

Discrimination Legislation

Summary
of Proposals



States of
Guernsey

March 2020

Why is new legislation needed?

Guernsey only has one piece of discrimination legislation at the moment which is about sex discrimination in employment. This means that if discrimination happens in other contexts (for example, if a bar tender refused to serve someone because of their national origin) there would be no way for the person affected to legally challenge this. Equality is important for our society and we want to make sure discrimination is prohibited.

The States of Guernsey committed to develop detailed proposals for legislation to protect disabled people and carers from discrimination in the 2013 Disability and Inclusion Strategy. The UN International Convention on the Elimination of All Forms of Racial Discrimination was extended to Guernsey in 1969 - this implies a commitment to protect people from racial discrimination. The Committee *for* Employment & Social Security ('the Committee') thinks that change is overdue.

Following extensive consultation, the Committee has published policy proposals for new discrimination legislation. The proposals will be debated by the States in April or May 2020. **The proposals are not the legislation.** If the proposals are approved by the States, the legislation will need to be drafted and approved by the States. The new legislation won't come into force before 2022, so businesses and organisations will have time to prepare.

Who would the proposed legislation protect?

The proposed legislation will say employers and service providers must not discriminate against someone on the basis of the following three characteristics:

- **Carer status** – people who provide care or support (in a non-professional capacity) on a continuing, regular or frequent basis. This must be for a close relative or a person that they live with. The person must have a disability that gives rise to the need for that level of care and support.
- **Disability** – briefly – where a person has one or more long-term physical, mental, intellectual or sensory impairments. Long-term would mean 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 a person's life. See section 5.4 of the [Policy Letter](#) for more details.
- **Race** – which includes colour, descent, national or ethnic origin and nationality.

These are referred to in this document as 'grounds of protection' or 'protected grounds'.

Some of these grounds of protection apply to everyone in Guernsey. Everyone has a nationality, for example. Anyone could be discriminated against. So, the legislation will protect everyone.

What about other protected grounds?

The Committee is proposing that other grounds are added to the proposed Ordinance in future so that Guernsey will, in time, have a single discrimination law covering multiple grounds of protection.

The Committee is proposing that, after phase 1 has been implemented, two further phases of work are undertaken to introduce the remaining protected grounds:

- In **Phase 2** the protected grounds of age and religion would be added to the legislation.
- In **Phase 3** sexual orientation would be added. The existing Sex Discrimination Ordinance would also be repealed and the grounds currently included in that would be brought into the new Ordinance (with possible changes).

It is anticipated that there would be around two years between phases being introduced, but this will depend on the work being resourced and prioritised by the States. This means that if the first phase proposed in the Policy Letter is introduced in 2022, then Phase 2 would come into force in 2024, and Phase 3 would be in 2026.

In what contexts would discrimination be unlawful?

If agreed, the proposed legislation would allow someone to register a complaint that they have been discriminated against on the basis of one of the above grounds of protection (carer status, disability or race):

- when applying for a job,
- at work,
- in some contexts related to work – for example, in apprenticeships, vocational training, employment agencies, business partnerships, as a director or public office holder, or if a trade union or professional body discriminated against someone,
- as a consumer when accessing goods or services – for example, when shopping, at the bank, at the pub, in the hospital, when ordering a taxi, or eating at a restaurant,
- when using public services,

- when buying, leasing or renting a property – both commercial and residential,
- when joining or being a member of a club or association.

The legislation would also apply to education. However, people will not be able to register education complaints immediately. This is because the Committee will need to finalise how adjudication for complaints of disability discrimination in schools, and school place allocation aligns with what is proposed under the forthcoming new Education Law.

In this document, when we say ‘employer’ we also mean employment agencies, vocational training providers, providers of apprenticeships, trade unions and professional bodies. When we say ‘service provider’ we mean providers of goods or services (including in the public sector), education providers, accommodation providers and clubs and associations.

What is discrimination?

The proposed legislation would prohibit several different kinds of discrimination.

Direct discrimination is treating someone less favourably than another person (or people) in a similar situation or circumstances. The reason for the different treatment must be clearly linked to one or more of the grounds of protection listed above for it to be unlawful. For example, if an employer refuses to shortlist a well-qualified candidate because they are a carer.

Discrimination by association 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).

Indirect discrimination is putting rules or arrangements in place that equally apply to everyone, but that put a person or group of people at a disadvantage compared with other persons because of any of the protected grounds. It can be lawful to have specific rules or arrangements in place which lead to a disadvantage, as long as they can be **objectively justified**. For example, a job advert says that people need to be over a certain height to get the job. Some disabled people will experience restricted growth, meaning that they are shorter than average heights. If challenged then the employer would need to show that the height requirement was objectively justified. This means the employer would be asked what the aim of the height requirement was, and if there was another way of doing things that would meet this aim that would not put people with restricted growth at a disadvantage. If the height requirement really was the best way to do things, the employer could keep applying it.

Discrimination arising from disability is when a person is treated unfavourably because of something arising from their disability. 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. An employer or service provider can treat a person less favourably in relation to something arising from their disability if this can be objectively justified (as explained above for indirect discrimination). They also will not be considered to have discriminated if they couldn't reasonably be expected to know that the person was disabled.

Failure to provide a reasonable adjustment would also be a form of discrimination.

Reasonable adjustments and accessibility

The legislation will place a duty on employers and service providers to make **reasonable adjustments** to enable disabled people to have the same opportunities as others and be fully included in society. What reasonable adjustments are provided must be discussed with the person needing the adjustment. 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. Under the proposals, denying someone a reasonable adjustment would be unlawful discrimination unless it would be a **disproportionate burden** for the employer or service provider to provide the adjustment.

Reasonable adjustments might include making existing facilities and information accessible, providing training, providing a service in a different way, adjusting someone's work tasks or working hours, providing equipment, adjusting curricula, learning materials and teaching strategies or just doing things slightly differently. However, adjustments would not have to be made unless the disabled person would suffer a substantial (meaning more than minor or trivial) disadvantage without the adjustment. Everyone would be expected to make small adjustments that cost little or nothing. Whether someone has to make significant changes (like physical changes to buildings) 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 things. If, following consideration, the adjustment would be a disproportionate burden to provide then the person, business or organisation would not have to provide it.

For education providers and providers of goods and services only, the reasonable adjustment duty is **anticipatory**. This means that providers of goods and services and education providers should think in advance about how to meet relatively common access needs – whether this is through more substantive changes to make facilities accessible (noting that some changes will not have to be provided if they would be a disproportionate burden), or through having a portable ramp or hearing loop to hand when people ask, for example. Guidance to help people think through what access issues might be relevant to

them will be available from the Employment and Equal Opportunities Service. The Committee is also proposing commissioning some specialist access consultancy advice for small service providers.

No one would have to make substantial changes to physical features (like buildings) in the first five years of the legislation. Even when the duty is in force and applies to physical features, no organisation would need to make changes that were a disproportionate burden to provide. The five year delay is intended to help organisations to prepare.

Public sector organisations would also have a duty to develop accessibility action plans, which would outline what steps the organisation would prioritise to improve access for disabled people. Public sector organisations would have five years following the introduction of the legislation to get a plan in place.

Equal pay

Under the proposed legislation, people will be able to register a complaint about equal pay if their employer is not giving them **equal pay for equal work** compared to someone else who works for the same employer (or an employee in an associated employer, like another branch of the company or a parent company – if both branches are in Guernsey). However, the difference in pay must be related to one of the grounds of protection.

To be doing equal work a person would need to be doing the same or a substantially similar job. At this stage, employees would not be able to make equal pay complaints that compare the value of their work to the value of the work done by someone that does a different job for the same employer (or associated Guernsey-based employer) (equal pay for work of equal value). In future, the Committee will look at introducing the right to equal pay for work of equal value in relation to sex discrimination.

Other prohibited conduct

The proposed legislation would also prohibit other behaviours:

Harassment is any form of unwanted behaviour linked to any of the grounds of protection that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person. **Sexual harassment** is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature. The proposals say that employers and service providers must not harass or sexually harass their employees or service users.

Victimisation is treating someone unfairly because they've complained or made an allegation about discrimination or harassment, intend to make a complaint or have helped

someone else who has made a complaint – providing that this is made in good faith. The proposals say that employers or service providers must not victimise people.

The Committee also proposes that people or organisations must not publish **discriminatory advertisements** which give the impression that they are seeking to attract a particular type of person, thus preventing equal access to opportunities. In addition, advertisements which give the impression that someone would be treated differently on the basis of one of the grounds of protection would also not be permitted.

Nor would someone be allowed to give **instructions to discriminate** or put pressure on someone else to do something that is prohibited under the discrimination legislation.

When would it be lawful to make decisions or base actions on the protected grounds?

There are some situations where it makes sense to treat people differently because of one of the grounds of protection. The proposals outline some of the situations in which it would be lawful to treat people differently.

It would be lawful to treat people differently if one person needs a **reasonable adjustment** and another does not. If a reasonable adjustment would be a disproportionate burden to provide, an employer or service provider would not have to provide it. Where a person would not be at a significant disadvantage (meaning more than minor or trivial) without an adjustment, there is no obligation to provide it.

It would be ok for an employer to make employment decisions for good reasons not related to the grounds of protection. For example, it is ok not to offer a job to a person who cannot do the **essential functions of that job**. It would also be ok to dismiss someone (provided that proper procedures were followed) if there were problems with their capability or conduct. However, if the employee is disabled, the employer must check whether the person could do the job with a reasonable adjustment.

It would be lawful in a very limited number of circumstances for an employer to require applicants for a particular job to have a characteristic that is covered by one of the grounds of protection. This is known as a **genuine and determining occupational requirement**. In such circumstances, an employer would need to be able to objectively justify the requirement (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 this could be justified).

If an employer or service provider has a provision which disadvantages a person or group of people (i.e. if they **indirectly discriminate**) they might be able to **objectively justify** this (see explanation on page 3). It is proposed that **objective justification** is also a permitted defence for **discrimination arising from disability**.

Positive action means situations where an employer or service provider voluntarily takes steps to address inequality. For example, offering special targeted work experience or shadowing opportunities to try to increase the diversity of job applicants in a sector. This would be lawful under the proposals, provided the employer or service provider can justify what disadvantage they are trying to correct, and provided that they do not go so far as to use quotas or appoint a person less qualified for a role only because they have a particular under-represented characteristic.

There will also be a list of **exceptions** specified in the legislation that will say when it is ok to use the grounds of protection to treat people differently. This will cover, for example, offering discounted entry prices to disabled people; or being able to continue to use the nationality requirements applied by Population Management and the Guernsey Border Agency.

A list of proposed exceptions is included in section 8 of appendix 4 of the [Policy Letter](#).

How would someone register a complaint?

If someone feels that they have been discriminated against then they should raise this with the employer or service provider first. Some employers or service providers will address issues well, leading to good outcomes.

The Committee thinks taking a case to a formal hearing should be a last resort. Ideally, people should be kept informed so that they can avoid discriminating in the first place. If discrimination happens, the Committee would like to ensure there are ways to help people to resolve the issue as soon and as informally as possible, while making sure that cases are taken seriously and there are good outcomes. Informal resolution is not only more cost-effective, it is also better for everyone involved as it is less confrontational and faster.

The Committee is proposing offering free advice and pre-complaint conciliation to try to help people to resolve issues before a formal complaint is registered. The existing Employment Relations Service would be developed into an Employment and Equal Opportunities Service to deliver this. The service would be led by a statutory official, which would ensure the operational independence of complaints handling.

If someone was not happy with how an employer or service provider has responded to them, they would be able to register a formal complaint.

We have an Employment and Discrimination Tribunal in Guernsey. The Tribunal can already hear complaints under our existing legislation about sex discrimination, minimum wage and unfair dismissal. The Committee is proposing developing the Tribunal to hear complaints under the new legislation. It is of the view that this would be preferable to hearing cases in court. The Tribunal is designed to be less intimidating and more accessible to people.

The process for registering a complaint would be similar to the process that is used today. Complaints are registered with the Secretary of the Tribunal. Once a complaint is registered the parties to the complaint are then offered conciliation (which will be facilitated by the Employment and Equality Opportunities Service) to attempt to resolve the complaint informally.

If either of the parties does not want to go through the conciliation process and would rather have their case heard by the Tribunal, or if the conciliation process does not lead to an agreement, then a hearing can be arranged. Cases are currently heard by three people selected from a larger Panel of people who are trained to adjudicate such matters. The Committee is proposing that, in future, the person chairing the Tribunal in any hearing should be legally qualified, though this won't be a requirement for the other two members selected from the Panel to hear the complaint. This area of law is complex, and additional legal skills will be useful.

If you would like to find out more about how this would work, please see section 7 of appendix 4 of our [Policy Letter](#).

What would the outcome of complaints be?

If the Tribunal finds that discrimination, harassment or victimisation has happened they can:

- 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).

The financial remedies would be different depending on whether the complaint was related to employment or not. If it is related to employment then the award would be up to 6 months' pay plus up to £10,000 for injury to feelings. If it is not related to employment, then the award would be up to £10,000 for financial loss (which would need to be evidenced) plus up to £10,000 for injury to feelings.

“Injury to feelings” complaints look at the personal impact of the experience on the individual, recognising that the effect of discrimination is not just financial or economic in nature. Injury to feelings claims would be based on a three banded scale akin to the Vento Scale used in the UK (but 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.

Decisions of the Tribunal can be appealed to the Royal Court on a point of law.

It should be noted that the adjudication mechanism for Education complaints is yet to be finalised, pending further information on the new Education Law.

What else is the Committee doing to prevent discrimination?

The Committee is proposing undertaking an attitudes survey to provide information on prejudice levels and to give more information about who in the community feels that they have been discriminated against. Using the survey findings and in discussion with affected groups in the community, the Committee is proposing doing some proactive education and awareness raising work around identified equality issues. This should help to promote cultural change and prevent discrimination from happening in the first place.

What do service developments mean for other kinds of employment complaint?

If the States agree the proposals, services for other types of employment complaint (like unfair dismissal and minimum wage complaints) will improve. This will include:

- employment cases being heard by a Tribunal with a legally qualified chair (rather than a lay member),
- pre-complaint conciliation for employment complaints – making it easier to resolve complaints faster,
- a statutory official heading the Employment and Equal Opportunities Service (which is a development of the Employment Relations Service) – meaning that it will have more guaranteed operational independence than today. This is important, as the Service handles complaints about the States of Guernsey,

- Rules of Procedure for the Tribunal – this will make it easier for people representing themselves, and others, to know how the Tribunal works.

If someone wanted to register complaints of both unfair dismissal and discrimination about the same set of circumstances, they could do so. The Tribunal may hear both complaints at the same time. The following awards would be possible:

Unfair dismissal complaint		Discrimination complaint		Award
	Not upheld		Not upheld	No compensation.
	Upheld		Not upheld	Up to 6 months' pay.
	Not upheld		Upheld	Up to 6 months' pay plus up to £10,000 injury to feelings, possibility of non-financial remedies.
	Upheld		Upheld	Up to 9 months' pay plus up to £10,000 injury to feelings, possibility of non-financial remedies.

What changes would employers and service providers need to make to comply with the legislation and when?

If the States agree the Committee's proposals then the Committee will start to prepare and publish guidance to support employers to understand what they need to do before the legislation comes in. A code of practice will be prepared to give clear guidance on what the legislation means.

Many of the duties that employers and service providers will have will be things that they are advised to do already, like having a **harassment policy** and a **diversity or equality policy** in place suitable to the size of the business (the Tribunal understands that small organisations may operate in a less formal way).

It might be advisable to wait until after the States debate before investing in changes – further guidance will be issued then. Some of the actions that might be advisable, if the States approve the Committee’s proposals, include:

- **Checking the organisation isn’t discriminating** – this could include:
 - reviewing policies, procedures, terms and conditions, working practises, contracts, etc to see whether they use any of the protected grounds (race, disability or carer status) directly or whether they could indirectly discriminate against someone on the basis of the protected grounds,
 - reviewing when questions are asked about the protected grounds in applications forms or interviews, and checking that advertisements do not refer to protected grounds in a prohibited way,
 - checking whether there are differences in pay between people doing the same or substantially similar jobs related to the protected grounds, or differences in terms and conditions related to the protected grounds between people doing jobs that are not materially different.

If anything is found, it is advisable to check whether this falls within the exceptions specified in the legislation (a provisional list is included in section 8 of appendix 4 of the [Policy Letter](#), but this list may be modified during the States debate or at the legal drafting stage).

- **Training staff** – consider whether staff will need training before the legislation comes into force so that they understand their duties under the legislation.
- **Preparing to offer reasonable adjustments** – this could include encouraging staff to get in the habit of asking whether reasonable adjustments are required for meetings, appointments, interviews and so on and ensuring booking systems include a facility to check whether reasonable adjustments are required. It might also be advisable to think through how the organisation would go about making reasonable adjustments for disabled people if the need arose.
- **Considering undertaking an access audit** – though there would be a 5 year delay before complaints related to physical features could be made, it may be helpful to prepare in advance and to consider other aspects of accessibility, such as web design or interactions with staff. There is already some guidance available at: <https://gov.gg/business/inclusive>
- **Positive action** – consider whether the organisation is currently using, or wishes to use positive action and, if it does, set out the rationale, objectives and a review period for this.

How can I find out more?

The Committee’s proposals are set out in full in a Policy Letter. This can be found by going to: <https://gov.gg/discrimination> and clicking on the link to the Policy Letter.

If you have any questions or need this document in a different format, please contact us at: equality@gov.gg
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What will happen next?

The proposals will be debated by the States of Guernsey in April or May 2020. If approved, legislation will be drafted and services will be developed to provide conciliation and to manage and hear discrimination complaints. Guidance and training for employers and service providers on their future new responsibilities will be provided before the legislation comes into force.

While a commencement date for making formal complaints has not been set, it is anticipated that this would be during 2022.

