

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If Guernsey were to exactly mirror the Jersey Law then, when the Sex Discrimination Ordinance is repealed, some important provisions in that Ordinance would be lost.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 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.