



COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

## RESPONSE TO GPEG'S REVIEW OF THE STATES OF GUERNSEY PROPOSALS ON ANTI-DISCRIMINATION

I feel compelled to write a response to GPEG's "Review of the States of Guernsey Proposals on Anti-Discrimination" and The Guernsey Press' opinion of 14<sup>th</sup> July 2022 entitled "Think Tank's valid points worth hearing." This is because GPEG's recent review contains a number of factual inaccuracies which makes many of their 'valid points' somewhat less valid. In addition, some of the recommendations are based on misunderstandings by GPEG. Many of their recommendations are (and were) already being implemented. The Committee would also very much appreciate further information to substantiate many of GPEG's points. Without the substantive evidence much of what has been presented appears to me to be a non-evidenced, unsubstantiated opinion piece masquerading as a well-researched report, but one that is full of inaccuracies. This response will start by addressing the inaccuracies and will cover each of the recommendations in turn later.

The Voisins' legal opinion quoted and replicated in the appendices is based on the 2019 draft proposals that were substantially changed, not the current and approved proposals for legal drafting. It is woefully inaccurate with respect to the version of the policy proposals agreed by the States. In fact, the GPEG response appears to be partly based on the original proposals; it doesn't acknowledge the successful amendment to include sexual orientation and religious belief in phase one (page 2 just refers to disability, carer status and race) and at least twice uses the terminology of appropriate adjustment when the legislation is now adopting the term reasonable adjustments, like the UK. GPEG also states that whilst it is the intention of the legislation to "widen the protected characteristics in Phase 2 to goods and services," it has "concentrated only on Phase 1 and in particular on employment data." This is another inaccurate statement. Protected grounds (or characteristics in some jurisdictions) include disability, carer status etc. Goods and services or employment are not protected grounds or characteristics. For clarity, phase one also includes protection from discrimination when accessing the fields of goods and services, education, accommodation and membership of clubs and associations in relation to the phase one grounds of disability, carer status, race, sexual orientation and religious belief. It is the provisions within the current Sex Discrimination Ordinance that will be expanded wider than employment in phase two.

The GPEG report also appears to misrepresent the Irish Disability Act (2005). This Act is not about discrimination as the GPEG report implies. It is about the provision of disability specific services, assessment of needs and accessibility. It is not unusual to have a narrower definition of disability for

assessment of need for specific services and a wider definition in relation to the protection of rights. In Ireland, the Equal Status Acts 2000-2018 ('the Acts') prohibit discrimination in the provision of goods and services, accommodation and education. They cover the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the traveller community. It was therefore valid for the Committee to review definitions of disability used in the Equal Status Acts and discrimination legislation in other jurisdictions, because protection from discrimination is the purpose of the legislation being proposed.

GPEG also claims that following a landmark UK ruling by the Supreme Court in July 2017, the fee to make an application to an employment tribunal in the UK was removed on the grounds that this "restricted access to justice" and that Guernsey is **likely to follow suit** leading to a significantly increased number of applications in relation to existing legislation. If GPEG had bothered to check its facts at all (on this and other matters), it would know already that there isn't a fee to take a case to the Guernsey Employment and Discrimination Tribunal and the States agreed that this should continue to be the case.

There is also no such thing as "indirect direct sex discrimination" as GPEG state on page 5. Discrimination is either indirect or direct, not "indirect direct".

GPEG claims "age discrimination, probably the most prominent of all discrimination in Guernsey and other jurisdictions, features at a later stage without explanation". There **was** an explanation for this in the Committee's policy letter. The policy work on age isn't complete and further work is required. The States prioritised disabled persons and carers for protection from discrimination when they approved the Disability and Inclusion Strategy in 2013. The States reaffirmed this decision and approved the phasing in July 2020. This explanation **was** in the policy letter, even if GPEG don't like it.

On a further point, GPEG incorrectly quote the definition of disability. The definition initially quoted by GPEG is the definition of 'impairment', which is just one word in the definition of disability. In order to qualify for protection from discrimination on the ground of disability, a person must have a "long-term" impairment. This 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. It is, frankly, ridiculous to suggest that everyone will fall within this definition. And even if a person does fall within the definition, it does not mean that they will have cause to bring a discrimination complaint under the new legislation. In any case, the burden of proof initially rests on the complainant 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. Unfortunately, these important points are lost on GPEG.

GPEG claims that the rewards available under the proposals will be greater than in the UK in many cases. How has GPEG worked that out? In Guernsey the maximum amount of compensation payable in employment matters will be six months' salary plus up to £10,000 for injury to feelings and in non-employment cases up to £10,000 for financial loss plus up to £10,000 for injury to feelings. In the UK, compensation for financial loss is unlimited and, in addition, compensation for injury to feelings of over £40,000 can be awarded in some cases.

Proportionality is at the heart of the Guernsey draft legislation through the concepts of disproportionate burden and objective justification. No employer or service provider will need to provide a reasonable adjustment if it is disproportionate for them to do so. Reasonable adjustments will also need to be both 'appropriate' to meet a disabled person's needs and 'necessary'. The latter means that disabled people will need to demonstrate a disadvantage because of an impairment in order for a reasonable adjustment to be necessary. Not everyone will qualify, as GPEG claims.

The States is planning training sessions for businesses, employers and service providers, that will be free of charge so to factor these costs into the £250,000 figure that GPEG have come up with for the cost of the legislation to the average business is already inaccurate.

These training costs were included in the policy letter on “Proposals for a New Discrimination Ordinance”, which were considered by the States in July 2020. Other costs that were referenced in the policy letter include the costs of accessibility audits for the public sector and the access to work fund and adjudication of education complaints; resolutions were for these costs to either be part of the normal budget setting process or for some policy proposals, such as the access to work scheme, to be brought back to the States. The States already has a fund for reasonable adjustments for its own employees; this is good practice and therefore something the States already does. GPEG claims that many of these costs have not been considered.

On what basis have GPEG come up with their other financial figures and declared the Committee’s costs “wildly understated”? A first draft of the new Ordinance has already been prepared and shared with ESS officers. It certainly hasn’t cost anywhere near the £300k claimed by GPEG for 8 or 9 months part-time work, although I’m sure the staff member concerned would love to earn that sort of amount if GPEG thinks their efforts of (and I quote) “human years of effort for expensive people” deserve it. GPEG are criticising that draft of the legislation when they haven’t actually seen the draft yet. I am confident that it **will** be proportionate, well drafted and relevant.

Similarly, where is the evidence for GPEG’s spurious claim that the legislation will result in a reduction of 200 private sector jobs? Good employers want to attract good employees; that is good for the bottom line. In 2021 good employees looking to work in Guernsey would expect the Island to have this type of legislation in place.

And why, as GPEG claim, would the proposals encourage islanders to dishonestly abuse the legislation? In my experience good employers already make reasonable adjustments for their staff if required and staff who feel listened to, respected and have jobs where they feel valued are much more likely to be productive, loyal and hardworking. There is a well-documented positive relationship between workplace performance and employee trust and engagement. Research studies have shown that inclusive and diverse organisations are more productive, generate more revenue, perform better on problem-solving and strategy tasks, think more creatively, are better at negotiating, and make enhanced decisions. There is, therefore, a meaningful correlation between diversity and performance. This evidence is the opposite of the ‘moral hazard’ argument put forward by GPEG and suggests that the legislation may improve employee culture and productivity, not harm it as claimed.

I would argue that it is bad for the Island’s reputation **not** to have protection from discrimination and harassment on multiple grounds. The Guernsey Press opinion that I referred to earlier stated “Elsewhere the tone of the report is less measured which dilutes its impact”. This is an understatement! I am concerned about the potential reputational damage to the island of some of the statements in the report. Do GPEG intend their comments such as “minority sexual habits” and “abnormal lust” to refer to some sexual orientations? If so, these comments would appear to demonstrate inbuilt prejudice on behalf of the authors. This is made all the worse and more ironic by GPEG’s strapline, which is “equality of opportunity for all”.

GPEG claim there is a lack of discrimination happening and no need for legislation in Guernsey. Jersey, the Isle of Man and the UK already have multi-ground discrimination legislation in force. There is no evidence to suggest Guernsey is different in its need for discrimination legislation. Many

complaints are unknown or hidden as there is currently no formal mechanism for registering a complaint other than in respect of sex discrimination in employment. So, the lack of data is a lack of data. It doesn't mean that discrimination is not happening. Without legislation, people know they are unable to pursue claims and so they don't report discrimination. Equality organisations are aware of many examples of discrimination that people are powerless to do anything about. Merely quoting service user figures from GET/GO/GROW (which are recorded for a different purpose) does not touch the surface.

The fact that GPEG claims the scale of the problem is so small and the cost of complying with the legislation is so high, is also highly incongruent or nonsensical. Either the problem is there, large and something needs to be done or there is less of a problem to fix, which won't cost so much after all. It is surely difficult to make both arguments simultaneously.

I will now consider each of GPEG's recommendation in turn:

**GPEG:** Recommendation 1 - Pause and review

**RESPONSE:** I'll return to this recommendation at the end and the question of whether there really is a case to pause and review.

**GPEG:** Recommendation 2 - Consider putting out a best practice guide on a non-legal footing and perhaps providing some level of mediation assistance for disputes. This could be trialled for a year or two to enable the States to gather evidence and support to see if legislation is really needed.

**RESPONSE:** There will be guides available on the legislation once it is approved by the States, and there will be both pre- and post-complaint conciliation offered by the Employment and Equal Opportunities Service. Currently about 70% of complaints are resolved outside a tribunal setting. The aim is for this to continue with a tribunal hearing only the last resort if other, less formal means of resolving the complaint have failed. The legislation won't come into effect until late 2022, almost 2.5 years after the approval of the policy proposals. This gives a trial period of a year or two for employers and service providers to develop best practice. Many of the key principles within the legislation are the same as other jurisdictions in which some larger businesses will already be operating. Some aspects of the legislation, such as changes to physical features, won't come into force for a further five years. Therefore, much of this recommendation is already happening.

**GPEG:** Recommendation 3 - A review of the wording of the Proposals forwarded to the Crown Officers for drafting, followed by really careful drafting and ample time for debate about the Proposals being implemented.

**RESPONSE:** The legal drafters have reviewed the wording of the proposals and drafted the legislation carefully. The draft will be reviewed by members of the Employment Lawyer's Association and other legal experts in the field. There will be the opportunity for a further debate, if necessary, when the legislation goes back to the States for approval. This will not be until quarter 1 2022 at the earliest. The implementation date could be set at that time, although this will certainly not be before the last quarter of 2022. All these factors allow ample further time for debate (notwithstanding the debate that has already happened regarding these proposals over a number of years).

**GPEG** Recommendation 4 - "Disabled enough" should be in place for all complaints regarding "appropriate adjustments".

**RESPONSE:** The terminology used in the latest draft of the policy proposals was “reasonable adjustments” not “appropriate adjustments.” This again suggests that GPEG have not properly familiarised themselves with the latest proposals. A reasonable adjustment is a necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden, where needed in a particular case, to ensure that persons with disabilities enjoy or exercise, on an equal basis with others, all human rights and fundamental freedoms. Reasonable adjustments therefore need to be both appropriate (i.e. they actually help a disabled person) and necessary. Disabled people will need to demonstrate a disadvantage because of an impairment in order for a reasonable adjustment to be necessary. Not everyone will qualify as ‘disabled’, as GPEG claims. Therefore, I believe that this point is already sufficiently covered.

**GPEG Recommendations 5, 6 and 7** (These three recommendations are considered together as they all concern the definition of disability).

5. Consideration be given to a narrower definition of disability in respect of the State’s own obligations.
6. A sensible definition of disability that does not capture a majority of the population would be more appropriate.
7. The States should carefully re-consider if they really wish to support an unconditional “social” definition as a conceptual policy basis.

**RESPONSE:** GPEG criticises the Committee for recommending the social model of disability as the basis for the definition. Using the social model is the same approach as already adopted in Jersey. The time-limit of six months for a long-term impairment is the same as in Jersey. Jersey’s definition of disability has been interpreted widely by its tribunal.

The key point (that GPEG has missed) is that it doesn’t matter if the definition of disability is wide or if 100% of the population ends up being disabled at some point in their life. If you haven’t been discriminated against on the basis of a disability, you can’t make a claim of discrimination on the ground of disability anyway. I therefore much prefer the well-argued opinion of the Chair of the Jersey Employment and Discrimination Tribunal, on how wide the scope of the definition of disability needs to be.

The following is a quote from the 29 May 2020 Interim Judgement of the Jersey Employment and Discrimination Tribunal in the case of “A Genda V Dunelm (Soft Furnishings) Limited” (paras.30-34).

*“...My reading of the Law is that it is not intended to make it difficult for people to claim they have been discriminated against on the grounds of disability; the intention and purpose of the Law is not to require people to have to cross a significant hurdle in having to demonstrate first that they are disabled. The purpose of the Law is to protect as many as people as possible from being discriminated against in as comprehensive way as possible. That is because as a society we have decided, rightly at least in my view, that discrimination of each and every variety should be prevented and in the event such prevention fails, and following due process, open to sanction and censure. To interpret the Law in a way which makes whether or not someone is as a matter of Law disabled the focus is in my judgment the wrong focus. To my mind at least that is not the important question and to an extent beside the point. In our 21<sup>st</sup> century society whether or not someone is in fact disabled is entirely irrelevant, or at least it should be. The important question for the Tribunal, and I would say our society in general, is whether or not someone has been discriminated against because of their disability. The entire purpose of the Law is to protect people from being discriminated against. In my view it would be undesirable to have a Law that made it difficult to seek a remedy for being discriminated against on the grounds of disability, because it was difficult to satisfy the Tribunal that*

*one was 'disabled' in the first place. Given that any individual complaining they have been discriminated against is always required to prove that such discrimination has occurred, which in my view is a not insignificant hurdle (and rightly so), I see no difficulty in interpreting the Law so as to make the definition of disability and the resultant class / potential class of people with that characteristic relatively wide. In my judgment that is far more preferable than making the potential class of disabled people artificially narrow. In any democratic society there are always extremes and there will always be people who seek to exploit and take advantage of the freedoms under which they operate. That that happens and is possible to happen is one of the hallmarks of a democratic society. That is not a reason to interpret the Law so as try and limit that happening. What is required is that the necessary checks and balances are in place so as to extinguish or at least minimise abuse. The necessary check and balance to any such approach in this situation is in my judgment easily found in the requirement to prove ultimately that one has in fact been discriminated against. I also cannot help to note a certain irony which lies at the heart of limiting, artificially, the breadth of the definition of disability, so as to limit or reduce the number of claims being made / proceeding past a preliminary stage. That would seem to be entirely contrary to the stated purpose of the Law of protecting people from being discriminated against. Apart from the most obvious cases where for example a physical impairment was not 'long term' for the purposes of the Law, in my judgment what the Tribunal should be focussed on is not whether or not someone is 'disabled' but whether they have suffered discrimination, which is of course an entirely different question and a much higher and more difficult threshold to cross."*

**GPEG:** Recommendation 8 - Carefully consider lighter touch regulation for smaller employers.

**RESPONSE:** The concepts of disproportionate burden and objective justification are central to the proposals. These automatically make the legislation lighter touch and proportionate for smaller employers.

**GPEG** Recommendation 9 - Put in a much earlier review of whatever is enacted. Perhaps two years after the initial implementation.

**RESPONSE:** The implementation of phase one will not be complete until 2027. The review is scheduled for 2029, or earlier if required.

**GPEG** Recommendation 10 - Money would be better spent supporting the existing third sector organisations than in setting up this legal morass. Funding action against discrimination outside of the courts is clearly preferable.

**RESPONSE:** Third sector organisations that focus on equality issues are strongly in support of implementing the legislation. The whole point of cases being heard by the Employment and Discrimination Tribunal is that complaints are heard outside of the courts. Also, the aim is to resolve the majority of complaints through conciliation before they reach this stage at all.

**GPEG** Recommendation 11 - This current Assembly should ensure that the project is fully costed and considered before moving forward on this Phase and the proposed Phase 2.

**RESPONSE:** The proposals have been costed as far as is possible at this time. Where there may be additional resource requirements, this has been highlighted as far as is known.

**GPEG** Recommendation 12 - Do not waste time and money signing the CRPD (UN Convention on the Rights of Persons with Disabilities). (See Appendix 3)

**RESPONSE:** This is outside the scope of phases one or two of the implementation of the Discrimination Ordinance, so whilst I disagree with GPEG on this, I will leave my arguments for another day.

**GPEG Recommendation 13** - Any legal process should take account of the actions of the discriminator and the person subject to discrimination. Failure to self-help should be a mitigation of any Tribunal decision. (See Appendix 5).

**RESPONSE:** The legal process can take into consideration the actions of the person subject to discrimination already. With regard to the current Sex Discrimination Ordinance if the Tribunal finds that the complainant has unreasonably refused an offer by the respondent which, if accepted, would have had the effect of putting the complainant in all respects in the position in which he would have been had the act which founded the complaint not occurred, the Tribunal shall reduce the amount of the award of compensation to such extent as it considers just and equitable having regard to that finding. The Committee's policy letter explained that the Tribunal's powers to reduce awards or make cost awards on application would remain (noting that costs cannot be awarded in relation to legal representation/advice). 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.

Now returning to recommendation 1...

**GPEG: Recommendation 1** - Pause and Review

**RESPONSE:** Given the answers to the other GPEG recommendations, I can see no valid reason to pause and review. The States will already have the chance to review the draft legislation when it returns to the States (and the rest of the community will be able to see the legislation and lobby States Members in advance of the debate if they feel it necessary). A first draft of the legislation is already complete based on the July 2020 proposals, so any further pause and review is not going to save on that drafting time or expense. It is more than seven years since the States approved the principle of implementing disability discrimination legislation. We have paused and reviewed for long enough already.

Deputy P J Roffey  
President

On behalf of the Committee *for* Employment & Social Security