d. carrying out external decoration.

Private residential landlords would not have to consent to any other changes to physical features other than the improvements listed above.

The accommodation provider may specify that this alteration should be at the tenant's own expense, and that they must agree, and have the resources available, to return the building to the original condition at the end of their tenancy.

As well as an assessment about the feasibility of restoring the property to its original condition, and the desirability of this, the length of a tenancy would also feature in an assessment of whether an accommodation provider was unreasonable to refuse permission for a tenant to make an adaptation. It might be reasonable, for example, to refuse a tenant with a very short lease permission to undertake substantial alterations. The accommodation provider may specify other reasonable conditions in relation to giving permission for work to be undertaken (for example, that the work be undertaken by professional tradespersons). Failure to comply with such conditions could be considered a breach of tenancy.

There would be nothing to prevent a tenant from asking an accommodation provider to pay for alterations, and this might seem reasonable in situations where the alterations would increase the value of the building, however, the Committee is proposing that the accommodation provider would have no obligation to pay.

This would also apply where an accommodation provider owns a multi-tenancy building with common areas or features and one tenant needs an adjustment related to a common area – the accommodation provider should not unreasonably refuse to permit improvements (as listed above) to the common area which relate to a disability access requirement. In the case of common areas, the impact on other tenants could be taken into account when deciding whether to permit the change.

6.3.3 When would a commercial accommodation provider be required not to unreasonably refuse changes to a physical feature?

In addition to the duties related to "improvements" outlined above that would allow a tenant to alter, for example, grab rails the Committee would expect that, in the context of commercial lettings, providers should not unreasonably refuse permission for alterations to physical features of a building to improve its accessibility (extending further than "improvements", for example, to ramps, changes to doorways and so on).

The Committee intends that, if an individual makes a complaint relating to a failure to make a reasonable adjustment against an organization who lets a premises, the accommodation provider could be liable for compensation owed to that complainant if they had unreasonably refused permission for a change and this was the cause of the failure to provide a reasonable adjustment.

As outlined above, accommodation providers may take a number of factors into account when considering whether it is reasonable to refuse permission, including length of tenancy and the desirability and feasibility of returning the premises to its original condition.

6.4 Anticipatory reasonable adjustment

6.4.1 What is anticipatory reasonable adjustment?

Where in most contexts, reasonable adjustment is about responding to a specific individual, there are some contexts when service providers need to think about the needs of disabled people in general in advance of an individual requesting an adjustment. These are:

- Providers of goods or services
- Education providers

This means an organisation cannot wait until a disabled person wants to use its services, but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need, such as people who have a visual impairment, a hearing impairment, a mobility impairment or a learning disability. The duty is also anticipatory for education providers. As this is an integral part of the reasonable adjustment duty, adjustments that would be a disproportionate burden on the goods or service provider or education provider would not have to be made.

Advice about how to anticipate needs and plan is included in section 6.6 and 6.7. There is no obligation on private or third sector organisations to have a plan in a particular format, but organisations may find following the process of developing a plan useful with regards mitigating their liability in relation to claims of anticipatory reasonable adjustment.

6.4.2 Would my organisation need to anticipate needs?

Employers, clubs and associations and accommodation providers would have a duty to make reasonable adjustments in response to a request from a disabled employee, member or tenant. However, the Committee proposes that they would not be required to anticipate adjustments in advance.

There are two points which are important to note when thinking about whether the anticipatory duty applies to a particular organisation:

- Firstly, one organisation might belong to several categories.

> **Example – service provider, employer and accommodation provider**
> An estate agent might be an accommodation provider (with regards tenants they manage the leases of, or sales that they make), a service provider (with regards the sales and other customer services that they provide) and an employer.
>
> In this case the accessibility duty would apply where goods or services are being provided to the general public. So, the estate agent only needs to consider the accessibility of residential properties it manages if a tenant is disabled, and only needs to consider the accessibility of a back-office room if

an employee that works there has an access need. However, when it comes to their services - their website, customer service-desk, and the way that they meet and interact with clients - the accessibility of these would need to be considered proactively. A good way to identify services (as opposed to other parts of the business) is to think about what forms of communication, premises, staff and so on customers, service users or members of the public would ordinarily come into contact with.

This also applies to clubs if they are providing services to the general public rather than just their membership.

- Secondly, someone who is primarily a service provider needs to consider the accessibility of their service – which does not always mean the same thing as the accessibility of their premises.

Example – accessibility of a service
A small plumbing firm has an office situated above a workshop on an industrial estate. They use this office to organise their work, manage their accounts and store some equipment. They are concerned that the accessibility duty would mean that they would need to make this office accessible. In fact, no customers ever come to the office, so it is only important to ensure that this is accessible to the employees that use it. What is important, from the perspective of the anticipatory reasonable adjustment duty, is that *the service* is accessible. Even if work is undertaken in other people's houses, it is worth thinking about whether staff are disability-aware when interacting with customers; whether work is explained to customers in a way they can understand; whether there are multiple ways for people to get in touch (if you only have a phone number, for example, this might be no use to someone who is hearing impaired, is there an email also?) The focus should be on making sure disabled customers can use your service, like other people.

6.5 Accessibility and indirect discrimination

It should be noted that even where an organisation does not have a duty to anticipate what reasonable adjustments might be required they may wish to consider accessibility. By accessibility the Committee means proactively thinking about how to design services and spaces so that they are as inclusive as possible. It would be possible for any organisation to have a complaint of indirect disability discrimination made against them if they were found to have a provision (including premises design) which on the surface appeared neutral but (intentionally or unintentionally) put individuals of a particular group at a disadvantage. In some cases it may be able to objectively justify such a provision (see section 3.4.2).

Organisations who have considered accessibility in advance may be better placed to objectively justify any unaddressed access issues if they are challenged. There would be

no obligation on private and third sector organisations to prepare an accessibility action plan as outlined below, but they may find it a useful process to engage voluntarily with as part of their consideration of their wider duties.

6.6 Public sector duty to prepare an accessibility action plan

Policy objective: to ensure that the public sector is transparent with respect to how it plans and implements improvements in accessibility (to both the physical and non-physical environment) in order to remove barriers for disabled people.

6.6.1 Introduction

It will be important for the public sector to show that it has considered the needs of service users, has prioritised what changes need to be made and that it is taking proportionate action which is appropriate.

The Committee is proposing that a duty to develop and maintain an accessibility action plan would apply to the public sector where it provides education or goods or services to the public or part of the public (i.e. where the anticipatory reasonable adjustment duty applies in the public sector). For the time being, this proposed duty is not intended to apply to organisations that receive an element of grant funding (but not sole funding) from the States. This means that the duty to develop and maintain an accessibility action plan would not be compulsory for the private or third sector. It would also not apply to parts of the public sector which do not provide education or goods or services directly to the public or part of the public.

6.6.2 Review periods for accessibility action plans

International understanding of accessibility is developing. The Committee would anticipate that accessibility action plans should be reviewed every five years to check that they align with current good practice, review what has changed in the context of the business, and consider whether actions have been completed and new priorities need to be set.

6.6.3 What would the consequences of not having an access plan be?

The Committee is proposing that if the head of the Employment and Equal Opportunities Service had reason to believe that a relevant public sector service or organisation either did not have an accessibility action plan or that their plan was not appropriate or proportionate or was not being implemented, then they could:

- investigate to establish the facts of the matter, and then, if required
- issue a compliance notice requiring the service or organisation to develop and implement an accessibility action plan.

The Committee intends that not complying with a notice would result in a civil penalty issued by the head of the Employment and Equal Opportunities Service. If the service or organisation felt that their being issued with a notice was in some way inappropriate or unfair they could appeal this to the Employment and Discrimination Tribunal.

6.6.4 Timeframe for implementing action plans

The Committee is proposing that the duty to have an action plan in place does not come into force as soon as the new legislation is implemented. The duty to have an action plan would come into force at the same time as the provisions that would allow people to register complaints in relation to alterations of physical features. This would be five years after the legislation is first introduced. This delay would be intended to give public sector organisations or services who are providers of education or goods or services time to undertake an access audit and develop their first action plan before the duty came into force. The plan would then be available to use in evidence should an organisation be challenged on its accessibility.

Note that the alignment with the physical features provision does not imply that action plans need only be about physical accessibility. It would be advisable to include (and begin implementing) changes in relation to the provision of information, customer services and other aspects as well as consideration of the accessibility of the built environment.

6.7 Developing an accessibility action plan

While it is proposed that the duty to develop accessibility action plans should only apply to the public sector, the guidance set out below may be relevant to other service providers considering ways to mitigate their liability should reasonable adjustment or indirect discrimination complaints arise.

6.7.1 What does the duty require the publics sector to do?

When developing an accessibility action plan it is relevant for an organisation to be able to show: that it has considered how accessible the service is, to have an appropriate and proportionate plan to improve access to their service, and to be able to show that this plan is being implemented.

What is appropriate and proportionate for one education provider or goods or services provider to undertake would not necessarily be appropriate and proportionate for another. Contextual factors influencing what is appropriate and proportionate would include:

- the size and financial circumstances of the provider,
- the nature of the service,
- the impact on other service users, and
- the feasibility of making certain changes based on what planning permission is available (where applicable), the location of the business and so on.

The proposed access plan is long-term. This means that if it is only possible to consider significant physical alterations to a building as part of a major refurbishment which only happens every fifteen years, acknowledgement of this might feature in an accessibility action plan. It would not be expected that the organisation undertake these changes immediately.

It is important that the plan prioritises actions. When prioritising, an organisation might take into account, for example: which kinds of impairments are particularly prevalent in the population as a whole, or in their service user group in particular; whether some of their services or premises are used by more disabled people and what their needs are; how critical that service is to people's lives (are some of their services things people really need and others things people could find other ways to access in the interim – like ordering online through an accessible website?); when they are next planning major refurbishments or staff training programmes and if substantial changes could be worked into those; which alterations would have the biggest impact for the money available; and how long making alterations will take. It would also be advisable to consult with service users regarding priorities.

6.7.2 What standards would public sector providers of goods or services and education providers need to meet?

Standards are constantly developing with regards to accessibility. The Committee is suggesting that public sector education providers and providers of goods or services should reference established standards when considering how accessible their service is (a list of established standards could be provided or indicated by the Employment and Equal Opportunities Service).

Starting points might be, for example:

- Guernsey Technical Standard M[135] – Access to and use of buildings, The Building (Guernsey) Regulations, 2012
- BS8300 – Design of an accessible and inclusive built environment[136]
- BS8878 – Web accessibility. Code of practice[137]

The Committee also proposes that it (i.e. the Committee *for* Employment & Social Security) would have powers to issue Codes of Practice in relation to accessibility which would set out what standards were expected, or desirable, in certain specific areas if there was a lack of clarity.

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[135] States of Guernsey, Development & Planning Authority (2012) Guernsey Technical Standard M – Access to and use of buildings - Available at: https://www.gov.gg/CHttpHandler.ashx?id=75185&p=0 [accessed 1st March 2020].

[136] British Standards Institution (2018) Design of an accessible and inclusive built environment. Available at: https://www.thenbs.com/PublicationIndex/documents/details?Pub=BSI&DocID=320519 [accessed 1st March 2020].

[137] British Standards Institution (2010) Web accessibility. Code of practice. Available at: https://shop.bsigroup.com/ProductDetail/?pid=000000000030180388 [accessed 1st March, 2020].

In many cases, it might not be possible for an organisation to fully comply with the best practice standards. What is important is to show that standards have been considered and a genuine effort has been made to identify where there is not compliance and take some action to improve access within that (public sector) education provider's, or providers of goods or services', context.

There will usually be some area where improvement could be considered. If the education or goods or services provider's facilities meet the accessible and inclusive design standards then there might be an opportunity to review, for example, training for staff on being disability aware or the accessibility of their website.

6.7.3 How would you know what to prioritise?
Different organisations will be operating in significantly different contexts in terms of the nature of their service, the needs of their service users and how much thought they have previously given to the accessibility of their services.

An access audit is a good starting point for a service to be able to identify what changes are needed. To undertake an access audit an organisation would need to compare the service and its facilities against a standard and to identify where the service did not meet the standard specified. For very small organisations, it is possible that this could be done by an individual with a check list (and potentially some guidance from the Employment and Equal Opportunities Service, or advice from the commissioned access consultancy service the Committee is proposing) or, for larger organisations, through hiring someone who has been trained to do access audits to undertake an audit for them.

An access audit report should look at a service user's "journey" through the service – what they need when they arrive, while using the service, and when leaving. It should outline the standards that are being referenced, highlight areas of non-compliance and make some suggestions about different ways of improving areas of non-compliance. It should also recommend some priorities for action.

Ultimately, the decision about what is a priority will be down to the organisation and will depend on the service provision model and the manager's or director's knowledge about the needs of their service users (ideally after consultation with them). The accessibility action plan should focus what resources are available on these agreed priorities.

6.8 Relationship to planning and building control and changes in standards

Policy objective: to ensure that it is clear that property managers taking reasonable steps to meet standards are able to plan in the medium to long term and are not adversely affected by improvements in standards.

6.8.1 Changes in building regulations and access standards

The Committee recognises that changes to buildings can be expensive.

When someone undertakes an access audit, this is usually assessed against a set of standards or best practice guidance. The guidance or standards will be updated periodically.

In some cases, an education provider, or goods or services provider, might be doing the best that they can to meet a high standard of accessibility (including complying with the standards outlined in Part M of the building regulations). However, the specifications that they are working from might be updated soon after, or while they are making a change – meaning that by the time the change is implemented it is already non-compliant with the new standards.

Accessibility action plans should always be prepared on a prioritised basis in any case, and it may not be possible for every service to be fully compliant all the time. However, for clarity, the Committee is proposing that no one should be expected to undertake significant building works more frequently than every ten years if, at the time the plans for the building or refurbishment are agreed, accessibility has been duly considered and they are compliant with appropriate standards – like Part M of the building regulations.

Example – ten-year grace period

A public building has an accessible toilet fitted that matches the required specification in the building regulations at the time the plans for it are approved. This is a substantial investment.

A year after the toilet is fitted the standards are updated and some of the requirements for accessible toilets change.

Four years later, a complaint is raised about the accessibility of the toilet. As part of their complaint, the person notes that it does not meet the new standards, and that a refurbishment of the toilet does not feature as a priority in the organisation's accessibility action plan. The service can argue that they upgraded the toilet to meet standards less than ten years ago, and that it would, therefore, be unreasonable for them to have to upgrade it again immediately given the level of investment this represents. They would not be required to substantially alter the toilet until the ten year period is up (and only then if it would not be a disproportionate burden).

Similarly, the Committee proposes that if an organisation had been refused permission to make an accessibility alteration to a building or physical feature and had then sought to implement the next best physical solution to the access problem, they would not have to reconsider the proposal which they had been refused planning permission (or permission from building control) for, for ten years. After ten years, they should review whether anything has changed which might lead to a different outcome.

Note that this would only apply where an organisation had fully explored with the Development and Planning Authority what it would be possible to change – just because one alteration has been refused does not mean there is no improvement possible.

6.8.2 If you get accessibility right, do you need to make reasonable adjustments?
It may not be possible to design a service which takes into account everybody's needs all the time. This is because the range of potential needs is often too diverse to be able to design an environment which includes everyone. In some situations people have needs that might conflict. For example, someone may require a very light environment in order to see where they are going and another person may react to bright light and prefer an environment which is darker. Consequently, while it is very important to design spaces and services which are as inclusive as possible, this does not remove a person's responsibility to provide reasonable adjustments to individuals who need them.

Having well designed services might mean that a provider of goods or services or an education provider receives less requests for reasonable adjustments because more people can navigate a service or environment without an adjustment.

Example – information accessibility
A provider of goods or services reviews all of the information that it provides against accessibility guidelines. After the review, all of its leaflets and websites will meet minimum standards of accessibility. This means that people with common impairments are more likely to use the information and the service, and are less likely to need adjustments to access the information.

Even though the information meets these minimum standards, the information is still hard to read for a person with dyslexia who finds it easier to read and understand information when it is printed on coloured paper. The service might still need to make a reasonable adjustment for this person if the majority of their leaflets are printed on off-white paper.

6.9 Accessibility of roads and transport

6.9.1 Accessibility of pavements and roads
The accessibility of roads is just as important as the accessibility of buildings.

The Committee intends that the legislation should include a duty to ensure that if a pavement or public footway is being constructed or altered, there will be a requirement for those alterations to take into account the needs of disabled people by providing accessible features (which might include tactile paving, ramps, dropped kerbs or other sloped areas) at appropriate places, particularly at or in the vicinity of any pedestrian crossing or intersection used by pedestrians. This would not be a provision that allows

individuals to claim compensation if a road was not made sufficiently accessible. However, the head of the Employment and Equal Opportunities Service would be able to investigate concerns that this duty were not being complied with and then, if issues were identified, issue a non-discrimination notice requiring improvements.

6.9.2 Accessibility of transport

Transport providers are considered to be providers of services for the purposes of this legislation. This means that taxis, ferries, planes, buses and other kinds of transport providers have a duty not to discriminate, including a duty to provide reasonable adjustments. This might be sufficient to support individuals to enforce their rights.

If there are more systemic issues identified then it would be possible for the Committee to develop Codes of Practice in relation to particular kinds of transport provision. However, depending on the issue, it may be more straightforward to address this directly through transport policy.

6.10 Summary

The below table summarises the duties in relation to reasonable adjustments and accessibility contained in these proposals.

<table>
<tr><th rowspan="2"></th><th colspan="2">Responsive reasonable adjustments and indirect discrimination</th><th rowspan="2">Anticipatory reasonable adjustment</th><th rowspan="2">Duty to develop accessibility action plan</th></tr>
<tr><th>Not including physical features</th><th>Requiring alteration to physical features</th></tr>
<tr><td>Employment</td><td rowspan="3">Immediately on law coming into force (or immediately on education field coming into force)
For reasonable adjustments: funded by employer, club, association, provider of goods or services, education provider or accommodation provider unless a disproportionate burden.</td><td rowspan="3">5 years following commencement of first phase of legislation.
For reasonable adjustments: funded by employer, provider of goods or services, club, association or education provider unless disproportionate burden</td><td>No</td><td>No (voluntary)</td></tr>
<tr><td>Clubs or associations</td><td rowspan="2">Immediately on law coming into force/or education field coming into force (unless alterations to physical features, in which case 5 years following commencement of first phase of legislation). Funded by service provider unless disproportionate burden.</td><td rowspan="2">Public sector only – 5 years following commence-ment of the first phase of the legislation</td></tr>
<tr><td>Goods or Services (including Public Services and transport)

Education</td></tr>
<tr><td>Premises/ Accommoda-tion</td><td></td><td>5 years following commencement of first phase of legislation. Funded by tenant. Should not unreasonably refuse in certain circumstances.</td><td>No</td><td>No (voluntary)</td></tr>
</table>

Section 7: The complaints process

7.1 Structure of this section

As explained in the Policy Letter, the Committee intends for the complaints process to be focused, as far as possible, on achieving informal and early resolution of complaints to reduce the impact of ongoing disputes on all concerned. Where possible, the Committee has also sought to use civil penalties rather than criminal offences where sanctions are required.

There are a number of different topics that need to be considered in this section, these include:

- **how people get advice** (sections 7.2-7.5) – section 7.2 details the organisations involved, section 7.3 looks at advice for people who would have responsibilities under the proposed legislation and 7.4 is about advice for people who would have rights under the proposed legislation. Section 7.5 looks at representation and whether and when people might need to engage a lawyer and what other support would be available to people thinking about making a complaint.
- the **complaints process -** from formally registering a complaint to a Tribunal Hearing and on to appeals (section 7.6).
- the **impact on the parties to the hearing** – section 7.7 covers the awarding of costs, support, protection and confidentiality during the hearing process.
- the **outcome** – section 7.8 looks at awards, remedies and who would be liable to pay compensation.
- **evidence and determining cases** –section 7.9 looks at rules about how evidence is managed and how cases are decided.
- **adjudication of education complaints** is covered in section 7.10.
- **investigations and compliance notices** – section 7.11 looks at the basic actions available to intervene in the absence of an individual bringing forward a complaint.

7.2 Organisations involved in the complaints process - introduction

There are three organisations relevant to the enforcement structure:

- the Employment Relations Service – proposed to become the Employment and Equal Opportunities Service,
- the Employment and Discrimination Tribunal, and
- the Royal Court.

7.2.1 The Employment Relations Service/Employment and Equal Opportunities Service

The Employment Relations Service is currently one of the States of Guernsey services that falls under the mandate of the Committee *for* Employment & Social Security. The Service provides free, confidential advice and conciliation on employment issues and sex

discrimination complaints at present to both employers and employees.

The Employment Relations Service already has delegated legal power from the Committee to undertake some of the proactive functions which are proposed for the new Ordinance. This includes a power to undertake investigations and issue compliance notices ("non-discrimination notices"), and the ability to develop codes of practice in relation to sex discrimination.

The Committee is proposing to expand and develop this service so that it can provide education, advice and conciliation in relation to the new discrimination legislation. The new service would be led by a statutory official to improve the operational independence of complaints handling from the States of Guernsey (see the Committee's Policy Letter).

7.2.2 The Employment and Discrimination Tribunal

The Employment and Discrimination Tribunal was established in its current form in 2006 as a development of the pre-existing system of adjudicating employment cases (such as unfair dismissal). The Tribunal is intended to be more accessible than a court. Complaints which progress to the adjudication stage are heard by three people who are selected from a wider panel. The Panel Members are trained for their roles. They have a Secretary, which is a statutory position, who registers complaints and assists with arranging hearings.

Under these proposals there would be some modifications to the Tribunal to ensure that there would be sufficient capacity and that Panel Members have the training that they need to adjudicate cases under the new legislation. A requirement would also be introduced that people chairing hearings should be legally qualified. Rules of Procedure would be introduced as well as a rolling training programme for panelists and a budget to ensure adjustments could be made for disabled people and people whose first language is not English (see the Policy Letter for further details).

7.2.3 The Royal Court

The Royal Court (presided over by the Bailiff or a Deputy Bailiff) currently hears appeals on points of law from the Employment and Discrimination Tribunal both under the current Employment Protection (Guernsey) Law, 1998 and under the existing Sex Discrimination Ordinance and would continue to have a role in hearing appeals under these proposals. Suitable legislative provision is also likely to be necessary to ensure that any material relating to national security or sensitive intelligence can be properly protected from disclosure. This may necessitate the transfer of proceedings from the Employment and Discrimination Tribunal to (or some other involvement of) the Royal Court in specified circumstances.

7.3 Getting things right to start with: advice for people who would have responsibilities under the new legislation

Policy objective: to provide advice, information and raise awareness amongst employers and service providers, so that discrimination does not happen in the first place.

7.3.1 Getting things right to start with

Preventing discrimination from happening is far better than responding to it after the event. The Committee thinks that often people do not intend to discriminate, but do so through bad practice or lack of awareness. The Committee does not want to "catch people out" if they are not aware of their responsibilities. Education and information will be really important in stopping discrimination from happening and helping employers and service providers to prepare for their responsibilities under the legislation.

The Committee is proposing that, before the legislation comes into force the Employment Relations Service/Employment and Equal Opportunities Service would be able to provide employers and service providers with free one to one advice on their responsibilities. The Committee would also suggest that there should be education, training, guidance and communications campaigns to make sure that people are aware that the law is changing.

In addition to this information and education, it is intended that the Committee would develop statutory codes of practice in relation to the new discrimination legislation.

7.3.2 Codes of practice

The Committee is proposing that there is a power included in the legislation to allow the Committee *for* Employment and Social Security (with assistance from the Employment and Equal Opportunities Service as may be) to develop statutory codes of practice on issues related to:

- the elimination of discrimination,
- the promotion of equality of opportunity in employment,
- the promotion of equality of opportunity in relation to education, accommodation, goods or services provision and club membership, and
- accessibility standards.

It is proposed that any statutory code of practice developed would be admissible as evidence in any tribunal or court cases brought under the legislation to which it applies.

This would mean that if an employer or service provider did not do what the code of practice advised, they might not be breaking the law. However, interpreting the legislation differently to the way that the code of practice interprets the legislation

might stand against them in a tribunal or court if the approach taken is found to be unreasonable or not compliant with the requirements of the legislation. The Tribunal may also consider whether the employer or service provider has considered, or attempted to follow, the code of practice in the course of proceedings.

Codes of practice would give people greater guidance around what to expect, and what their rights and responsibilities under the legislation were, in a way which was more accessible and pragmatic than the text of the legislation itself. This could include greater clarity around what employers might be expected to consider and action to prevent them and their employees from discriminatory practices or otherwise acting in contravention of the legislation.

7.4 Advice about your rights

Policy objective: to support people to secure their rights by providing them with advice about what the law says.

7.4.1 Advice for rights-holders

If the legislation is going to achieve its objectives, it is critically important that people have good awareness of, and advice about, their rights. The Committee knows that some people may experience discrimination and not take any action because they are not aware that they are able to challenge it, or because they are not sure how the legislation applies to their situation[138]. In order to address this, the Committee believes that both education and awareness raising (so that people are aware of their rights) are needed and free, confidential advice should be available when someone feels that they may have been discriminated against.

Initial advice might help people to know where they stand, so that they can try to resolve the situation themselves in discussion with their employer, or the service provider in question, which might mean that they do not need to make a complaint.

It is important to note that the provision of advice will not constitute legal advice, but will inform rights holders to be able to make informed decisions as to the action that they may be considering.

[138] See Committee *for* Employment & Social Security (2018) Discrimination Legislation Project: Sex Discrimination Ordinance: Summary of Consultation findings. Available at: www.gov.gg/sexdiscrimination

7.5 Representation and support to make a complaint

Policy objective: to ensure that there is access to justice; balancing the benefits of a non-legalistic approach with the value that representation can add.

7.5.1 Representation

A person can represent themselves in Employment and Discrimination Tribunal hearings, or they can nominate another person to represent them. There is no requirement for the representative to be a lawyer or hold a legal qualification. This means that usually a person could be represented by an employer organisation, trade union or other association; someone with relevant expertise, or a friend.

In exceptional circumstances the Tribunal might refuse to permit someone to represent another person, unless the representative is legally qualified. They must have good reasons if they do this.[139]

The Committee is not proposing to change these rules.

7.5.2 Why might a person want representation?

A person's representative might help them to prepare evidence and think about what should be said in a hearing. In a hearing, a representative could give an opening and closing statement on behalf of a person and ask questions of witnesses. Once appointed, the representative is usually the point of contact for all matters regarding the hearing, but must be authorised by the applicant. This authorisation can be revoked by the applicant at any time.

If a person does not have a representative, they would give their own opening and closing statement in a hearing, would ask questions of witnesses themselves and present their own case via their own statements.

7.5.3 Legal aid and support for individual cases

With regards to the current situation, legal aid in Guernsey is means tested support for people who could not otherwise afford access to a lawyer. A person cannot ordinarily access legal aid for the purposes of hiring a representative for an Employment and Discrimination Tribunal hearing. This is because the Tribunal is designed to allow people to represent themselves if they wish. However, subject to means testing, someone can receive 2 hours of "green form" legal advice from a lawyer on their employment related matter, paid for by legal aid.

[139] The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 – Schedule 2(c)

7.6 The process from registering a complaint to a hearing and beyond

Policy objective: to ensure that the process for managing complaints is accessible and has opportunities for fast, effective and informal resolution of complaints to prevent the escalation to more costly, adversarial and time-consuming approaches, where this is not necessary.

7.6.1 Overview of the process

The process for registering a complaint will be similar to the process used today for Employment and Discrimination Tribunal cases, with some slight modifications to (a) the timescales where pre-complaint conciliation is entered into and (b) the initial process for non-employment related complaints.

Each of the stages is discussed in more detail below. An overview of the process is shown in **Figure 7.6A** and **Figure 7.6B.**

Figure 7.6A – Overview of the complaint process: employment

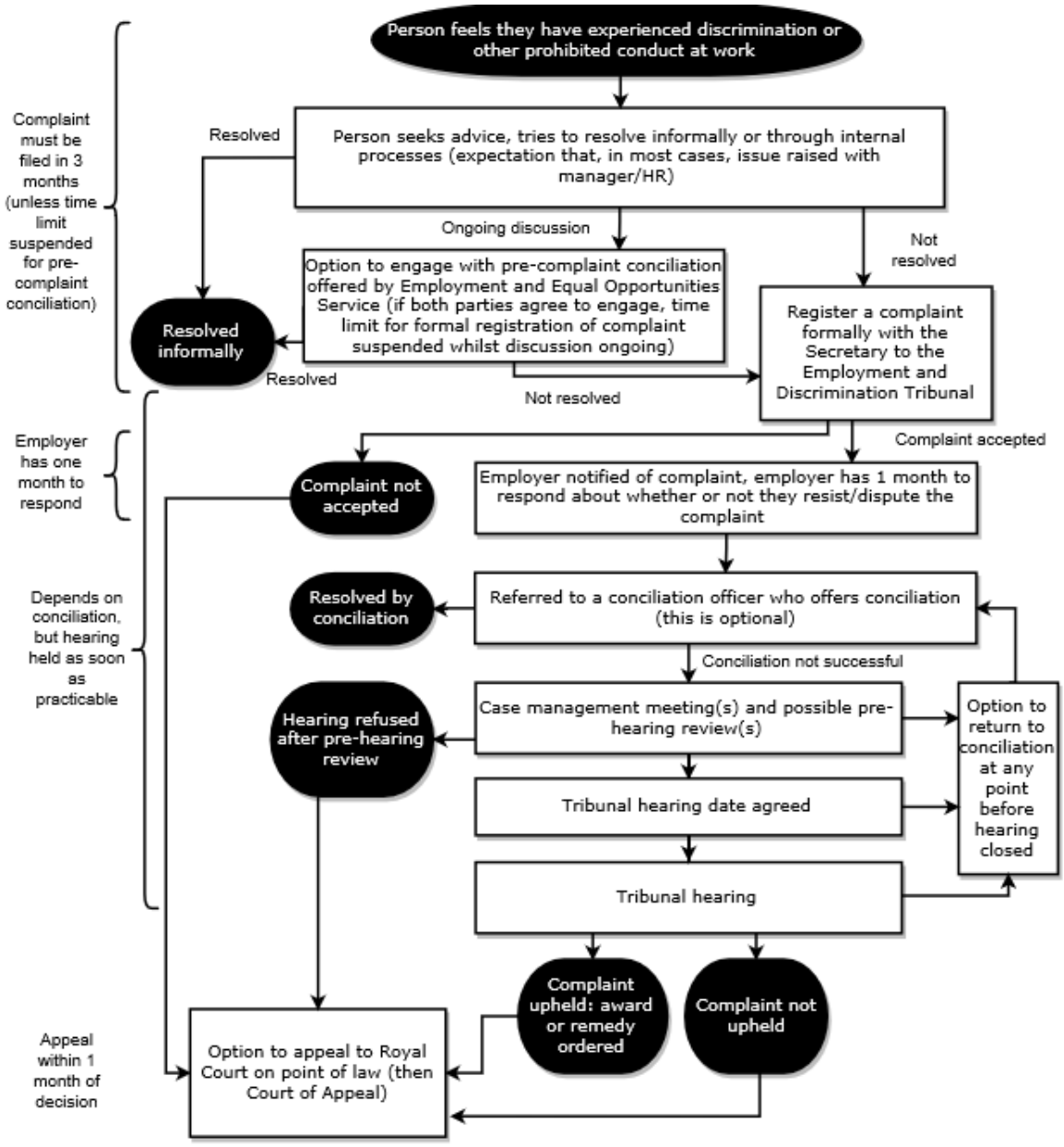
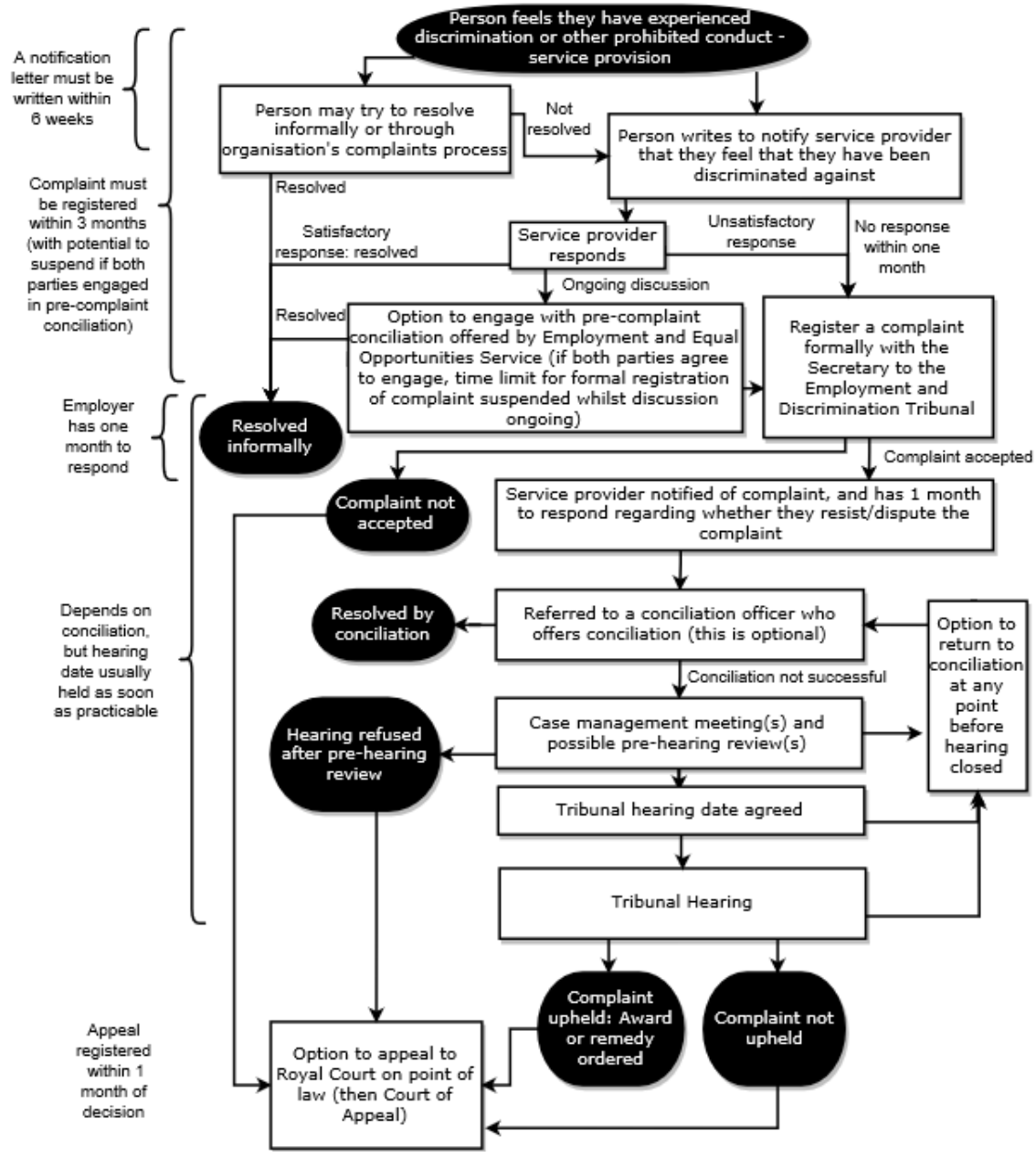


Figure 7.6B – Overview of the complaint process: service providers



Some people will be able to resolve their concerns through discussions early on or through internal complaints processes. The Committee intends that the Employment and Equal Opportunities Service would be able to provide one-to-one impartial advice to both individuals and employers and service providers where concerns arise. They would also be able to offer pre-complaint conciliation – an opportunity to seek to resolve things informally before registering a complaint.

If a person finds that the response of the employer or service-provider in informal discussions is not satisfactory and that they wish to take further action, they will be required to fill out a form to register their complaint with the Tribunal.

The Secretary to the Tribunal will then send the form to the person/organisation that the complaint is about (the "respondent"), so that they can decide whether to resist (dispute/defend) the complaint. They would have one month to respond to this. The matter would then be referred to a Conciliation Officer at the Employment and Equal Opportunities Service. Conciliation is a process to help the parties to a dispute to come to an agreement without having a hearing. Everyone will be offered conciliation, though participating in conciliation is voluntary. In some cases, conciliation will resolve the dispute. If it does not, then the complaint will likely be referred for a Tribunal Hearing.

When the complaint is referred to the Tribunal, there may be a preliminary hearing on certain matters, failing which, one or more case management meetings will be arranged to determine hearing dates, evidence, witnesses and so on.

Following the case management meetings, a Tribunal hearing date is set. At any point during the process until the Tribunal hearing is concluded, the parties can return to conciliation if they wish to do so.

The Tribunal will hear and adjudicate the complaint. The complaint will either be dismissed or, if upheld, an award or remedy may be ordered. Whether an award or remedy is ordered or the complaint is dismissed either party could appeal the decision to the Royal Court on a point of law.

There are some limited circumstances in which the Tribunal can refuse to hear a complaint (for example, if there has already been an agreement in conciliation, or if the complaint is vexatious or out of time). If the Tribunal refuses to hear a complaint, then this can be appealed on a point of law to the Royal Court.

The Committee would expect that in most cases a person who has a complaint would begin by raising that with the person or organisation who they believe may have discriminated against them. While the Committee is not proposing that this should be a legal requirement in employment cases, there is an expectation that an aggrieved employee will have raised the issue with a manager or HR professional within the organisation that they work for when the complaint of suspected discrimination first arises. We are proposing that the legislation is more prescriptive for non-employment

cases and that if a person felt that they had been discriminated against by a service provider (including accommodation providers, education providers, and clubs and associations as well as providers of goods or services), then they should write to notify the service provider that they felt that they had been discriminated against and that, unless the service provider was able to resolve their concerns satisfactorily, they might make a complaint.

The following sections look at these stages in more detail.

7.6.2 Written notification

The Committee is proposing that if someone believes that they may have been discriminated against in a non-employment context (i.e. in goods or services, accommodation, education or in a club or association), they should write to the service provider (which could be by email) and let them know – setting out what has occurred. They should also mention that, if a resolution could not be reached, they may exercise their right to make a complaint under the legislation.

There would be no need for the written notification to be given by a lawyer. Advice on what a notification letter to a service provider would need to contain, would be available from the Employment and Equal Opportunities Service.

The notification should take place within six weeks of the discrimination occurring.

This provision is intended to prevent situations arising where the first thing that a service provider hears about a complaint is from the Secretary to the Tribunal. While in employment cases it would be expected that, if someone felt that they had been treated wrongly, their manager would be aware by the time that they registered a complaint, the relationship between service users and service providers is often substantially different. For example, if a customer was discriminated against in a shop by a junior member of staff, then the shop manager may not even know what had occurred until a person formally registered a complaint. If the customer had to write to the shop about their complaint, as proposed, it would at least give the manager a chance to respond before the complaint is registered with the Secretary to the Tribunal.

The Tribunal may accept complaints in exceptional circumstances without written notification having happened (this might be, for example, if a person has reason to be afraid of a retributive response to the notification). The Tribunal might also extend the timescale if there are good reasons for doing so.

A formal complaint cannot be registered until either the service provider has responded in a way that the individual finds is unsatisfactory or, if the service provider does not reply, then one month after the written notification is sent to the service provider.

7.6.3 Pre-complaint conciliation

The Committee intends to introduce an option to engage in informal pre-complaint conciliation before a complaint is formally registered. This service would be provided by the Employment and Equal Opportunities Service. If both parties agreed to participate in pre-complaint conciliation, then the time limit for registering a complaint would be suspended while discussions were ongoing. So, for example, if the parties began pre-complaint conciliation two and a half months after the incident occurred, then after three weeks of both parties engaging in pre-complaint conciliation the complainant decided that they wished to register a complaint, they could still do so even though three months had passed. This is to ensure that productive discussions are not cut short due to time pressures. Participating in pre-complaint conciliation would be voluntary for both parties.

7.6.4 Formally registering a complaint

In order to formally register a complaint, a form would need to be completed and submitted to the Secretary to the Tribunal. The form will ask for some details about what the complaint is regarding, who is making the complaint and the entity or person the complaint is against.

If the person has an intellectual impairment or is a minor, then they may be supported to register a complaint or have an appointed guardian or parent act on their behalf in accordance with best practice and any legislation relevant to capacity.

The Tribunal can refuse to accept a complaint:

- if it is not registered in the correct form,
- if it is not supported by the documents which the Secretary requires, or
- if it is not registered within 3 months of the discrimination occurring (unless the time limit is extended via pre-complaint conciliation).

At any stage in the process, the Tribunal can also strike out or dismiss the whole or part of a complaint (see section 7.6.11).

If the Tribunal refuse to accept or if the Tribunal dismisses a complaint, then the person trying to make the complaint can appeal this decision on a point of law to the Royal Court.

A person registering a complaint may withdraw it at any time.

7.6.5 Time limits for registering a complaint

The Committee proposes that the complaint must be registered within 3 months of the alleged discrimination occurring (unless pre-complaint conciliation has been entered into, in which case this time limit would be extended accordingly). This 3 month time limit could be extended by the Tribunal if there were good reasons why it was not possible to bring the complaint within 3 months. If considering extending the time

period, the Tribunal should include consideration of whether the employer or service provider the complaint was made about, is aware of what has happened and if the time extension would impact on their ability to defend the case.

The Committee proposes that Equal Pay complaints can be brought within the normal contractual limitation period of six years. It is worth noting that it would not be possible to bring a complaint for a period that occurred before the legislation came into force.

If the person making the 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 three months to register a complaint from the time that they become aware of the relevant information.

The Tribunal's decisions to permit additional time would be subject to appeal to the Royal Court.

7.6.6 Sending the complaint to the person who has been complained about

The Secretary to the Tribunal will send the complaint to the employer or service provider who has been complained about and ask them whether they wish to resist (dispute/defend) the complaint, and to fill out a form with their response.

The employer or service provider will have one month to respond to this complaint (note that this is an extension on the current two weeks).

If the employer or service provider resists the complaint, the process continues to the next step, which gives an opportunity to engage in conciliation. If the employer or service provider does not resist the complaint, then the complaint is likely to be passed to a Conciliation Officer in the Employment and Equal Opportunities Service to resolve what will happen next.

7.6.7 Conciliation

The Committee is not currently proposing changing the current conciliation system (other than looking into appropriate training and support for Conciliation Officers to handle new kinds of complaint): everyone must be offered conciliation, but participation in conciliation is voluntary.

The Secretary to the Tribunal will send the complaint and the response from the employer or service provider to a Conciliation Officer.

The Conciliation Officer's role is to talk to both parties to see if a mutually acceptable solution can be found. The Conciliation Officer can explain the conciliation process, discuss the options open to the parties, assist the parties to understand how the other side views the matter, inform the parties of any similar cases that may have been taken to Tribunal, liaise with the parties regarding any proposals that the parties may put forward, and explain the law and tribunal procedures.

The Conciliation Officer cannot make a judgement on the matter or on the possible outcome at Tribunal, advise either party to accept or decline any proposal for a settlement, communicate threats, compel or advise an applicant to withdraw a complaint, act as a representative, take sides or assist either party to prepare their case.

The outcome of a conciliation process can be a mutually agreed settlement which could include financial or non-financial terms. If an agreement cannot be reached, or if either of the parties do not want to participate in conciliation, then the complaint can be referred back to the Secretary to the Tribunal.

The parties can return to conciliation at any stage before the Tribunal hearing is concluded.

More about this can be found in the Employment Relations publication "Conciliation for Individuals" at: www.gov.gg/employmentrelations

7.6.8 Case management meeting and setting of a date for the hearing
Again, the Committee is not proposing changing this process from the process currently used. More detail on this process can be found at: www.gov.gg/employmenttribunal

If a complaint is referred back to the Secretary to the Tribunal from a Conciliation Officer, then the Secretary will arrange a case management meeting. This is a meeting between the person that has made the complaint, the person the complaint is about, the Tribunal Chairperson and the Secretary to the Tribunal. The case management meeting will be used to agree any necessary administrative questions with regard to the hearing, this will include:

- confirming what issues in the complaint need to be adjudicated,
- estimating how long the hearing should last and setting the date(s),
- explaining the hearing process, and
- deciding what "Orders" should be made about documents and witnesses.

"Orders" will include, for example, deadlines for parties to collect their evidence and exchange documents. The Chair will also decide at the case management meeting which witnesses can be called.

Following this meeting, the date for the hearing will be set and the details agreed will be sent to the parties in a letter. Once the date of the hearing is set, it will not be changed unless there are exceptional reasons to do so.

7.6.9 Pre-hearing review
In some cases there will be a critical question which might determine whether a complaint (or part of a complaint) has been properly made within what is allowed under the legislation. If it is possible to address this question via consideration of paper-based

evidence (without the parties or their representatives present), then a pre-hearing review might be arranged to address this question.

The pre-hearing review decision will be published on www.gov.gg[140]. A decision to dismiss a complaint can be appealed to the Royal Court on a point of law.

7.6.10 Tribunal Hearing

The Committee is not proposing changing the hearing process. Further detail on the Tribunal Hearing process can be found at: www.gov.gg/employmenttribunal

Tribunal hearings are usually held in community venues, not in the Court building. This is to make the process more accessible to the public who may not be familiar or comfortable in the more formal court surroundings.

The hearing usually begins with an explanation of proceedings, followed by opening statements, evidence from witnesses, and then closing statements.

If either of the parties fail to attend the hearing, the Tribunal may go ahead and hear the complaint without them.

The decision is not usually given in the hearing. It is given in writing, as soon as is practicable following the date of the hearing. This is then posted and/or emailed to the parties by the Secretary so that they receive it at the same time. The decision is displayed at the Royal Court for seven days after it has been issued. It is also published on www.gov.gg.

7.6.11 Powers to dismiss or strike out complaints

The Committee intends to introduce stronger powers for the Tribunal to dismiss and strike out complaints in order to ensure that the Tribunal can manage cases effectively if cases come forward that are vexatious or where a complaint has no reasonable prospect of success. This would be implemented by an Order made under section 3 of the Schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 and would apply to all employment and discrimination cases and not just the ones under the new discrimination legislation. The Committee already has power to implement this.

Decisions of this nature would be able to be made by the appointed chair for that complaint sitting alone, or by the panel of three – the chair and two side panel members. In all cases the parties in question would have reasonable opportunity to make representations before such a decision is made.

Discretion in drafting these powers would rest with the Law Officers, but it is envisaged that they would be broadly similar to the powers under the England and Wales Rules

[140] https://gov.gg/article/151621/Employment--Discrimination-Tribunal-Decisions

(Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

7.6.12 Appeals

An appeal against a Tribunal decision can be made, but only on a point of law (for example, the Tribunal failed to run the hearing process properly or did not consider relevant information provided concerning the complaint). When the person is sent the Tribunal's decision in writing, they will also be sent a document called an "Appeals Order". If they wish to appeal, they must fill this in and send a copy to the Secretary of the Tribunal, who will then send copies of the document to the Tribunal, the other party and the Royal Court. The Royal Court will then manage the appeal process. Appeals must be made within one month of the Tribunal's decision. If, following a Royal Court decision, either party wishes to appeal this decision, they can then appeal to the Court of Appeal.

7.6.13 Hearing several complaints in the same hearing

The Tribunal may hear several related complaints in the same hearing in certain contexts.

If a person believes that they have been unfairly dismissed and that they have experienced discrimination, they might register complaints of both unfair dismissal and discrimination. The Tribunal may choose to hear both of these complaints in the same hearing.

If a person has been discriminated against on more than one protected ground by the same person, these complaints may be heard in the same hearing, but a separate decision will be made on each complaint. As explained in section 7.8.5, if the complaints of discrimination are about the same facts or set of circumstances, the Tribunal might apply the compensatory limits as if it were one case.

7.7 Impact on parties to the hearing

Policy objective: to provide individuals with some necessary protection when cases are heard, in balance with maintaining wider considerations such as the principle of open justice and public interest.

7.7.1 The impact on parties to the hearing – introduction

This section looks at a number of topics that are related to how the hearing might impact a person, how accessible the hearings are, what costs parties might face associated with a hearing and so on.

7.7.2 Accessibility of hearings

If either of the parties or any of the witnesses need reasonable adjustments or have access requirements, they should let the Secretary to the Tribunal know at the earliest opportunity so that they can make arrangements to meet the individual's needs. The Committee is proposing setting aside additional budget for this to ensure that disabled people have access to justice.

7.7.3 Awarding costs

The awarding of costs means that one of the parties to a dispute could be charged for expenses that others have incurred as a result of having the complaint adjudicated.

The Tribunal currently has the power to require one of the parties to pay all or part of the costs associated with the hearing, though this has been rarely applied to date[141].

The Tribunal can award costs in relation to the preparation and presentation of a case, including expenses for witnesses, and the costs, fees and expenses of the Tribunal Panel members. The Tribunal cannot award costs in relation to legal representation. This is because the Tribunal is designed to be accessible to people without using lawyers.

If a party wants to apply for costs to be awarded, they must put forward an application in writing at the hearing. This should be shared with the other party to the hearing in writing before the hearing date so that the other party has an opportunity to respond.

The Committee is not proposing to change this process.

7.7.4 Confidentiality

Similar rules around confidentiality of evidence apply in the Tribunal as they do in the Royal Court in Guernsey. The Committee is not proposing any changes to these.

This means that there are certain rules about legal privilege – which means that lawyers (where used in Tribunal hearings) are not required to disclose information that their client has told them in confidence, unless their client gives permission for this.

The Tribunal will be careful about how it handles sensitive or confidential information. However, if a piece of information is critical to explaining why a judgement was made, this may be included in the writen decision.

The Tribunal does have the power to hold all or part of a hearing behind closed doors/outside of the public domain at its discretion. However, this power is usually only used if required to protect a child or vulnerable person who is making a complaint or who is a witness where, even if granted anonymity, it would be possible to identify them from the evidence given.

[141] See section 6 of the schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 and also The Sex Discrimination (Recoverable Costs) Order, 2006

Ordinarily, the names of the parties to a dispute are published seven days before the hearing, the public and the media are allowed to attend the hearing and the decision is published in the Royal Court and on the www.gov.gg website.

7.8 The Outcome of a Hearing

Policy objective: to ensure effective, proportionate and dissuasive remedies are available which not only compensate individuals, but also reduce the chances of similar events from happening again.

7.8.1 Outcome of the hearing - introduction

If the Tribunal finds that the complaint is well-founded, it is proposed that the Tribunal would be able to award financial compensation and/or an order for an action to be taken. If it was an equal pay case then the person could claim an adjustment to their pay and payment in arrears.

7.8.2 Financial compensation (not including equal pay)

Currently, for sex discrimination complaints a person can receive up to three month's pay as compensation. The new proposed compensation includes three elements:

- a pay related award, similar to that currently used for sex discrimination complaints (for employment complaints only),
- actual financial loss (for goods and services only) and
- injury to feelings (on top of the pay related award/financial loss for any claim).

For goods and services complaints, actual financial loss means anything that the individual claims that they have lost financially that they would not have lost if they had not been treated in the way that they had. A person making a complaint would need to think about what actual financial losses they had experienced and list these, showing how they had calculated the total amount. The service provider would be able to challenge the amount claimed by the complainant if they felt that what was being claimed was not linked to the act which was disputed, or if the amount claimed was otherwise wrong. The Tribunal would then consider whether these losses were reasonably related to the discriminatory action which has occurred and could order the employer or service provider to pay the individual the final determined amount as compensation.

The injury to feelings element recognises that a significant amount of the harm done by discrimination is social in nature. This additional amount is intended to recognise where an individual has suffered harm. Injury to feelings includes subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression. It is proposed that the Tribunal would use a version of the Vento scale to determine the size of the award made. This is used in Jersey and the UK.

The Vento scale has three bands – a lower, middle and upper band. In the UK, it seems that one-off discrimination cases in service-provision contexts (e.g. a one-off encounter in a shop, restaurant etc.) have been more likely to be classified as belonging to the lower band. Cases where the relationship is more sustained might be higher. Given that employment and education related relationships tend to be more sustained and may have more impact on the individual, compensation for these cases may be more likely to be in the middle or upper band. The upper band is for the most serious cases[142].

There are certain criteria that will mean that the amount awarded is higher in certain contexts. For example, serious and extended campaigns of discrimination will be given a higher award than one-off incidents. Humiliating or degrading comments may increase the amount awarded, particularly if referring to intimate aspects of a person's life. Humiliating someone in public may also lead to higher compensation being awarded. If the person suffers physical or mental ill health as a result of the conduct, this may also increase the amount awarded. It is also intended that the extent to which the employer or service provider has attempted to prevent, mitigate, or remedy the situation might decrease the amount awarded. On the other hand, behaviour which suggests that the employer or service provider has blatant disregard for the legislation or has behaved in a way that is considered outrageous, could increase the amount.

Since the award is proportionate to the harm suffered, it is not possible to say in advance how much the award for any particular case might be.

The Committee is proposing that for employment cases, a six month pay related award may be issued (along the same principles as the existing three months award, this pay related award is not directly linked to financial loss). Up to £10,000 in injury to feelings may also be awarded based on a three banded scale akin to the Vento Scale used in the UK (albeit with a much lower upper limit).

The Committee is proposing that for discrimination in all other fields there is an award directly linked to financial loss, which has an upper limit of £10,000. Similarly to employment, there would also be an award of up to £10,000 for injury to feelings. This would be based on the same three banded scale, along the lines of the Vento scale.

7.8.3 Awards and remedies in equal pay cases

The award would be different in an equal pay case where the award could include either, or both, of the following elements:

- a requirement to improve the pay or terms and conditions of the complainant(s) so that they are the same as the person that they are comparing themselves with.

[142] For further information, see UK Equality and Human Rights Commission (2018) "How to work out the value of a discrimination claim", available at: https://www.equalityhumanrights.com/sites/default/files/quantification-of-claims-guidance.pdf [accessed 1st March 2020].

- arrears for the difference in pay, where relevant, for up to six years prior to the complaint being registered. However, pay or arrears could not be claimed for any time before the law came into operation (so, for example, if the relevant part of the law had only been in force for two years, a person could only claim two years arrears not six).

Unless combined with a wider complaint of discrimination, this would be instead of, and not in addition to, the six month pay award and injury to feelings award outlined above.

7.8.4 Non-financial remedies

The Committee is proposing that in addition to, or instead of financial compensation, a person might request, or the Tribunal might decide to make, an order for a certain action to be taken. This action must be well-defined so that it is tangible and easily understood by the person who needs to perform the said action and so that it is possible to check to see whether the person has done it. It could be used alongside, or instead of, a financial award. The Tribunal may decide, for example, in cases where indirect discrimination has occurred without the intention of discriminating that a non-financial remedy is more appropriate.

Actions that the Tribunal could require would include, inter alia:

- an order for equal treatment (e.g. to hire someone or to provide a reasonable adjustment).
- an order that a person or persons specified in the order take a course of action which is also specified (e.g. put an equality policy in place).
- an order for re-instatement (back into a role that a person used to undertake as an employee).
- an order for re-engagement (re-engagement as an employee of the same firm, but potentially in a different role, department, branch or office).

The order will require the person to provide evidence to the Tribunal after a certain period of time (but within five years of the issuing of the order) that they have undertaken the required action. If a person does not comply with an order, the Committee proposes that they would be subject to a civil penalty issued by the Secretary to the Tribunal.

7.8.5 How would this relate to unfair dismissal complaints and sex discrimination complaints?

The Committee is proposing that the awards and remedies in the Sex Discrimination Ordinance should be amended to align with the new legislation, so far as appropriate.

At the moment, if a person is dismissed and there is sex discrimination involved in the events leading up to their dismissal, then they can bring two complaints – one for sex discrimination and one for unfair dismissal. These are heard in the same Tribunal hearing. A person can be awarded up to three months' pay if their sex discrimination

complaint is upheld. If the Tribunal finds that the person was unfairly dismissed, they can receive up to six months' pay in addition to the three month's pay (i.e. nine months' pay in total).

Under these proposals, for carer status, disability and race complaints, if a person was not sure whether their dismissal was discriminatory or whether it was an unfair dismissal but was not discriminatory, they could still register complaints of both unfair dismissal and discrimination. The Tribunal would determine both complaints and would calculate the award that could be given.

Were this to happen, the outcome would be one of the following:

- neither the unfair dismissal complaint nor the discrimination complaint are upheld: no compensation.
- the unfair dismissal complaint is upheld but the discrimination complaint is not: up to six months' pay (as currently).
- the discrimination complaint is upheld but the unfair dismissal complaint is not: up to six months' pay plus up to £10,000 for injury to feelings, plus non-financial remedies as deemed appropriate.
- both the discrimination complaint and the unfair dismissal complaint are upheld: a combined award of up to nine months' pay plus up to £10,000 for injury to feelings, plus non-financial remedies as deemed appropriate.

If a person was discriminated against on different grounds they could register more than one complaint, which might be heard together at the Tribunal. If there are multiple complaints relating to different incidents or circumstances then the limit could be applied to each complaint (i.e. an employee could be awarded compensation up to the upper limits for an incidence of sex discrimination and also be awarded compensation up to the upper limits for an incidence of race discrimination). If there were multiple complaints based on different grounds about the same incident/set of circumstances, this might be treated as one set of circumstances from the perspective of compensatory limits.

7.8.6 Can a person get interest on the amount of financial compensation they are owed if the employer or service provider takes a long time to pay the compensation ordered?

Awards made by the Employment and Discrimination Tribunal are treated as "judgement debts". There is a law that allows for judgement debts to be charged interest[143], so any awards would follow these general rules. Usually this interest rate is set at 8%.

7.8.7 What if someone does not pay what the Tribunal has awarded?

In some circumstances, the payment of compensation will be made by mutual arrangement and will be unproblematic. However, if the person who has to pay

[143] The Judgements (Interest) (Bailiwick of Guernsey) Law, 1985

compensation does not wish to appeal the Tribunal's decision, or the appeal period has passed and the individual owed compensation has approached them and asked for payment and they have been refused, then the individual owed compensation can approach H.M. Sheriff at the Royal Court to recover the debt.

H.M. Sheriff can liaise with the person due to pay compensation and agree either immediate payment, or, if this is not possible, payment by installment. If the employer or service provider refuses to pay, the Sheriff can confiscate belongings to the value of the debt owed from the organisation, and sell these to pay the debt.

7.8.8 Who has to pay compensation when this is awarded? (vicarious liability and joint liability)

Subject to certain defences set out below, something done by a person in the course of their employment would also be considered to be done by that person's employer, whether or not it was done with the employer's knowledge or approval. Anything done by a person as an agent of another person would be considered to have been done by the person they were acting on behalf of, in addition to themselves.

If it is necessary to establish a state of mind (i.e. knowledge, intention, opinion, belief or purpose, or reasons for those) of a body corporate, it is sufficient to show that the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her actual, or apparent, authority and the director, employee or agent had that state of mind.

In both of the above situations, an employer could defend themselves if they could show that they took reasonable steps to prevent an employee from behaving unlawfully. This might include (but is not limited to) actions to make a person aware of their responsibilities, training, or having and implementing clear internal policies which cover discrimination.

While an employee might be jointly liable in some contexts, it should be clear that an employee may not be held responsible for following the direction or policy of an employer that they do not or cannot control.

7.8.9 How would Tribunal decisions apply to the States?

If a Tribunal made a decision that the States had discriminated under the new legislation, it would be treated in the same way as other organisations in terms of liability to pay compensation and undertake any actions ordered by the Tribunal.

If it were a statutory official operating under delegated authority to undertake States roles who discriminates, then it would be the States of Guernsey who would be responsible for paying compensation.

7.9 Evidence and determining cases

7.9.1 Gathering information before making a complaint

If someone thinks that they are in a situation which might allow them to make a complaint under the legislation, then they can write to their employer to request further information. This might include, but is not limited to requests for information about:

- why a person has done or has failed to do something,
- information about the pay and conditions of other employees (other than confidential information about an identifiable individual which they do not agree to share).

Of course, it is up to the employer or service provider whether or not they respond. However, the Committee's proposals suggest that if someone requests information of this nature from an employer or service provider and they withhold information that they have or give an answer which is false or misleading, the Tribunal may draw appropriate inferences from this behaviour if a complaint is made.

7.9.2 Pay disclosure

If a person discussed their pay with a colleague or ex-colleague for the purpose of gathering information about whether they could make an equal pay complaint under this legislation, this would be permitted even if their contract contained a pay non-disclosure clause. However, this does not mean that employees could disclose their pay to anyone in any circumstances. See example in section 4.5.10 above.

7.9.3 How much evidence would someone need to make a complaint?

It can be very difficult for a person to conclusively prove that they have experienced discrimination. If employers and service providers are aware that discrimination is prohibited, they might make decisions for discriminatory reasons but seek to conceal these reasons, particularly from the person who is being discriminated against.

Consequently, following European standards, these proposals suggest that what would be required in order to make a complaint, would be that someone could show a set of circumstances from which it may be presumed that discrimination has occurred.

7.9.4 Burden of proof

The proposals say that if the person bringing the complaint can demonstrate that there are circumstances in which it could be presumed or evidenced that discrimination has occurred, then the burden of proof shifts to the employer or service provider. They will need to show that there is a good explanation for why the circumstances that appear to be discriminatory are actually not.

This would mean that if an employer or service provider cannot provide any good reason, it can be presumed that they have behaved in a discriminatory way and are not being forthcoming about their reasoning (again this is intended to follow European

standards).

7.9.5 Acts done for more than one reason

In many discrimination cases decisions are being made for complex reasons. It might be that a person or group of people act in such a way that suggests that the fact that someone had a characteristic falling within a protected ground significantly influenced their decision. However, there might also be other reasons for them having made the decision that they made.

These proposals would say that any act done, where the decision included a protected ground as a factor, would be discriminatory and a complaint could be brought on this basis. Consequently, it is not necessary for someone to show that one of the protected grounds was the only, or determining, factor leading to a decision or an act, only that it was a contributing factor.

Example – contributing factor

An accountancy firm operates as a partnership and existing partners are deciding who to appoint to replace an outgoing partner. During a discussion about applicants, the attendees suggest that one of the candidates would be less credible with clients and they imply that this is because she is disabled. Other factors are considered including her level of experience, inter-personal skills and commitment to the firm. If there is evidence that the candidate's disability was a contributing factor to the decision being made not to appoint this candidate, it would constitute discrimination. This will apply even if the same decision would have been reached based on the other factors considered.

7.10 Adjudication of education complaints

The ability to formally register education complaints will be delayed and will not come into force at the same time as the other provisions. This is because two particular kinds of Education complaint are often dealt with through other routes in the UK and there may be an overlap with the way complaints are managed under the new Education law. These two areas are where the discrimination relates to States and Voluntary school admissions (on any of the protected grounds) and where the discrimination complained of relates to disability discrimination in schools (including decisions about special educational needs).

The Committee anticipates that the Employment and Discrimination Tribunal will hear some education complaints, including those that are not related to the two areas identified – for example, around adult education.

Once there is clarity about the appeal mechanisms included in the new Education law, and how these relate to the Employment and Discrimination Tribunal, a proposal can be returned to the States on how to manage education complaints. Following this, the

education field can be brought into force, allowing people to make complaints of discrimination in relation to Education.

7.11 Investigations and compliance notices

Policy objective: to provide a mechanism to correct unlawful conduct without individual complaint where this is in the public interest.

7.11.1 Investigations

The Committee is proposing to retain a power similar to that currently exercised by the Employment Relations Service (under the Sex Discrimination Ordinance). This would mean that, if there is reason to believe that an employer or service provider has behaved in a way which is unlawful under the legislation (through discriminating against, harassing or victimising their employees or service users; issuing discriminatory advertisements; procuring someone else to discriminate on their behalf; or not complying with a non-discrimination notice – see below) the statutory official heading the Employment and Equal Opportunities Service would have a power to allow investigation of this matter.

This might begin with an informal request for information. If this is unsatisfactory, a "notice to furnish information" might be issued to the employer or service provider and require them to provide information by a specified time, in writing or in person, in relation to the area of concern. If the employer or service provider does not comply or provides false information, they would be subject to a fine.

A person cannot be compelled to give evidence that they would not produce in civil proceedings before the Royal Court. A notice to furnish information could be appealed to the Employment and Discrimination Tribunal.

7.11.2 Compliance notices

If it is found that someone has, in fact, acted unlawfully, then it is proposed that a power is retained, similar to that which the Employment Relations Service has under the Sex Discrimination Ordinance, which would mean that the person who has acted unlawfully could be issued with a compliance notice which requires them to correct the situation. This power would legally rest with the statutory official heading the Employment and Equal Opportunities Service.

Before issuing a compliance notice, the issuer would usually try to resolve the issue informally by speaking to the employer or service provider about what is wrong and indicating what might need to be done, in their view, to put the situation right. They might then be issued with a warning that a notice might be issued (to which the employer or service provider could respond with representations) and then, if the issuer remains unsatisfied they could issue a non-discrimination notice.

The non-discrimination notice would explain what the person had done, or was doing, that was unlawful and would require them not to do that. It would explain what might need to be done to ensure that the person did not contravene the legislation and specify a way for letting the issuer know that they have done the action required of them.

If the employer or service provider complies with the requirements of the notice, no further action will be taken by the head of the Employment and Equal Opportunities Service, unless something else occurs which gives rise to concern. However, the person who had behaved unlawfully could still face a complaint of discrimination if an individual who was affected seeks to make a complaint. The fact that they have complied with a non-discrimination notice might be a mitigating factor for the employer or service provider if a complaint were upheld against them.

If someone fails to comply with a non-discrimination notice they may be issued with a civil penalty by the head of the Employment and Equal Opportunities Service. At present, a fine or prison sentence is available for failing to comply with a non-discrimination notice. The Committee intends that this should be changed to a civil penalty in the Sex Discrimination Ordinance also.

If someone wilfully alters, suppresses, conceals or destroys a document required to be produced by a non-discrimination notice, or if they otherwise recklessly or falsely provide information or material which is misleading, then they may receive a fine.

If an employer or service provider is issued with a non-discrimination notice and they disagree with the content or the action that they are being required to do, then they may register an appeal with the Employment and Discrimination Tribunal. They must do this within one month. The Tribunal can quash the requirements of the notice. It can also vary them or substitute a requirement which it deems is more appropriate. Or, the Tribunal can uphold the notice. The decision of the Tribunal could then be appealed to the Royal Court.

The Employment and Equal Opportunities Office will keep a register of non-discrimination notices, which will be available to the public.

Notices will not appear in the register, and civil penalties will not be issued, until after the month in which the notice could be appealed has passed. Notices would be removed from the register after five years.

Section 8 – Exceptions list

8.1 Introduction - exceptions

If the discrimination legislation is agreed and comes into force then, as a general rule, any discrimination on the basis of carer status, disability and race will be unlawful (in addition to the grounds of marriage, sex and gender reassignment in the existing Sex Discrimination Ordinance).

However, there will be exceptions to that rule where different treatment is not considered discrimination for the purposes of the proposed legislation. The Committee is proposing that the Ordinance includes a power for the Committee to amend the list of exceptions by regulation. This list sets out the Committee's proposals for an initial list of exceptions.

It should be noted that this list might change, if amended during the States debate, and also potentially at the legal drafting stage.

The exceptions are numbered for ease of reference.

8.2 Reasons for different treatment which are not exceptions

The Committee's proposals include some provisions that are not exceptions but that can allow people to act in ways that would otherwise be considered discriminatory. These include positive action measures (which treat people differently to promote equality), providing reasonable adjustments to include disabled people (or not, if it is a disproportionate burden to do so), objective justification of certain types of discrimination and genuine and determining occupational requirements.

These are discussed in more detail in sections 3, 4 and 5 of this appendix.

8.3 Exceptions that apply to all fields

The Committee is proposing that the exceptions in this section would apply in all (or multiple) fields – employment, goods or services provision, education provision (when commenced), accommodation provision and in membership of clubs and associations.

Requirements of the law (no. 1)
It is proposed that if someone is doing something that they are required to do by law this would not be discrimination for the purposes of the proposed legislation. This includes where someone is required to act in compliance with the law of another country. If someone believes that there are equality issues related to the operation of a law they should let us know (equality@gov.gg). It would then be for the States to

consider whether, when and how to change the law. In some cases, if a person feels that a law is discriminatory, they may be able to take a case under the Human Rights (Bailiwick of Guernsey) Law, 2000.

This exception does not apply to contracts and leases. See exception no.4 on transitional arrangements for contracts and leases.

It is also intended that the ability to make a discrimination complaint should not apply to anything done that is by the order of a court or tribunal or to judgements, awards or sentencing made by judges, magistrates, jurats, tribunals or others acting in a formal judicial capacity.

Wills and gifts (no. 2)
It is proposed that any person making a will or giving a gift can choose who benefits with regards to land, goods and property – this would not be subject to discrimination complaints. Any challenges to a will would be governed by existing legislation on wills and probate.

Preferential charging (no. 3)
It is proposed that people will be allowed to introduce or maintain preferential fees, charges or rates for anything offered or provided to carers or people with disabilities.

Transitional arrangements (no. 4)
There may be some historic schemes which have treated people differently with regards to the protected grounds (for example, in social insurance, insurance or pension plans) in a way which would not be permissible when the legislation comes into force. It is proposed that such schemes are not subject to complaints if: there are reasonable and proportionate transitional arrangements agreed prior to the legislation entering into force to phase out the scheme; and these are already being implemented at the time the legislation comes into force with a view to reaching a position which would be compliant.

The Committee recommends that a two year period of grace from the commencement of the legislation should be allowed for discriminatory terms in pre-existing contracts or leases.

Protection from harm (no. 5)
Different treatment of persons with:

- a tendency to set fires,
- a tendency to steal,
- a tendency to physically or sexually abuse other persons, or
- a tendency towards exhibitionism or voyeurism,

that could be objectively justified in order to protect from harm other people and/or their property, would not constitute discrimination.

It would also not constitute discrimination for the prison or probation services to take into account a protected ground as part of a wider package of evidence-based risk factors when assessing the likelihood and impact of re-offending and where it can be objectively justified that they do so in order to protect from harm other people and/or their property.

8.4 Exceptions related to public functions

National security (no.6)
It is proposed that acts done for the purposes of safeguarding national security are exempt, but only where this is justified by the purpose.

Crown Employment (no.7)
It would not be discrimination to place requirements of residence, nationality, birth or descent for employment in the service of the Crown; employment by a public body (whether corporate or unincorporated) exercising public functions, or holding a public office.

Immigration (no. 8)
It is proposed that Immigration Officers and Police Officers would not be discriminating where they are acting in a way required to give effect to relevant UK immigration law or policy as extended to and in force in the Bailiwick of Guernsey.

Population Management (no. 9)
Guernsey has a Population Management Law. The Law is designed to regulate the size and make-up of the population in order to support the economy and community both now and into the future. The Law is supported by a number of policies designed to attract the diverse range of skilled people needed to strengthen Guernsey's workforce and to provide clarity to those already resident.

It is proposed that action taken to give effect, in a proportionate way, to the population management policy adopted by the States of Guernsey and/or the Committee *for* Home Affairs may take into account carer status, or nationality, national or ethnic origin. This includes relevant decisions related to permits for different categories of housing or permits for employment where based on strategic policy and informed by the identified needs of the population. Disability may be referred to but only when considering the extension and/or type of permits for people who are already resident.

Household composition for grants, loans, or benefits (no. 10)
It is proposed that any income assessment for grants, loans or benefits provided by the States of Guernsey may take into account household composition, as part of the income assessment.

Determinations (no. 11)
It is proposed that it would not be discrimination, for the purposes of the proposed legislation, for an officer or Panel, with delegated authority, to make determinations which may take into account carer status and disability in ways which are proportionate and necessary to give effect to the social insurance or social assistance policy agreed by the States of Guernsey or the relevant Committee thereof.

Residency status (no. 12)
It is proposed that a Committee of the States of Guernsey, or the States, may impose policy requirements which vary terms and conditions to access government services, facilities, grants, loans, benefits or access to employment or other opportunities based upon place of residence, length of residence and/or place of birth in order to distinguish between services for citizens/permanent residents and others. This would not constitute direct or indirect race discrimination for the purposes of the proposed legislation. However, it should be noted that any such decisions made by the States or its Committees should otherwise align with Guernsey's human rights obligations.

See also social housing allocations – included in the "accommodation" section 8.11.

Ancient monuments – accessibility action plan (no 13)
It is proposed that the public sector duty to prepare accessibility action plans would not extend to ancient monuments where no other service is provided. For clarity, this exception does **not** apply to ancient monuments now used for another purpose or fee-paying visitor attractions or attractions where refreshments or souvenirs are sold.

8.5 – Employment

Safeguarding - employment (no. 14)
The Committee does not intend that anything in the proposals would require an employer to recruit, retain in employment or promote an individual if the employer is aware, on the basis of a criminal conviction of the individual or other reliable information, that the individual engages, or has a propensity to engage, in any form of sexual behaviour or violent or abusive behaviour which is unlawful and there are relevant safeguarding concerns.

Immigration and population management (no. 15)
It is intended that employers must continue to appropriately take into account immigration status and the requirements of Population Management – to do so would not be discrimination for the purposes of the proposed legislation.

Genuine and determining occupational requirements in part of a role (no. 16)
In some cases an employer may employ staff across a number of postings and duties, where some of these duties or postings could be considered to carry a genuine and determining occupational requirement (i.e. that a person of a particular description is

required to perform those duties or hold those postings – for example, undertaking certain kinds of security search). In such a case, it is suggested that it would not be discrimination for the purposes of the proposed legislation to allocate a person to a particular duty or posting on the basis of their meeting the genuine and determining occupational requirement, where an employer must allocate a person of a certain description in order to maintain operations and meet requirements, provided that this is both objectively justifiable and is permissible in the employee's contract of employment.

Family situations (no. 17)

It is suggested that it would not be considered discrimination for the purposes of the proposed legislation, for employers to:

- grant individual requests for flexible working arrangements (provided that remuneration, leave and other benefits are equivalent on a pro-rata basis and that the right to request a flexible working arrangement is available to all employees),
- provide benefits in relation to care responsibilities (for family members) without this being a disadvantage to employees that do not have those responsibilities,
- provide a benefit to an employee in relation to a family situation (e.g. additional paid leave during a period of family illness).

Qualifications (no. 18)

It is proposed that it would not be indirect race discrimination, for the purposes of the proposed legislation, to require a person to hold a particular qualification to undertake a role. This might apply, for example, if someone had a professional qualification from another country which was not recognised in Guernsey (both for employers and for vocational bodies).

Supported employment (no. 19)

It is suggested that, for the purposes of the proposed legislation, a person may provide supported employment for people with a particular kind of disability without this being considered discrimination against people with other kinds of disability.

Genuine and Determining Occupational Requirements and Employment Services (no. 20)

It is intended that a provider of employment services (including vocational training) may restrict access to their training or services where employers they provide services to are operating Genuine and Determining Occupational Requirements which mean that they require persons of a particular description for those roles.

8.6 – Education

Different treatment based on assessed needs (no. 21)
It is proposed that it is not discriminatory for an education provider or authority to offer alternative or additional educational services in order to meet the assessed needs of a student where another student is not offered such services due to a difference in their assessed needs.

Admissions policies (no. 22)
It is proposed that a school may set an entry standard based on ability or aptitude. If an applicant does not meet the required standard for selection, for reasons related to, or in consequence of a disability, and despite reasonable adjustments having been offered or made available where relevant, then they, like other applicants who fail to meet that standard, may be refused a place.

Curriculum (no. 23)
It is proposed that when setting the curriculum, while representation might be desirable, it is not the intention of the Committee that someone could bring a complaint against the teaching of a subject on the basis that the set material or texts are not representative of all social groups or identities.

Please note that some of the other exceptions may be relevant for education providers. In particular see exceptions 37 on drama and 38 on sport.

8.7 – Financial services and pensions

Risk (no. 24)
It is intended that people who provide pensions (occupational or personal), annuities, insurance policies or any other services related to the assessment of risk would be allowed to use some of the protected grounds to undertake assessments and vary the service that they provide accordingly. However, this must be based on reliable and relevant data and differences in services provided should be proportionate to risk.

It is suggested disability would be a relevant ground. For example, insurance providers would be able to vary health or travel insurance premiums or exclude pre-existing conditions where based on reliable and relevant information and proportionate to the risk.

Other financial services like banking services that do not relate to actuarial risk are not covered by this exception.

Occupational benefits, occupational pension schemes and personal pension schemes (no. 25)
All occupational benefits and pension schemes and employers or providers of such schemes would be covered by this exception. It also applies both to occupational pension schemes and to personal pensions and employment benefit schemes such as retirement annuity contracts and retirement annuity trust schemes and to trustees and administrators of schemes as well as employers. Occupational benefits mean schemes that provide benefits to all or a category of employees on their becoming ill, incapacitated or redundant. The Committee proposes that employers or providers of occupational benefits and pension schemes and administrators of personal pension schemes can use the following criteria when administering occupational benefits and pension schemes.

- A pension scheme or occupational benefit scheme may provide ill health benefits at any age.
- The amount of benefit may increase according to the severity of the illness or disability (e.g. total incapacity benefits may be higher than partial incapacity).

The law should require non-discrimination for future actuarial benefits but not for benefits acquired/accrued prior to the commencement of the legislation.

8.8 - Health and care related

Infectious disease (no. 26)
It is proposed that it would not be discrimination, for the purposes of the proposed legislation, to treat a person differently on the grounds of disability where the disability is an infectious disease, or where an assistance animal has an infectious disease, and different treatment is required for public health reasons.

Clinical judgement (no. 27)
It is proposed that if the difference in treatment (including prioritisation of treatment) of a person is solely based on a registered health and social care professional's clinical judgement this would not be discrimination for the purposes of the proposed legislation. This is not intended to protect health and social care professionals from complaints if their use of a protected ground is prejudicial and not clinically relevant. This exception also does not remove the need to provide reasonable adjustments, where applicable.

Legal capacity (no. 28)
It is intended to include an exception that will permit difference in treatment where this is necessary in relation to a person's legal capacity status, in alignment with the new capacity legislation being developed.

Blood donation services (no. 29)
It is proposed that blood donation services may refuse to accept an individual's blood if the refusal is based on an assessment of the risk to the public or to the individual based on clinical, epidemiological or other relevant data. This is because services in this area are reliant on support from the UK NHS and, in order to ensure continuity of these essential services for Guernsey, there is a need to maintain a position that is consistent with the UK's.

Preventative public health services (no. 30)
It is intended to allow targeted preventative public health interventions including but not limited to screening programmes, immunisation programmes, access to primary care mental health and wellbeing services, diabetic retinopathy, provision of free contraception and other such measures which are strategically aimed at particular groups where this is objectively justified through epidemiological or other relevant data.

Care within the family (no. 31)
It is suggested that if people are providing care to other people as if they were a family member – including care for a child, an elderly person or a disabled person – the arrangements made for how, to whom and where they provide care are not subject to this legislation.

8.9 - Goods or Services (other)

Special interest services and services only suitable to the needs of certain persons (no. 32)
It is intended that goods or services providers may permit differences in treatment where these are reasonably necessary to promote bona fide special interests or where the goods or services in question can be reasonably regarded as only suitable to the needs of certain persons. Segregation on the basis of colour is not permissible.

Broadcasters and publishers (no. 33)
It is proposed that broadcasters and publishers can exercise editorial discretion over their content (not advertising) to be able to publish a range of views and permit free speech but this would not go so far as to allow them to promote/incite discrimination, harassment or hatred (note that there is separate legislation on racial hatred).

Web information services (no. 34)
Information Society Services Providers (ISSPs) provide services through a website. The Committee intends that ISSPs would not ordinarily be held responsible for the content of the data that they process, in particular where they are acting as a conduit, they provide caching of web pages, or they provide a “hosting service”. As in the UK, an ISSP which creates cached copies of information, and becomes aware that the original information has been removed or disabled at source, must expeditiously remove or disable any cached copies it holds. Similarly, if an ISSP “hosting service” becomes aware

that information they hold contravenes the proposed legislation they should expeditiously remove the information or disable access to it.

8.10 – Community, religion, cultural, entertainment, charities, sports, clubs and associations

Charities acting within their constituted aims (no. 35)
It is proposed that charities can provide benefits to people who share the same characteristic related to a protected ground if this is in line with their constituted aims and they can show that it is either a proportionate means of achieving a legitimate aim, or is compensating for a disadvantage linked to the characteristic. Charities may also restrict participation in activities (e.g. fundraising events) to promote or support the charity to people who meet a certain requirement. Racial segregation on the basis of colour is not permissible.

Clubs and associations – restricted membership (no. 36)
The Committee is proposing that clubs and associations can restrict their membership to people who share a particular characteristic related to a protected ground. However, it is not permissible to racially segregate on the basis of colour.

Drama and entertainment (no. 37)
It is suggested that the legislation should permit differences in treatment in relation to disability or race where this is reasonably required for the purposes of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment (for example, seeking a disabled actor to portray a character with a disability in a play).

Sports, games and other competitive activities (no. 38)
It is intended that it would not be considered discrimination, for the purposes of the proposed legislation, to exclude a person from a sporting, gaming or competitive activity if the person is not capable of performing the actions reasonably required in relation to the competitive activity (including with a reasonable adjustment). Similarly, it would not be considered discrimination, for the purposes of the proposed legislation, if someone is not selected as part of a team or as a participant if there is a selection process by a reasonable method on the basis of skills and abilities relevant to the competitive activity.

It is also intended that it would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to disability, nationality or national origin in relation to providing or organising sporting or gaming facilities or events or other competitions but only if the differences are reasonably necessary and relevant.

8.11 - Accommodation and premises

Premises not generally available to the public (no. 39)
It is proposed that if a person sells, lets or otherwise disposes of property without this being generally available to the public or a section of the public (for example, through advertising it via an estate agent) then decisions the person makes in relation to the sale, letting or disposal are exempt from this legislation. This is intended to exempt, for example, family property transactions or agreements between friends about house-sitting and so on.

Social housing and housing association allocations (no. 40)
It is intended that social housing providers and housing associations can treat people differently when allocating accommodation or managing waiting lists based on prioritisation in line with an allocations policy related to people's needs. This applies to the following grounds only: carer status, disability, and residency status (in so far as this is associated with the race ground).

Specialist accommodation (no. 41)
It is proposed that accommodation which is set aside for a particular use or for a particular category of people is permitted. For example, care homes, refuges, and sheltered accommodation.

Accommodation provided in someone's home (no. 42)
It is proposed that if a person is providing accommodation in a premises where they or a near relative live (i.e. where this would affect their private or family life) then they are exempt from this legislation and may choose who they wish to accommodate. It is intended that this would cover accommodating family members or friends in spare rooms or letting a room in a family house to a lodger where the premises remains primarily an individual's or family's home. It is not intended to exempt persons running guest houses or houses of multiple occupation or letting a separate and self-contained wing or apartment from the requirements of the legislation.

Population Management (no. 43)
It is proposed that accommodation providers must appropriately take into account population management requirements; to do so would not be discrimination for the purposes of the proposed legislation.

APPENDIX 5

COMMITTEE'S VIEWS ON USING THE DISCRIMINATION (JERSEY) LAW 2013 AS A MODEL

INTRODUCTION

A common response to the summer 2019 consultation on the Committee's draft technical proposals, was to ask if the Committee could give further consideration to the Discrimination (Jersey) Law 2013 ("the Jersey Law"). This was not in force when the Committee *for* Employment & Social Security carried out its analysis of the effectiveness of legislation in other jurisdictions during 2018 and so had not been included in the original analysis. As a result of this consultation feedback, during November and December 2019, and January 2020, the Committee reviewed the Jersey Law and carefully considered this as an option. The Committee has identified a number of areas where the Committee would recommend the new Guernsey discrimination Ordinance differs from the Jersey approach, which are explained later in this appendix. These can be subdivided into four key areas:

- areas where the Committee *for* Employment & Social Security wishes to adopt a different policy position to Jersey;
- areas where the Committee would like to provide clarity through explicit provisions rather than key provisions relying on interpreting the legislation in line with case law from the UK;
- areas where there are differences between Guernsey and Jersey that need to be reflected in the Guernsey proposals; and
- areas where Jersey either goes further than the Guernsey draft technical proposals or where the Jersey position is relatively untested in terms of the number of cases going before a tribunal.

Now that the Committee has substantially modified its original technical proposals – as explained in section 2 of appendix 4, the Committee's resultant high level policy position is much closer to the Jersey Law.

Key policy differences

Need to retain provisions in the Sex Discrimination Ordinance

If Guernsey were to exactly mirror the Jersey Law then, when the Sex Discrimination Ordinance is repealed, some important provisions in that Ordinance would be lost. For example, in the Sex Discrimination Ordinance there is a specific provision for discriminatory advertising, but this is not in the Jersey Law. Discrimination on the basis of marriage is not protected in Jersey, but it is in Guernsey's existing Sex Discrimination Ordinance. The Jersey Law allows 8 weeks for a complaint to be lodged. Guernsey's current Sex Discrimination Ordinance allows 3 months to make a complaint from the

last act of discrimination. The Committee went out to consultation on allowing a time period of 6 months between the discrimination taking place and a complaint being made. Following feedback from the business community that this was too long, the Committee has agreed to retain the 3 month period used in the existing Sex Discrimination Ordinance. It may be perceived as regressive by some if the Committee was to move from the current 3 months in the Sex Discrimination Ordinance to 8 weeks, as is the case in Jersey.

The Committee wishes to include transparent protection for carers

"Carer status" is not a protected characteristic under the Jersey Law. That is not to say that carers have no protection from discrimination in Jersey. UK case law and guidance has established that carers of disabled persons are protected from direct discrimination by virtue of their association with a disabled person. Given that the Jersey Employment and Discrimination Tribunal follows UK case law (noting that they are not bound to do so) carers in Jersey may, depending on the circumstances of the case, be protected from direct discrimination. However, carers are not protected from indirect discrimination in Jersey, although it's possible that a carer may be able to bring a complaint under a different protected ground (e.g. sex under the Sex Discrimination Ordinance, although this protection only applies in the field of employment at present). By including carer status as a protected ground, the protection is more transparent and applies protections directly to the role of being a carer, rather than having to rely on, say, in the case of indirect discrimination, a sex based comparison. The Committee has recommended that, in order to provide clarity for rights holders, duty bearers and adjudicators, "carer status" be a protected ground and discrimination by association be clearly and transparently prohibited under the legislation.

The definition of disability

The Jersey definition of disability does not fully align with the Committee's understanding of the social model of disability. This is particularly in relation to the inclusion of a clause that requires that a person has to be able to prove a limitation on their ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under the law in order to be eligible to make a complaint (see section 5 of the Policy Letter for a discussion of this point).

The Committee is recommending a starting point of the Jersey definition of disability but with the following changes:

- 'Impairment' is defined, based on the definition of disability in the Republic of Ireland.
- Without the phrase "which can adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law." (see section 5 of the Policy Letter).
- In addition there is clarification that if the existence of a condition, impairment or illness or the prognosis is in doubt, medical, or other expert, evidence may be required.

Reasonable adjustment duty
The Committee wishes to include a specific individualised duty to provide reasonable adjustments to a disabled person and to anticipate that the duty bearer should liaise with the disabled person about the appropriateness of this adjustment. The Committee does not wish to rely on indirect discrimination where a complainant would have to show disadvantage to a group of people. The Jersey Law appears to deal with the duty to make reasonable adjustments in an unusual way, prescribing failure to make adjustments as a form of indirect discrimination, rather than an as an individualised, positive and reactive duty.

Religious belief, equal pay, intersectional discrimination
The Jersey Law does not offer protection for the grounds of religious belief or marital/civil status. The Committee is recommending the inclusion of these grounds in a later phase.

The Jersey Law does not cover equal pay for work of equal value, which the Committee wishes to include in phase 3 in respect of sex, in order to meet Guernsey's obligations under the International Covenant on Economic, Social and Cultural Rights and in order to support the extension of the Convention on the Elimination of All Forms of Discrimination Against Women.

Intersectional discrimination is not proposed for the first phase of Guernsey's legislation but should be reviewed as part of a later phase. It would be needed to cover complaints where discrimination is exacerbated by the combination of two or more grounds, e.g. where women are discriminated against on the basis of race and gender. This is not covered in the Jersey Law.

Where the Committee would like to provide clarity

- Past, present, future and imputed characteristics (particularly relevant for disability and carer status, but applies more broadly)
- Discrimination by association (particularly relevant for carers but applies more broadly)

There are several substantive provisions that are not written into the text of the Jersey Law, but may be interpreted into it via UK case law or the Jersey guidance. The Committee *for* Employment & Social Security is concerned that because UK case law is persuasive but not binding on a Guernsey Employment and Discrimination Tribunal, unless the provision is in the legislation, it is not guaranteed that the UK position would be followed. The Committee feels that it would be clearer for individuals, employers, service providers and tribunal members if issues such as discrimination by association and past, present, future and imputed characteristics (see section 3 of appendix 4) were specifically referenced in the legislation. Being clear about what is covered would increase transparency, avoid confusion and reduce litigation.

Differences between Guernsey and Jersey that need to be taken into consideration

Guernsey specific exceptions
Guernsey would need to ensure that the exceptions to the discrimination Ordinance were specific to the Guernsey policy and legislation context. It is advisable to have a 'Guernsey' list of exceptions which draws on the Jersey exceptions but also/alternatively includes those that were included in the Committee's summer 2019 consultation document, for example a specific exception would be needed to cover policies under Guernsey's population management law. Particular consideration would need to be given to exceptions relating to age, when it is decided to implement this ground.

Compensation structure
Jersey has a different award structure for unfair dismissal, so the structure for financial compensation may need to differ in Guernsey if the local unfair dismissal regime is to remain unchanged.

Service structure
Guernsey already has a different service structure regarding employment and discrimination complaints handling and advice, so cannot straightforwardly replicate Jersey's service structure without taking the existing structure and wider context into account.

Compliance with other legislation
Various provisions would need to be changed to align with other legislation in Guernsey.

Jersey goes further

In some areas the Jersey Law appears to go further than the UK and Guernsey's existing legislation. These are on issues that would require further consultation if they were to be introduced. For example, volunteers are protected from discrimination under the Jersey Law. The Committee has previously decided not to recommend that the Guernsey legislation covers volunteers, at least initially (unless the person is effectively employed). The Committee has not consulted with the third sector regarding following Jersey and including volunteers.

APPENDIX 6

FURTHER DETAILS ON SERVICE DEVELOPMENT PROPOSALS

This appendix provides more detail on the service developments that are being proposed.

A.1 Service capacity

New discrimination legislation is likely to increase demand for advice, conciliation and adjudication. Without providing training to staff and adjudicators handling complaints and adjusting the capacity of those services it would not be possible to implement the legislation.

Demand
Reviewing caseload in the UK, Jersey, and elsewhere and in discussion with the Employment Relations Service, the following demand (set out in **Table A.1**) has been estimated if legislation is going to be introduced on the grounds of race, disability and carer status. Note that there could be a number of cultural and other factors which would mean that caseload in Guernsey could vary from these estimates. Actual service requirements and staffing levels would need to be kept under review as demand could be higher or lower than our estimates.

Table A.1 – Estimated demand for services

	Current caseload (per year – 5 year average 2013-17)	**Disability, race, carer discrimination (per year)**	**Total caseload (per year – stable rate)**
Advice enquiries	1,344	100 / 700*	1,444 / 2,044*
Registered complaints	50	13	63
Hearings	12	3	15

*In the first year after the introduction of the Sex Discrimination Ordinance there were seven times as many advice enquiries compared to the stable long term rate. The Committee believes these were largely from employers. There was not a comparable increase in registered complaints or hearings. While in future the Committee would expect only 100 enquiries per year, 700 enquiries might be expected per year in the first two years (i.e. an enquiry rate equivalent to about a third of employers contacting the service).

A.2 Core service developments

A.2.1 Advice and conciliation capacity, accessibility and training

In order to meet this demand the capacity of the Employment Relations Service would need to be expanded at a cost of around £135,000 per annum from 2021/22. This figure anticipates that some additional time would be needed to manage enquiries about accessibility and reasonable adjustment in the first couple of years; it includes a small amount of additional capacity to meet a peak in demand for one-to-one advice around the time of the introduction of the legislation (crucial for small businesses); it also includes other costs that would be incurred (for example subscriptions to relevant legal case material that the team do not currently have). A budget of £20,000 for producing accessible materials, translations and making reasonable adjustments has also been included in this figure – it will be crucial to ensure that disabled people and people whose first language is not English can engage their rights if the law is to be effective. While it might be possible to slightly reduce the £135,000 annual figure once the law is established and the peak in demand for advice has passed, this should be reviewed in 2023 light of whether legislation on new grounds of protection (such as age, sexual orientation etc.) are ready to be introduced and in relation to emerging caseload.

There would also be a one-off project cost associated with training, IT and other costs associated with recruiting new staff members of £30,000 in 2020/2022.

A.2.2 Adjudication capacity and training

Increasing the size of the panel and secretariat
The Committee believes that a number of changes are necessary for the Tribunal to be equipped to hear cases – which it must be before the legislation can come into force. These include an increase in the capacity of both the panel (from which members are selected to hear cases) and the secretariat. The panel would need to be expanded not just to increase capacity but also to ensure that there was a wider range of skills and viewpoints represented if the panel is to hear disability, race and carer complaints in relation to goods and services and accommodation provision as well as employment. This is because the panel currently only hear employment related complaints, and their skill set reflects this. The Committee is, therefore, proposing increasing the Tribunal Panel size from 13 to 20. It should be an important principle to ensure that new recruits provide a balance of perspectives and backgrounds that align with the additional breadth of the new scope of the legislation – as well as ensuring that there is an appropriate mix of employee and employer representatives for employment cases. Increase in the panel size will increase the baseline costs associated with compensating members for attending training, meetings etc. Some additional budget would be required for room bookings for hearings etc.; additional staff capacity will also be needed to register the predicted increase in complaints. The Committee is requesting an additional £100,000 to deliver these changes (with preparatory changes starting in 2021, though cases on the new legislation would not be heard until 2022).

Legally qualified chairs

Significant feedback has been received from a wide range of stakeholders, including Tribunal Panel members, suggesting that before the new legislation is introduced it is necessary to provide additional legal support to the Tribunal. In part this is due to the fact that the body of law the Tribunal will be managing will be more complex and could require making more complex awards than is currently the case, as well as reviewing case law from other jurisdictions.

While the possibility of a legally qualified Secretary was considered, equivalent Tribunals in Jersey and the UK operate requirements that chairs be legally qualified and the Committee believes this is a preferred model. A legally qualified secretary, in particular, would be less resilient if conflicts of interest arose when compared to a panel of legally qualified chairs. A legally qualified secretary would not confer the same benefits as legally qualified chairs in their ability to use legal skills for judgement drafting and other areas of the chairs' responsibility. Legally qualified chairs would provide benefits in identifying pertinent points to focus on in case management meetings and hearings, would support lay panel members to understand legal arguments, would provide additional legal skills when writing judgements, and may have greater skills in supporting complainants or respondents representing themselves in hearings.

The Committee is proposing that four of the twenty panellists would be chairs – any one of these four could be appointed to chair the hearing of a case (depending on conflicts of interest, availability and so on). The chair would sit alongside two lay panel members selected from the remaining 16 panel members. It is envisaged that one of the four chairs would also be the Convenor of the panel of twenty, and one the deputy Convenor. In the existing law, the Convenor and deputy Convenor have a role in selecting which panellists hear cases. In practice they may also represent the panel as a whole at relevant meetings or undertake a chair role in quarterly meetings of panellists.

One difficulty of seeking to recruit legally qualified chairs is that many individuals with the right skill set will be practicing employment lawyers and may not be able to also adjudicate cases part time due to conflicts of interest if one of the participants in the case is a client of theirs. The Committee is proposing to address this risk by ensuring that some of the legally qualified chairs could be recruited off-island (and provided with training in local law).

Panellists are paid on a day/half day rate, which mean actual expenditure can, to some degree, be lower if there are fewer cases. However, these changes would entail paying a higher hourly rate to make the position attractive to people of the appropriate skill level, plus introducing a travel budget for off-island chairs. The Committee has included £40,000 to cover these costs. The Committee has also asked the States to agree to direct the Law Officers to amend the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 to allow for legally qualified chairs and make this change possible.

There would be a one-off project cost associated with training and recruitment for the Tribunal staff and Panel of £30,000 in 2021/2022. This would be vital to ensuring that the Panel understood new aspects of the law, such as adjudicating service provision cases and to ensure proper processes are followed in the recruitment and selection of Panellists.

The Policy & Resources Committee has appointed an independent panel to undertake a review of Arm's Length Bodies and, at the time of writing, the review panel has yet to submit its report. However, based on the Committee's current understanding, the changes proposed in this Policy Letter would not conflict with changes being made under the Arm's Length Body Review. While the review panel is proposing the possibility of creating a centralised tribunal service, if such a service were created, the Committee does not believe that this would negate the need for the Employment and Discrimination Tribunal to have legally qualified chairs appointed, Rules of Procedure and appropriate additional training on adjudicating cases in service provision contexts, as outlined above.

Note that these budget figures are based on delivering the average number of hearings and complaint registration in any one year (i.e. an anticipated 15 hearings and 63 complaints). If there were more than this then, without additional budget, the Tribunal would develop a backlog of cases which could have significant implications for access to justice. Actual caseload should be monitored carefully and resource increased if complaint levels are higher.

A.2.3 Commitment to deliver efficiently

The Committee is committed to delivering services effectively and efficiently. During the change process, the Committee intends that the service manager will liaise with equivalent organisations in other jurisdictions to identify whether there is anything that could be learned that could help the service to deliver its expanded functions in a way that ensures value for money. The increased staff complement for the service should, therefore, be kept under review with regards emerging caseload and any opportunities for different ways of working identified. Staff complement should be adjusted if necessary.

A.3 Changes to ensure the legislation is effective

The Committee believes that there is a strong case, and demand for, including a package of changes that would increase the effectiveness of the legislation. These are explained in this section.

A.3.1 Training and guidance about the changes in legislation

Education, guidance and awareness raising about new legislation
Awareness raising and training has been requested by a range of stakeholders including

some businesses who are concerned about being 'caught out' by changes. The Committee wants to ensure that everyone knows what legislative changes are coming when and what they can do about them. A one-off investment in producing and delivering guidance, training materials and raising awareness is, therefore, required. It is envisaged this would include some staff time and some spend on outreach materials, advertising, room hire and so on. A budget of £85,000 has been included for this between 2020 and 2022 (when the legislation would be introduced). Preparation of guidance material would begin in 2020 and outreach and training work would be undertaken throughout 2021.

A Code of Practice

A code of practice would aim to comprehensively explain what the legislation means in plain English with examples. It would give further guidance about what the more complex areas of the legislation mean in practice. Developing a code would be technically complex so the Committee has included a budget of £100,000 for the Committee to progress this, which is envisaged would include staff time and budget for engaging the services of a legal expert. Codes of practice have been requested by civil society groups and some businesses. This code of practice would be particularly about disability, race and carer status discrimination. It is possible further codes of practice would be required for future stages. The first draft code of practice would be prepared and published five months before the legislation came into force (though other forms of guidance would be available earlier than that) to allow employers and service providers to better understand how the legislation might be applicable to them. The code would also be useful for people who feel that they have experienced discrimination and are considering making a complaint once the legislation has been brought into force.

Accessibility support for small businesses and charities

The Committee would like to encourage and enable smaller businesses and charitable organisations seeking to make their services more accessible. There could be over 5,000 small or micro service providers (with less than ten employees) who might struggle to afford a professional access audit, though not all of these would have premises. If these organisations were supported with a checklist and a guide to assist them in undertaking a simple self-audit, then the States could offer some professional consultancy advice to help service providers decide what to do with the findings of their self-audits (i.e. how to prioritise action and how issues could be addressed). This would be a cost-effective way of helping small businesses and charities become more accessible. Any consultancy of this nature would be targeted at the smallest organisations, which are not branches of larger organisations, which have premises, and do not have funds or expertise available to support them.

Access consultancy is very tailored advice and does not straightforwardly fit into the picture of impartial advice of the kind the Employment Relations Service currently give. It might, therefore, be strange for the service to be giving advice of this nature while also managing complaints/conciliation sessions and adjudication.

Commissioning a targeted service for access consultancy from a third sector or private sector provider, therefore, seems the preferable route. The Committee estimates that this would cost around £35,000 per annum to employ a part time access consultant (with some additional costs such as equipment, mileage, meeting space). Employment & Social Security policy staff would commission the service and manage the contract.

A.3.2 Awareness raising and changing attitudes

Awareness raising and education can help to create cultural change in order to address the prejudice that can be at the root cause of discrimination. It might be especially important for disabled people and carers to help ensure that wider society is aware of what might be a barrier to their participation, as discrimination may arise from simple lack of understanding. Awareness raising around the discrimination complaints process is also important to make sure that people know where to go for advice or to register a complaint if the need arises.

The Committee is keen that awareness raising and education about equality issues should be targeted where most needed. In order to inform this work, the Committee is proposing to commission a survey once every eight years (every other political term) to measure social attitudes towards prejudice and discrimination. This should give a stronger understanding of what prejudice is prevalent in the community. Both civil society groups and the Policy & Resources Committee have highlighted the importance of gaining data of this nature. It is anticipated that this would cost around £80,000. It may be possible to reduce the future cost of surveys if the data can be obtained by including key questions in another, compatible social survey which the States of Guernsey is commissioning on a different topic (no such surveys are planned in the near future). The Committee would like to commission a survey as soon as possible – preferably later in 2020.

Sustained and strategically focused education efforts[144], that are developed in consultation with communities affected by prejudice are more likely to be effective in delivering cultural change than untargeted efforts. This is why the Committee also proposes making available an annual ongoing resource of £45,000 to address any issues identified in this survey. This could be used for a combination of staff resource and some budget to commission or procure relevant resources, depending on the particular issues identified as priorities from the survey results. Cultural and attitude change can be vital to helping to prevent discrimination from happening. This might be particularly important for disabled people where there could be a low level of understanding of accessibility or what might present a barrier to participation for a disabled person.

[144] Scottish Government (2015) "What works to reduce prejudice and discrimination? – A review of the evidence". [Online]. Available at: https://www.gov.scot/publications/works-reduce-prejudice-discrimination-review-evidence/pages/9/ [accessed 20th January 2020].

A.3.3 Improvements in practice and governance

The Committee is proposing a number of changes in practice and governance which should improve the experience of people using the service and ensure that conflicting roles are fully separated. It should be noted that these changes provide benefits to the wider range of employment disputes and are not exclusively about discrimination complaints.

Independence of the new Employment and Equal Opportunities Service

The current Employment Relations Service sits within the civil service, in one of the larger civil service office buildings alongside core services like Revenue Services and Social Security. The Service has no statutory independence from the Committee. It operates powers (like issuing 'non-discrimination notices' – a form of Compliance notice under the existing Sex Discrimination Ordinance) which are delegated to it by the Committee. It also handles complaints in relation to the largest employer in the island – the States of Guernsey – including, should it be relevant, complaints from staff who work in the same office building.

While operational independence is put into effect in practice, there is no official separation of duties. In other jurisdictions, Employment or Industrial Relations services have statutory independence from government. This is considered necessary to ensure that services can be impartial when handling complaints against government. The Committee believe that if States employees are to be able to access a confidential and impartial service, there is a need for a greater degree of independence. Creating a statutory body overseen by a board of directors has been considered. However, the Committee selected a model with a statutory official lead. This should ensure a guarantee of operational independence. The Committee would be able to hold the statutory official to account for service delivery. However, high level employment and discrimination policy would still remain with the Committee. The budget for the service would also remain within the Committee's annual budget rather than arranging grant funding. The Committee suggests that the service is rebranded as the "Employment and Equal Opportunities Service" and is moved to a separate office location, away from main civil service hubs, with good public access (including for disabled people).

The statutory official directing the Employment and Equal Opportunities Service would be selected by the Committee and recommended for appointment to the States. The legislation underpinning the statutory official would clearly state that there is a principle of non-interference in the Service's casework and secure the Service's operational independence. The official would have general duties, for example to promote good practice, work towards the elimination of unlawful employment practices and support the resolution of disputes.

They would also have some specific powers set in legislation. Some of these already exist in employment law and would need to be transferred from 'the Committee' who is the current holder of these powers to the statutory official. These include responsibilities to provide conciliation; enforcement powers in relation to minimum wage, contracts, wage

slips and sex discrimination; and responsibilities to maintain records of cases handled. There would also be new duties under the proposed legislation in relation to issuing 'non-discrimination notices' related to disability, carer status and race – these are fully outlined in appendix 4. The statutory official would work with the Employment & Social Security policy team and may provide information on trends, statistics, data and other forms of advice within their areas of competence.

Where there are existing powers in employment and discrimination legislation that enable 'the Committee' to make appointments, regulations or policy these powers would remain with the Committee *for* Employment & Social Security and not be transferred to the statutory official.

Primary legislation would need to be drafted in order for the statutory official to be able to be appointed. Assuming the discrimination legislation is drafted first, it is anticipated that this would not be able to come into force until 2022 at the earliest. The implementation of the statutory official role is not critical to the legislation being implemented, so this could be put into place after the first phase of discrimination legislation comes into force (the existing service operates without a statutory official). However, due to the governance implications, it is recommended that this is put into place as soon as possible. The Committee is, therefore, asking the States to agree to draft the legislation to underpin the role.

The Committee request that Policy & Resources commit to working with Employment & Social Security to find a suitable property within the States of Guernsey estate for the service to move to. This would improve its independence when providing services to States employees. A project cost for moving expenses, such as IT, furniture, branding and so on is included of £75,000.

Separation of duties

There are some roles that it is important to ensure are kept separate. The Committee is proposing that the secretariat to the Employment and Discrimination Tribunal is no longer line managed by the Senior Employment Relations Officer. There will still need to be close communications between the services if cases are referred from the Tribunal (when complaints are registered) to the Employment and Equal Opportunities Service (for conciliation). They may also need to work closely in relation to Industrial Disputes, where appropriate. However, it is important that staff who undertake conciliation (which the Senior Employment Relations Officer does) cannot be seen to have any influence over how those cases are managed if they progress to a hearing.

Secondly, the Employment Relations Officers currently give impartial advice to employers. They also have enforcement powers to undertake investigations and issue compliance notices delegated to them in relation to contracts, pay slips, minimum wage and discrimination (under the Sex Discrimination Ordinance). There is a risk that their involvement in enforcement could put employers off approaching the Employment Relations Officers for advice in case this leads to action being taken against them. It

could also put employees off if they are concerned that they might lose control of a situation and find enforcement action being taken, escalating a situation faster than they intended. The Committee intends that in future, if at all possible, the staff member undertaking enforcement action should not also be providing impartial advice and conciliation and there should be appropriate processes in place regarding when and whether cases are handed from advisory officers to enforcement.

Rolling Training for the Tribunal

The Committee is proposing that a new programme of ongoing refresher training is developed for the Tribunal. This is not just to help Tribunal members maintain skills (though that is important as they may sit infrequently). A rolling programme of training will ensure that if there is any turnover in panellists, new panellists are brought up to speed as quickly as possible. It should also be recognised that Employment and Discrimination Law are developing areas of legislation in terms of practice and interpretation and it would be useful for all Panel members to have updates on how things are changing in Guernsey and further afield as part of this programme. The training programme would be developed in discussion with the Panel. An annual budget of £5,000 has been included for this purpose (covering room hire and facilitation/training; members' time is budgeted separately).

Rules of Procedure

The Tribunal does not currently have a set of Rules of Procedure. Consultation has led the Committee to believe that written Rules of Procedure would be beneficial. This would help to provide guidance for the Secretary and Panel as a quick reference for how to handle issues that arise infrequently. It would also be useful for individuals who are representing themselves in the Tribunal to understand how the Tribunal operates.

It is anticipated that the Rules of Procedure produced would draw on the Guernsey Royal Court Civil Rules, 2007; the UK Employment Tribunals Rules of Procedure 2013; the Isle of Man Employment and Equality Tribunal Rules 2018; and the Employment and Discrimination Tribunal (Procedure)(Jersey) Order 2016. Development of the Rules would give consideration to any appropriate changes that would be necessary for Guernsey. A plain English and accessible guide to the Rules of Procedure developed should also be made available. The Committee already has powers to introduce Rules of Procedure for the Tribunal under section 3 of the schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005. The Committee intends to take this work forward in consultation with relevant parties. This would be delivered through allocation of time from the Law Officers and policy staff. A project budget of £5,000 in 2020 has been included to allow for some additional Tribunal Panel members meetings to discuss proposals.

Striking out powers

The Tribunal does currently have some powers to dismiss complaints. However, the Committee is proposing to bring these closer in line with the powers under the England and Wales Rules (Schedule 1 to the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013).

This will help to ensure that the Tribunal can manage cases effectively if cases come forward that are vexatious or where a complaint has no reasonable prospect of success. This would be implemented by an Order under section 3 of the Schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 and would apply to all employment and discrimination cases and not just the ones under the new discrimination legislation.

Decisions of this nature would be able to be made by the appointed chair for that case sitting alone, or by the panel of three – the chair and two side panel members. In all cases the parties in question would have reasonable opportunity to make representations before such a decision is made.

Pre-complaint conciliation

Something the Committee has heard from a range of stakeholders was the desire to ensure that there are opportunities to resolve disputes as early and informally as possible. At the moment in Guernsey conciliation is only available after you have formally registered a complaint with the Tribunal. The services equivalent to the Employment Relations Service in both Jersey and the UK offer pre-complaint conciliation that can be accessed ahead of a complaint being registered. Evaluations of the UK scheme have suggested that using the scheme saves both the complainant and respondent money[145]. The Committee is proposing introducing a pre-complaint conciliation option which is voluntary to engage with and can be accessed before formally registering a complaint. Usually an individual wishing to register a complaint would need to do so within three months of the incident they are complaining of occurring. It is suggested that if both parties agree to participate in pre-complaint conciliation, this time limit is paused while conciliation is underway – this would ensure that there was time to try to resolve things without feeling pressured to decide whether to make a complaint. In order to ensure a consistent conciliation offering for sex discrimination and other employment complaints, the Committee is proposing making minor amendments to other employment and discrimination legislation to allow for such a suspension to be used.

On the basis that offering this service will increase demand for conciliation the Committee has included £10,000 in the budget for pre-complaint conciliation. It may be the case that this will mean some cases that would have gone to Tribunal will be resolved faster, saving administration costs in the Tribunal. However, it may also mean that

[145] ACAS (2009) "Research Paper: Pre-Claim Conciliation pilot – Evaluation summary report". Available at: https://archive.acas.org.uk/media/1079/Pre-Claim-Conciliation-pilot--Evaluation-summary-report/pdf/0209_PCC_pilot_summary.pdf-accessible-version-Jun-2012.pdf [accessed 21st January 2020].
ACAS (2015) "Research Paper: Evaluation of Acas Early Conciliation 2015". Available at: https://archive.acas.org.uk/media/4335/Evaluation-of-Acas-Early-Conciliation-2015/pdf/Evaluation-of-Acas-Early-Conciliation-2015.pdf [accessed 21st January 2020].

people who would not wish to formally raise a complaint seek the assistance of the service when they otherwise would not. Exact demand and expense will not be clear until the service is tried. The impact of offering pre-complaint conciliation should be evaluated after the first year or two of operation.

A.3.4 Managing change

Oversight and coordination of the work is vital to ensure that all of the changes outlined can be delivered on schedule and risks to delivery managed appropriately. This would be managed via the Committee's Programme Management Office. £70,000 is included in the change cost figure below for programme management from 2020-2022.

APPENDIX 7

SERVICE DEVELOPMENT OPTIONS APPRAISAL

During 2019 the Committee considered a wide range of options that would meet the needs of the new legislation, respond to the Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX) Resolution to develop a business plan for an Equality and Rights Organisation (see appendix 1), and respond to feedback on the existing service provision.

The Committee made an initial decision that the existing Employment and Discrimination Tribunal should adjudicate cases under any new law (in line with what seems to have been the original intention behind establishing the Tribunal). Options were then shortlisted for consideration forming two lists: one in relation to developments to the Employment and Discrimination Tribunal and one in relation to the developments of advice, conciliation, informal resolution and other functions related to equality and human rights. The Committee selected a preferred option from each shortlist.

During December 2019, the Committee discussed the shortlists and their preferred options with key stakeholders including representatives of the business community, civil society groups, trade unions, the Policy and Resources Committee, relevant staff, and the Tribunal Panel.

The shortlists were developed with the long-term in mind and the initial cost estimates presented reflect the cost of operating the model if all ten of the grounds of protection were to be introduced (as originally set out in the Committee's technical draft proposals in July 2019[146]). The proposal included in the Policy Letter is a modification of the preferred options from the shortlist stage, having taken into account feedback and adjusting the scope according to the more limited number of grounds included in the first stage (now only covering race, disability and carer status) and having taken other action to reduce costs.

Shortlist of options for developing the Employment and Discrimination Tribunal

As well as needing to increase capacity, the Committee were cognisant of feedback from the Tribunal Panel and a range of other stakeholders that, if the new legislation were to be introduced, the Tribunal would need better access to legal skills than is currently the case.

[146] Available at www.gov.gg/discriminationconsultation

Four main options were considered:

1. Business as usual

Used purely as a comparator, this represents the current structure which has an annual budget of around £135,000. The Tribunal has 2FTE staff (who also support the Industrial Tribunal) and 13 panellists – three of whom can be selected to sit at a hearing. There is no requirement for panellists to be legally qualified. The panels expertise currently lie in employment (rather than education, accommodation provision or service provision, for example). It would not be possible to implement the proposed discrimination ordinance without at least some modification to the panel.

2. Enhanced training and procedure

This would involve the expansion of the Panel to 20 members, an increase in the capacity of the secretariat to the Tribunal, additional training and the introduction of Rules of Procedure. There would be no requirements for legal qualification in this option. An initial cost estimate for this model (if it were resourced to cover 10 of the grounds of protection) was £320,000, an increase of £190,000 on current expenditure.

Advantages of this approach would be its similarity to the current model, that there would be increased capacity and training and that the cost is relatively low. Disadvantages include the fact that it does not meet the identified needs with regards better access to legal advice.

3. Legally trained Secretary

Similar to the Magistrate's Clerk role in the UK this model would involve the Secretary to the Tribunal being legally qualified and supporting lay panel members. Additionally, the size of the Panel would be increased, the capacity of the secretariat would be increased, additional training would be offered and Rules of Procedure would be introduced. An initial cost estimate for this model (if it were resourced to cover 10 of the grounds of protection) was around £370,000, an increase of around £230,000 on current expenditure.

The advantage of this approach is that it would increase the access of legal skills in the Tribunal and the fact that the Secretary would be permanently employed might reduce the risk of conflict of interest in terms of their having clients in private practice. The main disadvantage of this model is that there is still scope for conflicts of interest to arise, and no substitute in these situations and that, though it would increase access to legal advice, it would not necessarily increase the access to legal skills for key functions that chairs are responsible for, such as judgement writing.

4. Legally qualified chairs with a single lay panel (preferred option)

This option would seek to appoint 4 legally qualified chairs and have a lay member panel of 16 panellists who represented a wider range of interests and skills including goods and service provision, accommodation provision and those with particular insight into the grounds protected. Any panel would be composed of one legally qualified chair and two lay persons. All Panellists would be remunerated only for time spent, so would most likely have full-time employment elsewhere in addition to their role (as presently). The proposal suggested that there would be specific efforts to recruit panellists from the UK or Jersey in order to reduce the possibility that a case arise which presented unmanageable conflicts of interest. There would also be additional training for panellists, Rules of Procedure to increase transparency of process. An initial cost estimate for this model (if it were resourced to cover 10 of the grounds of protection) was around £410,000, an increase of around £280,000 on current expenditure.

Advantages of this model are that there is more scope for covering situations where there is conflicts of interest and that legal skills would be available where needed – i.e. in terms of judgement writing, and so on. Cost would also be proportionate to time spent on Tribunal business – meaning that if caseload were low then the costs of remunerating someone with legal skills would be proportionate to this. Disadvantages may include the fact that the success of the model depends on the ability to recruit suitable chairs, and that there would be some increase in hourly rates and travel costs.

Option 4 was selected as the Committee's preferred option. This would bring the Tribunal closer in line with practice in the UK and Jersey. After consultation with key stakeholders, the Committee found that there appeared to be widespread agreement on this proposal (though preferably at a lower cost if possible).

Two sub-options were also considered (but not costed).

Firstly, the Committee considered whether there should be two or three separate lay panels representing different interests (for example a panel representing employer interests, a panel representing employee interests and another panel). This would mean that, in addition to the chair, one lay panel member would be taken from each panel for a hearing – guaranteeing a balance of interests. The Committee considers that the same result could be achieved through, in practice, taking into account the need for a balance of interests when recruiting to the Panel and when selecting panellists for any particular case. Consequently, this option was not pursued at this time. This should be kept under review.

Secondly, the possibility of having the Convenor and Deputy Convenor of the Panel as legally qualified members, who could provide legal advice to other Panellists, was also considered. The Convenor and Deputy Convenor have an organisational role under the existing legislation and chair routine meetings of Panellists. They do not necessarily chair more Tribunal hearings than other Panellists. There were concerns that this model

would depend heavily on the availability of the Convenor and Deputy Convenor and may also be limited in its ability to respond to conflicts of interest. Consequently this model was not pursued.

Shortlist of options for developing the Employment Relations Service and/or an Equality and Rights Organisation

The Committee considered six options with regards the possibility of developing the wider range of services related to equality and human rights. In addition to the need for increased capacity, the Committee were aware that the current service sits within the civil service and has no statutory independence – despite the States of Guernsey being the largest employer on the island. In most countries the body that handles advice and conciliation for complaints of this nature has statutory independence. This increases trust in services and guarantees that there can be no operational interference in complaints handling.

The Committee also considered the recommendation from the Disability and Inclusion Strategy (see appendix 1) to develop a business plan for a Paris Principles compliant equality and rights organisation. The Paris Principles outline the minimum international standards for organisations tasked with promoting and protecting human rights. Organisations monitoring human rights require a high degree of independence from government as they need to be free to say things critical of government without fear of reprisal.

1. Business as usual

Again, included as a comparator only, the first option was the current Employment Relations Service with no changes to its capacity or governance structure. The service currently has 2.5FTE and a budget of around £155,000. If no developments were made to the service it would not have the capacity needed to provide advice and conciliation in relation to the new legislation.

2. Minimal expansion of business as usual – Employment Relations Service

The second option considered was a minimal expansion of the Employment Relations Service to provide advice and post-complaint conciliation for cases under the new law. There would be no change to governance arrangements and no additional services offered in terms of awareness raising or advice around accessibility issues in the long-term. A code of practice and guidance on the new law would be developed. Initial cost estimates (including covering 10 grounds of protection) were that this would cost £90,000 per annum more than the current expenditure per annum in the long-run (not inclusive of set up costs).

While low cost and easier to deliver, the Committee considers this model to be inadequate in terms of the need to work towards a preventative approach, which should

include gathering more information on equality issues in the community and working towards changing attitudes. It does not improve the current situation with regards promoting early resolution, which is an important factor for employers, service providers and individuals alike. Nothing is done to address identified issues around the independence of the service.

3. Employment and Equal Opportunities Service (preferred option)

The third option considered was a minimal adjustment of the Employment Relations Service so that it was headed by a statutory official, moved to a new office and rebranded as the 'Employment and Equal Opportunities Service' – guaranteeing operational independence and improving customer relations. Conciliation would be offered pre and post complaint and advice would also be offered. A proactive element would be included: an attitudes survey covering perceived discrimination and prejudice would be commissioned and awareness raising work would be undertaken to address any issues identified in the survey. A code of practice would be produced and there would be guidance and awareness raising about the legislation at points where the legislation changed. The initial cost estimate for this (with all 10 grounds in force) would be £380,000 per annum more than the current provision (not inclusive of set up costs).

The Committee believe that this option would meet the immediate needs of the community around the introduction of the legislation and go a step further than the current model in seeking to prevent discrimination and enhance early resolution. While the Committee do see the benefits of including a wider range of functions for the promotion and protection of human rights, this option seems like a proportionate and pragmatic step for the island at this time. It would also leave the door open for further developments in human rights monitoring in future.

4. Employment and Equal Opportunities Commission

This model seeks to combine the functions of the existing Employment Relations Service with the functions of a basic Equalities Commission (which focuses only on equal opportunity and not the wider range of human rights). The Commission would be overseen by 7 Commissioners appointed by the States on 5 year terms. They would be recruited with the desire to ensure that a plurality of social forces is represented on the Commission. The organisation would be grant funded by the States. Commissioners would decide how to focus their resources. As well as the advisory, conciliation and awareness raising roles outlined in earlier models, this model would incorporate a responsibility to monitor equality, advise government, research and publish reports on equality. An initial cost estimate (covering all ten grounds of protection) suggested this might cost £670,000 more than the current model (not inclusive of set up costs).

While the Committee seriously considered whether this option would be a pragmatic way to take a step further towards a Paris Principles compliant organisation, there were a number of factors (in addition to affordability) which raised concerns about this model.

These included the fact that, once established, the organisation might be harder to alter. This would mean that, should the States revisit the idea of establishing a human rights Commission it would potentially be more difficult to develop if there was already an existing Employment and Equal Opportunity Commission – equality and human rights sit naturally together but adding employment, equality and human rights to one mandate would make the scope of the organisation very wide. Deconstructing or altering a fully independent arms-length body would be more complex than altering a part of the public sector staff structure. The transition from the current position to the model outlined for Option 4 would also be more complex and pose greater risks than options 3 or 5.

5. *Equality and Human Rights Commission (without strategic litigation) and Employment Relations Office*

In this model an independent statutory Equality and Rights Commission is established. When first established, it would only have a mandate covering equality, later extending to the broader range of human rights.

The Equality and Rights Commission would be overseen by a board of seven Commissioners. Commissioners would be selected to represent a plurality of social forces. They would be appointed by the States on the recommendation of the Committee for Employment & Social Security for limited 5 year terms (which could be renewable).

The existing Employment Relations Service would be made more independent, being moved into a separate office and with a statutory official appointed to ensure a higher degree of legally guaranteed operational independence (as in option 3). While the Commission would provide advice and conciliation for most discrimination issues, the Employment Relations Service would handle cases where individuals also wished to make other kinds of complaint (for example unfair dismissal and discrimination).

In addition to the functions outlined in earlier models, this model would incorporate awareness raising around a broader range of human rights issues, would offer support and advice to individuals with human rights complaints and would monitor compliance with human rights law and advise government.

Initial cost estimates suggested that to deliver a model of this description in the long term (with all 10 grounds of protection in force) would cost around £890,000 in addition to the cost of the current service.

While the Committee can see the benefits that this would bring in terms of supporting the promotion and protection of equality and human rights, the Committee is concerned that this option would be unaffordable and would be perceived to be disproportionate for an island of Guernsey's size in both the immediate and long term.

6. *Equality and Human Rights Commission (with strategic litigation) and an Advisory and Conciliation Service*

In this model an independent statutory Equality and Rights Commission is established. When first established, it would only have a mandate covering equality, later extending to the broader range of human rights.

The Equality and Rights Commission would be overseen by a board of seven Commissioners. Commissioners would be selected to represent a plurality of social forces. They would be appointed by the States on the recommendation of the Committee for Employment & Social Security for limited 5 year terms (which could be renewable).

The existing Employment Relations Service would be replaced by an independent statutory Advisory and Conciliation Service. This would be overseen by a Board of five people appointed by the States of Guernsey.

In addition to the functions outlined in the earlier models in this model the Equality and Rights Organisation would not provide advice and conciliation on individual discrimination cases - this would be provided by the Advisory and Conciliation Service in this model. Instead, the Equality and Rights Organisation would be involved in strategic litigation and be able to fund cases, or initiate cases in its own right. Initial cost estimates for this model were in the order of £1.3m extra funding required per annum.

While the Committee can see the benefits that this would bring in terms of supporting the promotion and protection of equality and human rights, the Committee is concerned that this option would be unaffordable and would be perceived to be disproportionate for an island of Guernsey's size in both the immediate and long-term.

The option the Committee has included in its proposals is a modification of option 3. There was divided feedback from stakeholders on the options presented. Some felt that only options 5 or 6 would provide the equality and rights organisation that Guernsey needed (even if the cost was high), others felt that developments should be kept to a minimum.

It should be noted that a significant number of other options were considered at the long-list stage that were not included here. This included separating the advice for goods and services and placing it in a different organisation, for example in the third sector (as done in Jersey). This was not considered advisable for the following reasons:

- Many businesses will be service providers. Advice is important for small businesses as well as individuals and in the Committee's public consultation, it was suggested that businesses would be less likely to want to seek advice from the third sector.

- The advice-giving role is technically complex and we anticipate significant training will be required to deal well with issues that arise. The understanding of the key concepts of discrimination is the same no matter whether the context is employment or service provision.
- The team in Guernsey is very small and it can be hard to ensure that the service is covered if there are vacancies or a member of staff is unwell, for example. It, therefore, seems desirable to avoid splitting the team if at all possible in order to retain resilience.

The Committee has not, therefore, further explored commissioning a separate advice function for service provision.

APPENDIX 8

EXTRACTS FROM STATEMENTS BY THE PRESIDENT OF THE COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

27 NOVEMBER 2019 (Delivered by the Vice-President)

"…The Committee is devoting a huge amount of time to progressing the discrimination legislation proposals. We're meeting on average weekly or more frequently to review and make decisions on extensive detailed reports and expert advice. As reported by Deputy Le Clerc during the budget debate, and a subsequent media release, the size of the response that we received to our consultation exercise, and the polarised views that have become so evident, have caused the Committee to rethink the scope of the discrimination proposals, as well as the detail.

Without question, our refocus has to be primarily on disability discrimination proposals. That is what the States first resolved in 2013 and what the States further endorsed in 2015 under the stewardship of the Policy Council. With the Committee restructures, the baton was passed to Employment & Social Security from 2016, and we have run with it throughout this political term. We're determined to deliver proposals to the States on disability discrimination before the election next year. We are hearing some calls for us to slow down and get it right, rather than be driven by the closure of the political term. But we know we can get it right in the time available and that any further handing over of the baton would risk substantial delay as a new Committee familiarised itself with the material and inevitably retraced steps over very well-trodden ground.

We do recognise that we have to refine our definition of disability, and we're working very actively on that. Many people, but in particular the business lobby, don't like the definition that we consulted on, saying that it's far too open ended. Taking account of the consultation, we're confident that we can return with a definition of disability which will find more support. But we can be sure that it, too, will have critics. Among the many things that we have learned in this exercise is that there are very few issues on which even the experts agree. We are going to need the support of this outgoing assembly in order to deliver on the States long overdue commitment to people with disabilities and their families.

As said, our focus will be on disability discrimination legislation and carers of people with disabilities, but if time allows we will also include proposals for protection of other grounds, currently race, religious belief and sexual orientation…"

12 JUNE 2019

"…The first thing I'd like to talk about is the progress with disability discrimination legislation for Guernsey. I'm pleased to report that we are on target to launch our consultation on the new multi-ground discrimination legislation proposals at the beginning of July. We will be consulting on the basis for legislation which will prohibit discrimination on a number of grounds, for example: disability, race, age, sexual orientation, religion, and a number of others.

The legislation will provide protection in a range of fields including employment, goods and services, education and accommodation. We will be engaging with a wide range of stakeholder groups across the different fields and the different grounds of protection. The consultation will run for at least 2 months until early in the autumn. Following this consultation period, the Committee will analyse the responses received and revise its proposals where necessary. We will return to the States with a Policy Letter before the end of this States term, most likely for debate in April 2020.

It is difficult to describe the huge effort that has been required of staff in researching and preparing the documentation for the Committee's consideration and decision making.

In parallel to the legislation piece, the Committee is also developing proposals for an Equality Rights Organisation, or ERO for short. We had hoped to bring forward a Policy Letter on the ERO before launching the consultation on the legislation. However, because of the extent of effort needed, we have had to prioritise our efforts into the legislation consultation. This is to ensure that we can still meet our target of bringing proposals back to the States, by spring 2020, on **both** the multi-ground discrimination ordinance and the ERO.

Before closing on this topic, I just want to mention our Disability and Inclusion Strategy Highlight reports, which we publish every 2 months. These reports include detailed information about progress that has been made on the various work streams set out in the Strategy, with a simple traffic light system showing the status of work streams. So without having to wade through lots of words, you can see at a glance whether things are on track, or off track. We do this to be transparent and open. The only trouble is that the red lights by definition ring the alarms among our stakeholders and I find myself having to repeatedly answer similar questions in the media. But we will keep the reports going. And I'm confident that when we publish our consultation documents next month, and in particular, one of the detailed documents intended for those requiring in-depth details of the Committee's proposals for the new discrimination legislation rather than an overview, the amount of work that has been invested in this project, and our commitment to it, will be obvious…"

29 JANUARY 2019

No update provided

6 JUNE 2018

No update provided

17 JANUARY 2018

"…One of the main updates that Members may be keen to hear about is how we're progressing with the Disability and Inclusion Strategy.

On the disability discrimination legislation work stream, it became clear that there was a need to inject more pace and that the only way we would be able to do that was to find a subject matter expert who could help the Committee select legislation from another jurisdiction on which to model our own disability discrimination legislation. We've met with representatives of the Policy & Resources Committee to discuss the extra funding needed to recruit this expert, and we're in the process of finalising a business case for P&R's consideration. Following a competitive procurement process, we're now very close to appointing a leading academic in the field to undertake this work during the first quarter of 2018. I am personally really excited about the calibre of candidates that we have attracted to apply for this position.

The Committee's work towards developing an Equality and Rights Organisation (an ERO) that would be suited to Guernsey's needs is also moving forward at a good pace. Some initial meetings with stakeholders have taken place on aspects of the work stream, including some project team meetings. In December, we hosted a workshop to engage stakeholders and begin mapping out the principles of the ERO. It will be a statutory body, designed to foster fairness and inclusion for all islanders. Our work on this project includes close consultation with members of the Equality Working Group, which includes a wide range of stakeholders.

[…]

Further discussions on progress with the Disability and Inclusion Strategy will be had at the Scrutiny Management Committee's public hearing on 31 January. We're keen to engage with this hearing, and to address any concerns...."

18 OCTOBER 2017

"Sir,

Thank you for allowing me to make a statement today on the subject of the Disability and Inclusion Strategy. As some members may be aware, in November 2015, following a Policy Council update on the Strategy and mindful of the impending restructure of Committees, the States resolved to direct the relevant committee to report back on the Strategy no later than November 2017. Since May 2016, responsibility now falls to the Committee for Employment & Social Security.

The Committee intends for its next Policy Letter on the Strategy to include concrete recommendations on the implementation of outstanding Resolutions. As such, it regrets that it has not been able to meet the deadline for reporting back by next month. But I hope that, though this statement, I can provide this Assembly with an interim update on progress.

Disability and inclusion is one of the five key priorities submitted by the Committee within the latest phase of the Policy and Resource Plan and likewise proposed by the Policy & Resources Committee as one of the 23 priorities of the States.

As the Policy & Resource Plan indicates, the "inclusion" agenda is broad, ranging from work on disability to P&R's review of matrimonial laws - all the while, centred on the equal rights and fair treatment of all members of our society. The Disability and Inclusion Strategy itself, which is our priority, is made up of around a dozen individual work streams, many of which are large projects in their own right. I should note that some of these work streams are the responsibility of the Committee *for* Health & Social Care, for example capacity legislation, safeguarding vulnerable adults and several frameworks for people with particular disabilities.

I will not be commenting on the HSC work streams, but understand that they are progressing well and I would like to take the opportunity to commend Deputy Soulsby, her Committee and staff for their excellent work on projects such as the framework for people with dementia and the framework for people with autism.

But returning to the Employment & Social Security responsibilities, I would first like to discuss disability discrimination law. Such law is a cornerstone of the Strategy and the UN Convention on the Rights of Persons with Disabilities, and an indication to disabled islanders that we take their rights and inclusion seriously.

The Committee's responsibility is to bring to the States proposals for a law that protects against discrimination and promotes equality for disabled islanders. When this project began, it was thought that Guernsey would develop its own bespoke legislation from scratch. However, on reflection, the Committee considers that adapting the non-discrimination legislation of another jurisdiction - an approach adopted for many other

local law-drafting projects, especially in relatively new or complex areas of law - will achieve the aims of the Strategy within a more rapid and acceptable timeframe.

The Committee has drawn together a project team for this work, which includes ESS officers and political sponsorship, as well as members of the Guernsey Disability Alliance and the Chamber of Commerce - the two groups whose members are most likely to be directly impacted by the new law - for whose time and commitment we are very grateful.

ESS, with input from the project team, intends to carry out a thorough review of relevant laws from six jurisdictions in order to identify a law on which to largely base our own legislation, recognising that there is no single law which is internationally upheld as the best way of preventing discrimination or promoting equality, and that any law would need to be adapted to fit the Guernsey context.

While this approach will bring the work down to a manageable level, it is still a challenging and complex project. In February this year a senior policy officer was seconded within Employment & Social Security to lead on this work stream. We believe that assigning a dedicated resource is the only way to ensure progress, although in the same breath I have to acknowledge that there have at times been difficulties in fully protecting the officer's time for disability and inclusion work because of essential competing demands; and we are now adding a second, half-time, officer to the project to add further support.

The second work stream I would like to mention is the development of an Equality and Rights Organisation, a statutory body that would promote equality, provide advice and education on best practice, and monitor compliance with legislation. In 2013 the States resolved to approve, in principle, the establishment of such an organisation but to defer implementation until a business plan has been developed stating in detail the functions, staffing resources, costs and charges for such an organisation and any additional funding required becomes available. Within our small and very stretched policy officer resource, we have since August 2017 assigned part of the time of an officer to the development of a business plan for an Equality and Rights Organisation. It is hoped that the business plan will be completed, and the States will provide the resources necessary to establish such an organisation, ahead of the commencement of any Disability law, so that it is able to raise awareness, advise on best practice and provide support to businesses and islanders in respect of that law.

The States must lead by example when working towards a future where disabled persons and their carers are not excluded from or denied access to employment, goods, services or education on the basis of disability or because they provide care for a disabled person. So, in August 2016 we commissioned the Business Disability Forum to review the entire operation of the States, with a view to establishing how the States could improve its operations and better accommodate people with disabilities. This is consistent with Public Service Reform and the goal of improving customer experience

across the States, and the resulting action plans have been presented to the Chief Executive's Management Team to progress and implement as a priority.

[…]

Recognising the importance of providing information for businesses in Guernsey in preparation for the Disability Discrimination Legislation, the States commissioned Guernsey Employment Trust to write a Good Practice Guide for employers and an Employers' Disability Charter. The documents are available free on-line for businesses to access. In addition GET are delivering a number of training sessions and provide guidance on the Employers' Disability Charter. The training was oversubscribed and GET has arranged additional sessions.

In concluding this update, it is obvious that work has not progressed as quickly as was anticipated when the Strategy was approved by the States in November 2013. Many good things have happened since the Strategy began, but the flagship projects - disability discrimination law and an equality and rights organisation - have still not become reality. Those are now our priority.

ESS has been responsible for progressing the strategy since May 2016. We, too, have not made the progress that we would have hoped for. But we have a good structure in place, we now have some, albeit limited, staff resource dedicated to the work and we have the cooperation and assistance of third sector partners.

The Committee needs no persuasion as to the need to improve the quality of life of disabled people and their carers. We are all committed to do so."

8 MARCH 2017

"…I know that many people are keen to hear a progress update on the Disability and Inclusion Strategy. The States approved a Disability and Inclusion Strategy in November 2013, and responsibility for its implementation has now passed to the Committee *for* Employment and Social Security.

The Committee has two main priorities in this area for this term. The first is to introduce effective legislation to ensure equality for disabled people in all aspects of life, including employment, and access to goods and services. A member of staff has been allocated to work on this legislation. We will report further on progress with the legislation, and the implementation of other Disability and Inclusion Strategy work streams before November this year, as directed by the November 2015 Wilkie and Bebb amendment.

The second priority is to establish an island-wide Equality and Rights Organisation, in accordance with the Strategy. This will promote positive public awareness of the value of inclusion and accessibility. It will provide general education and awareness-raising, as

well as guidance and assistance on good practice to employers and service providers, and advocacy on behalf of those who face discrimination or exclusion. It is likely that this work will not commence until proposals for the Disability Discrimination Legislation work stream has been brought forward. The Committee will work with other States' Committees and organisations to ensure that the recommendations of the Strategy are implemented…."