Public Consultation

Discrimination Legislation

Technical Draft Proposals

States of Guernsey

July 2019

If you require this document in a different format please contact us at equality@gov.gg or call us on 01481 732546.

Contents

Foreword

Although the detail of these draft proposals may seem complicated, at its heart what we are proposing is simple: everyone in Guernsey should be included and have an equal opportunity to participate in the life of our island.

The Committee has worked with partner organisations over the last few months raising awareness about equality issues and the concept of non-discrimination. This has raised the profile of these concepts and resulted in some public debate about whether discrimination legislation is necessary in Guernsey. If we are not on the receiving end, we are unlikely to be aware of what is happening to others. While we do not have a study which quantifies the rate of discrimination, we do have evidence that it happens in Guernsey. Equality and non-discrimination are among the most fundamental principles of democratic government. Discrimination is a global problem, which happens everywhere, and we should not assume that Guernsey is immune to it.

The question is not whether we need to consider discrimination as a policy issue, but how we want to address it.

The States commitment to take action on these issues goes back a long way. In 1969 the UN Convention on the Elimination of All Forms of Racial Discrimination was extended to Guernsey. Fifty years on we still have not made race discrimination explicitly unlawful. In 2003 the Advisory and Finance Committee brought a Policy Letter to the States which said "The Committee is mindful that any measures to eliminate all forms of discrimination must be appropriate and proportionate. It, therefore, believes the introduction of one comprehensive law represents the best way forward"[1]. This was more than fifteen years ago. In 2013, as part of the Disability and Inclusion Strategy, the States resolved to bring forward proposals for legislation to prevent discrimination against disabled persons and carers. In June 2018, the Committee *for* Employment & Social Security suggested widening the scope of this project to develop proposals for legislation to prevent discrimination against people in relation to a range of characteristics including disability, but also others not previously included such as race, age and sexual orientation. This suggestion was unanimously approved by the States. We are progressing this work as a priority.

We have drafted our proposals along the lines of international standards for discrimination legislation, which we have tailored into something which, we believe, would be proportionate and effective for Guernsey. While we want to realise greater equality of

[1] States Advisory and Finance Committee (2003) "Proposals for comprehensive equal status and fair treatment legislation" para 21, in Billet XXI of 2003.

opportunity and inclusion as soon as possible, we also want to make sure that the island can cope with the pace of change. We recognise that there is a need for balance.

The Committee is seeking the views of the community on our draft proposals. This includes some specific questions in a questionnaire, but we would welcome feedback on any part of the draft proposals. Please go to www.gov.gg/discriminationconsultation.

Deputy Michelle Le Clerc
President, Committee *for* Employment & Social Security

Section 1: Purpose of this document

This document sets out our draft proposals in full. But you might not need this level of technical detail, or you might only be interested in certain parts of the proposals. **You do not need to read the whole of this document to take part in our consultation** – you can dip in and out of the sections that interest you, or you can just refer to our easy-read and summary documents. These are available at www.gov.gg/discriminationconsultation and include:

- a summary of the draft proposals,
- an FAQs leaflet about what the draft proposals mean if you experience discrimination,
- an FAQs leaflet about what the draft proposals mean for your business or organisation,
- a questionnaire about key questions, and
- an easy read summary of the draft proposals.

Have your say

There are three ways you can respond to this consultation:

1. By completing **the questionnaire** on our key questions (available at www.gov.gg/discriminationconsultation or by contacting us)
2. By **writing to or calling us** with feedback on the draft proposals
3. By **attending an event** to discuss the draft proposals or inviting us (subject to availability) to come to talk at an event you are hosting. Details of planned events will be listed on www.gov.gg/discriminationconsultation

Please ensure that any responses have reached us by **30th September 2019.**

You can contact us at: equality@gov.gg

01481 732546

Discrimination Legislation, Level 4, Edward T. Wheadon House, Le Truchot, St Peter Port, GY1 3WH

The Committee *for* Employment & Social Security will process any personal data which you provide, through this consultation, in accordance with the Data Protection (Bailiwick of Guernsey) Law, 2017. Further information about how your personal data is processed by the Committee *for* Employment & Social Security can be found via www.gov.gg/dp or by calling 01481 732546.

What will happen next?

A summary of the feedback we have received will be published on www.gov.gg/discriminationconsultation by **early December 2019.**

The Committee will consider the feedback received and whether to modify the proposals. A Policy Letter with the final proposals will be brought to the States no later than **April 2020.**

If the proposals are agreed by the States, then the legislation will be drafted. While this is happening, changes will be made to our services so that people can access advice and register complaints when the legislation comes into force. No date has been set for when the legislation, if agreed, will come into force. The earliest this could be would be 2021.

Will the law be the same as the draft proposals contained in this document?

This document is intended to capture the policy intent for the purposes of consultation. The draft proposals contained in this document could yet change because the following stages need to be completed:

- The Committee will give further consideration to key points (including reviewing your consultation feedback) and may change the proposals as a result.
- A Policy Letter will be drafted setting out the final proposals.
- The States will debate the Policy Letter – the proposals could be amended during the States debate.
- The final proposals agreed by the States will then be interpreted and drafted into law by our staff at St James' Chambers.
- The drafted Ordinance will return to the States for approval.

Consequently, these draft proposals represent where we are now and what the direction of development of the final proposals is ***at this stage***. This document in no way constitutes legal advice about what the future rights or duties under the legislation will be.

Section 2: Why new legislation?

Background

As part of the Disability and Inclusion Strategy[2], the States of Guernsey agreed that policy proposals should be developed for disability discrimination legislation and returned to the States following consultation.

The project to develop the proposals was transferred from the Policy Council to the Committee *for* Employment & Social Security in 2016 with the change of the structure of the government. The Committee initiated work on the project in early 2017, and in autumn 2017 resolved that identifying a piece of model legislation to work from would accelerate progress towards formulating a Policy Letter to return to the States.

In early 2018, after a competitive bidding process, Drs Quinlivan and Buckley from NUI Galway were engaged to undertake a comparative study of the legislation of six countries against a set of evaluation criteria[3] which were agreed by the Committee following engagement with key stakeholders. From this study it was suggested that a combination of the Irish and Australian legislation would provide the best 'model' to work from to meet Guernsey's needs.

Noting that it was clear that one of these models – the Irish legislation – covered multiple grounds of protection, the Committee considered whether it would be advisable to expand the scope of the project to develop a multi-ground piece of discrimination legislation. It was felt that this would have a number of advantages: providing equal protection to all islanders: allowing better protection for people being discriminated against on multiple or intersecting grounds of protection; and greater resource efficiency in the long run (the alternative being separate legislation being developed for each ground individually). Consequently, in June 2018, the States unanimously agreed an amendment laid by the Committee to the Policy & Resources Plan, which directed the Committee to bring policy proposals for multi-ground discrimination legislation to the States by April 2020.

Following this decision, Drs Quinlivan and Buckley were re-engaged to produce a 'straw man' model piece of legislation. This outlined which provisions would be likely to be needed and drew on what they considered to be best practice in the Irish and Australian legislation. The 'straw man' was used by the Committee as a basis for further discussions about what was right for Guernsey and what adjustments to that model might be desirable. The

[2] Which can be found in Billet XXII of 2013.
[3] Available on request from the project team: equality@gov.gg

Committee then formulated their draft proposals as laid out in this document to seek the views of the public before presenting final proposals to the States of Guernsey.

Why is the proposed legislation right for Guernsey?

We think these draft proposals, if developed into legislation, would meet Guernsey's needs, and be effective, for the following ten reasons.

1. **Everyone will have rights**. The fact that the draft proposals cover multiple grounds of protection – which include attributes which everyone has (like age) - mean that the legislation will provide necessary protection for everyone on the island.

2. We are proposing that there will **only be one piece of discrimination legislation** in future. This would ensure that things are consistent and straightforward. In 2003 the Advisory and Finance Committee said that they felt that developing a single piece of discrimination legislation was a proportionate approach for Guernsey[4] - we agree.

3. The draft proposals are **based on the fundamentals of international standards.** Globally, there are some common standards to discrimination law, such as how discrimination is defined. During the course of this work we have considered other countries' legislation as well as thinking about the requirements of international organisations like the UN. We think that these draft proposals meet the fundamental requirements of those standards.

4. The draft proposals would **encourage people to resolve things informally,** if possible. We believe that there will be better outcomes if things can be resolved early on without the need for a hearing. If people have made genuine mistakes, we think that it is good for them to have opportunities to resolve the issue and make amends so that it is not necessary for a formal case to be brought against them. The draft proposals include elements which make sure that there are opportunities for people to try to reach a resolution informally: they encourage people to raise issues through internal processes before bringing a case and include an offer of conciliation for everyone before a hearing is arranged. Of course, the draft proposals also include enforcement routes if this does not work.

5. We are suggesting that there should be **free advice and awareness raising** so that employers and service providers know what their responsibilities are, and people know what their rights are, before the legislation comes into force so that they have time to prepare for it.

[4] Billet XXI of 2003.

6. We are proposing to retain the fact that you **do not have to have a lawyer** to bring a case. The Employment & Discrimination Tribunal is designed to allow people to bring cases without having a lawyer if they wish to. This might save expense and prevent things from becoming unnecessarily legalistic.

7. We are proposing that compensation will be **proportionate** to how serious the case is rather than a fixed award for everyone. If taken forward, we are proposing that the Tribunal would **also be able to order action** as well as, or instead of, financial compensation. This would mean that the behaviours or causes of discrimination could be addressed through, for example, requiring changes to discriminatory policies or requirements to undertake training.

8. The draft proposals **build on existing structures.** We are intending to adapt the existing Employment & Discrimination Tribunal to manage complaints under the new legislation rather than start again from scratch.

9. The draft proposals include **Guernsey specific exceptions** which will allow us to continue to treat people differently on the basis of the protected grounds where this is fundamental to the way the island works – for example, the legislation will still allow population management to use some of the protected grounds when considering someone's employment permit.

10. We will be bringing forward proposals for an Equality and Rights Organisation, which will be able to **intervene early on** if someone is behaving in a discriminatory way, so that this can be addressed without an individual needing to bring a case.

We know that some people will feel that the length and level of detail in these proposals make them overly complex for Guernsey. We believe that the detail may be beneficial for the sake of transparency and want people to fully understand the implications of changes if they were to form the basis for drafting a new piece of legislation. While it would be possible to present proposals which appeared to be less complex, this would not change the complexity of the cases arising and would risk 'glossing over' significant points.

For those with less time available, we have also produced a summary document, FAQ documents and an easy read version, which cover some of the key issues. You can find these at: www.gov.gg/discriminationconsultation

Detailed draft proposals

The draft proposals are split into sections:

- **Section 3** explains who will be protected and what discrimination is.
- **Section 4** explains unlawful discrimination in employment.
- **Section 5** explains unlawful discrimination in goods, services, education provision, accommodation provision and in the membership of clubs and associations.
- **Section 6** explains appropriate adjustments for disabled people and accessibility.
- **Section 7** explains the development of a business plan for an Equality and Rights Organisation.
- **Section 8** explains the complaints process.
- **Section 9** explains some of the steps that will need to be taken to implement the final proposals.
- **Section 10** invites feedback on any other points.
- **Appendices A and B** explain exceptions to the rule of non-discrimination.

Section 3: Discrimination

3.1 Purpose of the legislation

3.1.1 Purpose

The purpose of new legislation would be:

<table>
<tr><td>Purpose</td><td colspan="3">To promote and protect people's rights to non-discrimination, equality of status, opportunity and treatment.</td></tr>
<tr><td>Vision</td><td colspan="3">Everyone in Guernsey has equal access to employment, goods, services, accommodation and education, regardless of age, carer status, disability, marital status, pregnancy or maternity, race, religious belief, sex, sexual orientation, or trans status.</td></tr>
<tr><td rowspan="4">Desired outcomes</td><td>Everyone in Guernsey has their fundamental rights promoted, protected and upheld.</td><td rowspan="4">Greater equality of opportunity and enhanced life chances for any members of the community (or visitors to the island) disadvantaged by prejudice, discrimination or unconscious bias.</td><td rowspan="4">Improved quality of life for all islanders (and visitors to the island).</td></tr>
<tr><td>Everyone in Guernsey has better access to and enjoyment of employment, goods, services and education.</td></tr>
<tr><td>Higher workforce participation rates of groups likely to face discrimination in work (especially disabled people, those with family responsibilities and older people).</td></tr>
<tr><td>Improved awareness and consideration of the needs of groups likely to be disadvantaged by prejudice, discrimination or unconscious bias amongst employers, providers of goods, services, education and accommodation and in the wider community.</td></tr>
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3.1.2 Civil rights

We are proposing that we draft legislation that would give people rights. If people's rights were violated under such legislation, we propose that they would be able to take a case to the Employment & Discrimination Tribunal and seek compensation and/or an order for an action to put things right.

Under this system, the employer or service provider[5] who violated their rights would be responsible for paying this compensation and/or carrying out the action agreed by the Tribunal or Court.

We suggest that unlawful discrimination would be a civil offence rather than a criminal offence (meaning that a person charged with discrimination under the proposed legislation would not get a criminal record, and the Police should not need to get involved). It would be up to the person who has experienced discrimination to bring a case. However, in a limited number of circumstances, for example, if a case involves harassment, this might also be a criminal offence under a different piece of legislation.

It is possible that our final proposals will also contain some powers for the Equality and Rights Organisation to challenge discriminatory behaviour, without an individual registering a complaint. The Committee is in the process of developing a business case for such an organisation.

3.1.3 Other legislation addressing abuse

These proposals focus on things that should be open to everyone: job opportunities, access to public services, shops, social venues, education and housing. The new legislation which is being proposed would not protect people from being discriminated against or treated badly by family, friends or strangers in the street. There is other legislation that could help with this. This includes, but is not limited to, the Protection from Harassment (Bailiwick of Guernsey) Law, 2005 and the Racial Hatred (Bailiwick of Guernsey) Law, 2005.

If you feel like you have been treated badly by someone at home or someone close to you, you can find out more about support available to you by visiting www.gov.gg/domestic-abuse. If you feel you have been treated badly by a stranger in the street or by family or friends you could also contact Guernsey Police on 01481 725111 or email controlroom@guernsey.pnn.police.uk.

3.1.4 International obligations

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, the UN International Covenant on Economic, Social

[5]In general we are using the term 'service provider' to mean providers of goods or services, providers of education, providers of accommodation (including people who sell property) and clubs and associations. On the other hand 'providers of goods or services' only applies to organisations who fall within the specification in section 5.2.

and Cultural Rights and the UN Convention on the Elimination of All Forms of Racial Discrimination, 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 Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of Persons with Disabilities.

We intend 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: a) to ensure effective protection based on personal characteristics frequently associated with discrimination; b) to maintain or improve upon the protections in existing discrimination legislation; and c) to achieve protections which are comparable to other advanced economy jurisdictions.

Why?

3.2.1 How were the proposed protected grounds selected?

We looked at what grounds are protected in other countries. While there are some differences, the grounds we chose are commonly protected. These grounds were also all previously identified for inclusion in a future discrimination law by previous States decisions and debates:

- Guernsey's existing legislation – the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 - already covers **sex** (including **pregnancy**), **gender reassignment** and **marriage**.
- The UN Convention on the Elimination of All Forms of Racial Discrimination was extended to Guernsey in 1969. To comply with this Convention **race** should be included. The intention to develop race discrimination legislation was recognised in the March 2003 State Report to the UN Committee on the Elimination of Racial Discrimination[6].

[6]UN CERD (2003) Reports Submitted by States Parties Under Article 9 of the Convention, Seventeenth periodic reports of State parties due in 2002: United Kingdom of Great Britain and Northern Ireland. Available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs

- The need for **disability** to be a protected ground was agreed by the States in Billet d'État XXII of 2013 as part of the Disability and Inclusion Strategy.
- The resolution from the Disability and Inclusion Strategy also said that we should protect people who care for or support disabled family members or friends (i.e. '**carers**'), so we have included a **carer** ground.
- The need for protection from **age** discrimination was recognised in "Longer Working Lives" and agreed by the States[7]. This is particularly important as our population is ageing.
- **Sexual orientation** and **religious belief** are common grounds which we believe should be provided protection. These were suggested alongside race and other grounds in the States Advisory and Finance Committee report on the proposals for the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004 included in Billet XXI of 2003 (para 22).

We do not have data on the prevalence of discrimination yet, and while there is some evidence of discrimination occurring[8], we do not intend to justify the selection of these grounds by how many people experience discrimination. We believe that discrimination should be prohibited on these grounds even if the occurrence of some forms of discrimination are infrequent because they represent individual's fundamental civil rights.

3.2.2 Protected grounds

Discrimination legislation protects people from being treated less favourably or from not being included because they have certain characteristics. It is proposed that, the protected grounds would include:

- age,
- carer status,
- disability,
- marital status,
- pregnancy or maternity status,
- race,
- religious belief,

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[7] See Billet d'État V of 2018.

[8] See, for example, Stage two of the 2012 Disability Needs Survey (available at: http://www.signpost.gg/article/151313/Improving-Island-life-for-disabled-people-and-carers) or the feedback we received in response to a consultation on the Sex Discrimination Ordinance (https://gov.gg/sexdiscrimination).

- sex,
- sexual orientation, and
- trans status.

Everyone in Guernsey has some of these characteristics. So this legislation will give some protection from discrimination to everyone on the island.

Why?

3.2.3 What is not included?

In early discussions about this list, other grounds were suggested. These included protection for whistle-blowers, trade union members or representatives, benefit recipients and ex-offenders. While recognising the importance of the rights of these groups, we believe that protection for trade union members or representatives, whistle-blowers and ex-offenders might best be covered in other ways or in other pieces of legislation and not in this legislation. To include them here, we think, would increase the scope of this work beyond what we consider the States' original intention when it asked us to develop proposals.

It will always be possible to revisit this list at a later date and add additional protected grounds to the legislation.

3.2.4 A limited list

Another suggestion put forward was that the list of protected grounds should be open ended which would mean that people could register a complaint of discrimination on the basis of other grounds not included in the list. While used in human rights laws (including the Human Rights (Bailiwick of Guernsey) Law, 2000), this approach is not usually taken in discrimination legislation.

If the list of grounds in the discrimination legislation were open-ended it would allow people to bring discrimination complaints wherever they felt a decision was based on an arbitrary factor or characteristic. The Employment & Discrimination Tribunal would have to determine whether or not to allow cases – a significant responsibility. The countries we might ordinarily look to for case law do not have non-exhaustive grounds (except for in human rights legislation), which would mean there would be limited guidance to draw on. It would also make it harder to correctly identify exceptions to the rule of non-discrimination in advance. Consequently, we believe that leaving the list open-ended would create significant uncertainty for people who have responsibilities under the legislation.

For these reasons the Committee is recommending that there is a limited list – you would only be able to bring cases on the ten grounds specified.

We will now look at what these proposed protected grounds cover in a little more depth, noting that, like all of the proposals in this document, the grounds could change subject to feedback in the consultation process.

3.2.5 Age

We are proposing that a person's age includes a person's numerical age and/or their age group.

We suggest that young people below a certain age should not be able to make complaints of age discrimination, though they will be able to make complaints based on other grounds:

- in education, we are proposing that people can make age discrimination complaints with respect to further and higher education provision but not nursery, preschool, primary or secondary school provision where it is common for different ages to be educated separately and for provision to be targeted at specific age groups.
- in employment, we are proposing that people who are below school leaving age will not be able to make complaints of age discrimination.
- in goods or services provision, accommodation provision and membership of clubs and associations, we are proposing that people below the age of 18 will not be able to make complaints of age discrimination.

Why?

3.2.6 Age discrimination complaints for young people

The Committee is proposing that under 18s will be protected from discrimination on the basis of carer status, disability, marital status, pregnancy or maternity status, race, religious belief, sex, sexual orientation and trans status. So, for example, if a child was discriminated against because they were disabled they could bring a disability discrimination complaint – no matter what age they were. If a child were discriminated against on the basis of race, they could bring a race discrimination complaint. However, the position is more complicated when considering whether a child or young person should be able to be treated differently because of their age.

Many services and organisations will treat young people differently in order to take into account the needs of someone of that age. It is important that this legislation does not

stop organisations from providing age-appropriate services for children and young people and taking their wellbeing into account appropriately.

If under 18s were protected from age discrimination in the legislation, extensive exceptions to the rule of non-discrimination would be required for the many circumstances where a child or young person's age needs to be taken into account to ensure the provision of appropriate services or support. Relying on specific exceptions creates a risk that some important elements will be missed, or not be taken into account sufficiently. This could lead to organisations that are trying to meet the welfare needs of children in an age-appropriate way having to justify their age-based approach in a Tribunal. We do not think this is reasonable or in the best interests of children and young people. Consequently, the Committee is proposing a lower age limit on the ability to register age discrimination complaints.

In order to ensure that service providers can ensure age appropriate treatment without fear of an age discrimination complaint being made, the Committee is recommending that in the provision of goods and services, accommodation and in the membership of clubs and associations, people will need to be 18 or over to register age discrimination complaints. As already explained, young people will be able to register discrimination complaints on the basis of the other grounds apart from age.

The Committee feels that school leavers aged 16-18, who might be working full time, should not be treated unfairly and should have the same protection as the rest of the workforce. Therefore, the Committee is proposing that in the field of employment people can register age discrimination complaints when they are at, or above, school leaving age (currently 16). This would allow employers to ensure that terms and conditions were age appropriate for young people working in addition to going to school (e.g. in a weekend job).

The Committee also feels that young people should be protected from age discrimination in further and higher education institutions; access to further and higher education for people of any age should be dependent on whether a person meets the entry requirements, not their age. However, for safeguarding reasons people cannot register age discrimination complaints with regard to schools, nurseries or preschools, as it would not always be appropriate for adults or older children to access the same environment.

Key question:

Do you think people:

- below school leaving age in employment, or
- people in primary or secondary education, or
- people under the age of 18 in accommodation provision, goods or services provision and membership of clubs and associations

should be allowed to make complaints of **age** discrimination?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

3.2.7 Carer status

We are proposing that the 'carer status' ground covers 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.

As disability is defined widely in these proposals (see section 3.2.10), this would include carers of people who were unwell, had cancer, a mental health condition or people with dementia – who might not think of themselves as 'disabled'.

By 'dependent child' we mean a person under the age of 18 who is wholly or substantially dependent on the person providing the care or support. This would include people who are providing foster care organised by the Committee *for* Health & Social Care.

Why?

3.2.8 Transparent protection for care-givers

Historically, caring has been a predominantly female role. This has meant that, in some circumstances, a woman might be able to complain of sex discrimination under Guernsey's existing legislation if she is treated less favorably at work in relation to her responsibility to care for her children or elderly parents. In recent years many countries – including Australia, Ireland, Hong Kong and South Africa – have included family responsibilities or family status as an explicit ground in their legislation, recognising that this is different from sex or gender and can lead to people experiencing discrimination. It is important to ensure that men who have care responsibilities are also protected from discrimination.

People who support a disabled family member or friend can also complain, in some circumstances, that they receive unfavourable treatment and are discriminated against on the basis of their association with a disabled person (disability discrimination by association).

Complaining of sex discrimination or disability discrimination by association are not immediately obvious and we want people to understand their rights. A separate ground makes the protection for people with care responsibilities more explicit and transparent.

3.2.9 Recognition of carers as a disadvantaged group

In addition, the States has indicated a desire through other policy work to pay particular attention to care-givers. Guernsey's population is ageing. It is important for our future that people are able to participate equally in society and combine work with raising children and supporting relatives[9].

3.2.10 Disability

We intend to adopt a broad definition of disability along the lines of that used in Ireland and Australia. The following is a working draft included for the purposes of consultation. It should be noted that this might change as a result of the next stages of the Committee's work, and the work that would be undertaken by our legal drafters.

Working draft definition:

'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,

[9] See for example the Carers Action Plan (2019), the Supported Living and Ageing Well Strategy (Billet III v.II of 2016, Longer Working Lives (Billet V of 2018) and Maintaining Guernsey's Working Population (Billet XXIV of 2015).

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.

Why?

3.2.11 Social model of disability

The Disability and Inclusion Strategy (Billet XXII of 2013) embraces the social model of disability. The social model of disability focuses on how people are disabled and excluded by the way things are designed and the way people behave. For example, if a person with a hearing impairment has problems communicating with you on the phone, the social model of disability locates the problem in the use of a method of communication that is inaccessible to the person with the hearing impairment instead of using another method (for example a text chat) that works for that person. It does not view the difficulties the person with a hearing impairment experiences as inevitable and because of medical reasons or because there is something 'wrong' with them.

3.2.12 Definition that aligns with the UN Convention on the Rights of Persons with Disabilities (UNCRPD)

The States resolved to seek to extend UNCRPD as part of the Disability and Inclusion Strategy in 2013. Successfully introducing discrimination legislation is fundamental to moving us closer towards being able to seek to extend that Convention. The Convention aligns with the social model and recognises that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

We have sought expert advice on how best to define disability in this legislation. Based on this advice, and the 2018 General Comment No 6 from the UN Committee on the Rights of Persons with Disabilities, we believe that this definition provides sufficient guidance while being broadly compliant with the Convention.

We do recognise, however, that this working draft definition does not distinguish between an impairment and a disability – which we would usually do in social policy. So, for example, an impairment is a condition or difference (such as having autism or a visual

impairment) and disability is what arises from that impairment where interacting with social attitudes and environments which are not inclusive and which present a barrier to participation (for example, not being able to participate in a social event because the information about it was written in a format the person could not read). However, we feel to introduce a distinction between impairment and disability into these proposals would add a layer of complexity for users of the legislation – potentially making it less clear what is covered by the definition and requiring a person to provide evidence that their impairment interacted with their environment in such a way that it amounted to a disability, in order to show that they had grounds to bring a case – we do not want this to be overly complex. Adding a distinction between disability and impairment would also depart significantly from the model legislation we are using. Consequently, we have not made this amendment.

3.2.13 Determining whether someone is disabled

The working draft definition is intended to cover a wide range of people - people with physical and sensory impairments, people with mental health conditions, people with learning disabilities, people with autism, people with other ongoing health conditions, people with old age-related impairments, people with cancer or terminal illness, people with HIV… and the list goes on. It protects people who have temporary impairments and does not require a person prove that what they experienced is 'severe' or 'long-term' in order for them to be able to complain that they have been discriminated against. The working draft definition also includes people whose disability does not affect their work, but where their employer (due to prejudice) is concerned that it will; and the proposals cover situations where someone is imputed (assumed) to have a disability and treated worse because of it, when they do not actually have a disability (see section 3.3.4).

There have been concerns in the UK, USA and elsewhere that people who bring disability discrimination complaints have to prove that they are protected by the legislation as a disabled person before the court will consider whether the conduct of the employer or service provider was at fault. This can mean that people who have genuinely experienced substantially unfair treatment feel reluctant or unable to challenge unlawful conduct due to the humiliation of feeling that they are 'on trial' for whether they are disabled enough to be protected by the legislation. This may also be detrimental for employers or service providers due to the costs that might be involved in assessing whether a person is disabled for the purposes of the legislation. We are advised that there have not been problems with spurious complaints where a similar wide definition is used in Ireland.

This definition would have some impacts on how employers manage sickness absence. This is discussed further in section 4.2.6 below.

Key question:

Our consultation questionnaire invites comments on our working draft definition of disability.

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

3.2.14 Marital status

The definition in existing Guernsey legislation (the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005) protects only married people.

We are proposing that the marital status ground would cover being single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner.

For clarity, this only covers a person's legal marital status and not their relationships or who they live with. If a person is treated differently on the basis of whether they are living with a partner (whether married or not), for example, this would not fall within the marital status ground.

3.2.15 Pregnancy or maternity status

This ground would be intended to protect people who are pregnant, breast-feeding or who are taking, have taken or intend to take maternity, maternity support or adoption leave.

While covered under sex discrimination within the existing legislation, we are suggesting this is added as a separate ground. Amongst other things, this will better protect men who are adoptive parents or trans people who are pregnant.

3.2.16 Race

We intend that 'race' would include colour, descent, nationality, ethnic origins and national origins.

The ground of '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 Convention on the Elimination of All Forms of Racial Discrimination, which has been extended to Guernsey.

For the sake of clarity: some stakeholders have asked if we intend that the 'race' ground would extend to people who identify as 'mixed-race' – the answer to this question would be yes, it would cover all forms of discrimination based on colour and also allow for someone to register a complaint that they were discriminated against on the basis of the particular combinations of nationalities or ethnic or national origins that they have. We have also been asked whether this definition would cover 'second generation immigrants'. The answer to this question is also yes. People whose parents moved to Guernsey from another country before they were born may not have the same nationality as their parents. However, if their parents' nationality was imputed to them (see section 3.3.4) and they were discriminated against on this basis they could register a complaint, or they could register a complaint on the basis of being treated differently because of their ethnic or national origin.

"'National Origin' refers to a person's State, nation or place of origin."[10] Place of origin would include, for example, being of Guernsey origin.

3.2.17 Religious belief

We intend that the religious belief ground would include a person's religious background or outlook and also include not having a religious belief.

By religious outlook we intend to cover, for example, having conservative Christian views, as opposed to just being Christian – in recognition that there is a good deal of diversity within the major world religions. Religious background might include someone who is not practicing a religion but has been brought up in a particular faith.

3.2.18 Sex

We intend to have a ground which protects people from sex discrimination, but we are seeking the public's views on how this ground is framed.

[10] 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

Why?

3.2.19 Why might the definition of sex be controversial?

We want the sex ground to enable people to effectively challenge sexism they experience because they are a woman or a man.

In the vast majority of cases whether someone is a man or a woman is not controversial. However, we are aware that there have been debates in the UK and elsewhere about whether trans people should be treated as men or women for the purposes of sex discrimination.

It is important to note that the definition of sex does not necessarily impact policy on whether or when trans people have access to single-sex spaces. This is discussed in the list of exceptions (included in Appendices A and B) and the consultation questions available at: www.gov.gg/discriminationconsultation.

It would be possible to define sex biologically (in which case, for the purposes of sex discrimination, a trans man[11] would be considered female and a trans woman[12] would be considered male). It could be defined based on gender identity (in which case, for the purposes of sex discrimination, a trans woman is a woman and a trans man is a man).

The majority of the Committee's preferred position would be simply to define sex as 'being a man or a woman' (equivalent to option B in the table below). If a dispute arose in a sex discrimination case about whether a trans complainant or a trans comparator was appropriately being considered a man or a woman then the Tribunal would have to determine what was most appropriate in those circumstances. It is intended that this would reflect the nature of the discrimination in question and a relevant question would be whether the alleged discriminator was treating them as a man or a woman and why.

The Committee would like to emphasise that it is united in its view that trans people should be protected from discrimination on the basis that they are trans (see the trans status ground below).

[11] By 'trans man' we mean a person whose original birth certificate states that they are female, who has transitioned, or is transitioning to identify as a man.
[12] By 'trans woman' we mean a person whose original birth certificate states that they are male, who has transitioned, or is transitioning to identify as a woman.

The options for the definition of sex could be summarised in the following table:

	Option A	**Option B**	**Option C**
Sex ground definition	Sex = male or female (biological at birth).	Sex = being a man or a woman (could include biology or social elements – court determines if in question).	Sex = what a person identifies as.
Comparators (sex ground)	For the purposes of sex discrimination, a trans man would be considered female and a trans woman would be considered male.	For the purposes of sex discrimination a trans man might be considered a man, or a trans woman a woman; but there could be exceptional circumstances.	For the purposes of sex discrimination a trans man would be considered a man and a trans woman would be considered a woman.
Trans ground	A trans ground would be included providing protection to people who intend to transition, are transitioning or have transitioned. For the purpose of that ground, a trans person would be able to compare their treatment to the way a non-trans person [of any sex] would be treated in the same circumstances.		

N.B. access to single-sex spaces might be governed by exceptions rather than the definition of the grounds. See Appendices A and B.

Key question:

Our consultation questionnaire asks for people's views on the framing of the sex ground.

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

3.2.20 Sexual orientation

For the purposes of these proposals, we intend sexual orientation to mean a person's sexual orientation towards persons of the same sex; or persons of a different sex; or persons of the same sex and persons of a different sex.

3.2.21 Trans status

We are proposing that a person has trans status[13] if they intend to undergo, are undergoing, or have undergone a transition from being a man to being a woman, or being a woman to being a man. This does not require that a person has undergone any particular medical procedure or process (such as surgery or that they take certain hormones), though they might have.

Access for trans people to single-sex spaces is discussed in the list of exceptions and the consultation questions available at www.gov.gg/discriminationconsultation.

We note that, internationally, there is a gradual move towards protection for intersex and non-binary people in discrimination legislation. While these proposals do not provide protection for non-binary and intersex people within the trans status ground, we are suggesting that this is something which should be revisited after the initial legislation has been established.

This covers all of the grounds of protection. There are a couple of further points to consider regarding who will be able to make complaints.

3.2.22 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.

The exact scope of the legislation will be considered by the legal drafters when preparing the legislation, if the final proposals are agreed by the States. 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. Subject to further legal consideration, this might include:

- employment at an establishment in Guernsey[14]. This includes employment on a ship registered in the Bailiwick of Guernsey or employment on an aircraft or hovercraft registered in the United Kingdom and operated by a person who has their principal place of business, or is ordinarily resident in Guernsey.

[13] This would operate in a way largely equivalent to 'gender reassignment' in the UK and Jersey. However, the term 'gender reassignment' was felt to potentially imply that surgical or other procedures might be necessary to be protected by the ground.
[14] We would envisage that this would largely align with Section 11 of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005.

- use or sale of housing, land or commercial property in Guernsey.
- education provided by an establishment in Guernsey or a person who has their principal place of business, or is ordinarily resident in Guernsey.
- goods or services provided by a person or organisation who is resident in Guernsey or is otherwise sufficiently connected with Guernsey.

We explain below that discrimination law does not override existing laws that are already in force. This means, for example, that access to employment for people coming to the island will still be governed by Population Management law; and access to goods, services or benefits will still be constrained by any legal restrictions already in force.

3.2.23 Alderney, Sark and Herm

If introduced, the legislation would apply in Herm.

Generally, legislation of this nature would only apply in Sark and Alderney if the Chief Pleas of Sark and the States of Alderney seek to introduce or extend the legislation. We will be having further discussions with the States of Alderney and Chief Pleas in Sark regarding this before the Policy Letter is finalised.

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.

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 or combination of characteristics 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(s).

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

The age ground
We propose that someone may compare themselves to a person of a different age.

Note that this proposal does not currently include comparisons involving people below the ages specified in section 3.2.5 – though this is one of the consultation questions being asked.

The carer status ground
We propose 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
We propose 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 an appropriate adjustment (see section 6.2).

The marital status ground
We propose that a person may compare themselves to someone with a different marital status.

The pregnancy or maternity ground
We propose that a person who has pregnancy or maternity status can compare themselves to a person who does not. A person who does not have pregnancy or maternity status cannot compare themselves to someone who has. This means that treating a person with pregnancy or maternity status (i.e. someone pregnant, breast-feeding, intending to take or taking statutory maternity, maternity suppport or adoption leave) more favourably than someone who does not have that status cannot lead to the registration of a complaint.

The race ground
We propose 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).

The religion ground
We propose that a person with religious belief may compare themselves to someone who has a different religious belief, or a person with no religious belief. A person without a religious belief may compare themselves to a person with a religious belief.

The sex ground
We are proposing that a woman may compare herself to a man, or a man may compare himself to a woman.

The sexual orientation ground
We propose that someone may compare themselves to a person with a different sexual orientation.

The trans status ground
We are proposing that a person who has trans status may compare themselves to a person who does not have trans status or vice versa.

3.3.2 Types of discrimination and other prohibited conduct

We are 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.

We intend that discrimination will include:

- direct discrimination,
- discrimination by association,
- discrimination arising from disability,
- indirect discrimination, and
- the denial of an appropriate adjustment for a disabled person.

The next sections explain in more detail what is meant by these.

In addition to these forms of discrimination, we are proposing that the legislation will also prohibit:

- harassment or sexual harassment of a person (see section 3.5),
- permitting the harassment or sexual harassment of a person (see section 3.5),
- victimisation of a person (see section 3.6),
- publication of discriminatory adverts (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, or a combination of the grounds of protection (see section 3.3.1).

Example – direct discrimination
A landlord tells a prospective tenant that they will not let their property to them because they think that people of their nationality are more likely to be messy and they only want to let to people of certain other nationalities. This would be direct race discrimination

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 (as outlined in section 3.3.1 above).

Example – direct discrimination (continued)
To continue the example: the landlord lets the property to someone who has a different nationality to the original prospective tenant, which is a nationality that the landlord thinks is 'clean' based on their stereotypes. To make the case that they have been directly discriminated against, the person who was rejected could compare themselves to the tenant who was accepted. They could show that the landlord did not accept them and did accept the other person of a different nationality. From this, an inference of discrimination would arise. It would then be for the landlord to show that there was not a legitimate reason for this different treatment. This comparison is key to direct discrimination complaints.

We are suggesting that the comparison could be with an actual person (or people) who is 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.

Example – direct discrimination (variation)
A landlord tells a prospective tenant that they will not let their property to them because they think that people of their nationality are more likely to be messy and only want to let to people of certain other nationalities. The landlord is new to the market and has never

let before. After refusing the prospective tenant they do not find another tenant. To make the case that they have been directly discriminated against, the person who was rejected could compare themselves to a hypothetical tenant who is of a nationality the landlord approved. They could register a complaint with the Tribunal that the landlord did not accept them but that you could assume, based on what the landlord said, that they would have accepted a person of another nationality and that the reason for this difference in treatment was nationality. This is the use of a 'hypothetical comparator' which the proposals would allow.

We intend 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.

We have also included in these draft proposals that a complaint of direct discrimination on the grounds of age (but not other grounds) could be defended via objective justification (see section 3.4.2 below).

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 Muslim customer on the basis that they are Muslim. This is direct discrimination on the grounds of religion.

However, we propose that a complaint of direct discrimination could also be made:

- when someone assumes that someone has a characteristic which 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 refused a promotion. She overhears her manager discussing with a senior manager that this is because he is concerned that she might get pregnant because she is a young woman who got married recently and the manager does not want to appoint someone to the position who would go on maternity leave. Even though the employee is not pregnant she could make a complaint that she has been discriminated against on the grounds of pregnancy.

- when someone assumes someone has a characteristic that they do not have

Example – a characteristic which is imputed to the person concerned
A and B are sisters who both identify as straight. They decide to go out for a drink. When they walk into a pub holding hands the person behind the bar uses abusive language towards them and refuses to serve them because he believes that they are a couple. Even though neither of the sisters have the sexual orientation that the bar attendant assumes, they could make a complaint of discrimination on the grounds of sexual orientation.

3.3.5 Direct discrimination – other clarifications

There are a couple of other points about direct discrimination which we would like to clarify in respect of our current position in these proposals.

Firstly, that we do not believe that discrimination needs to involve an intention to harm or discriminate; secondly, following European practice, to bring a case, it is enough to show that circumstances appear to be discriminatory – that you can draw an inference of discrimination from them; 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. These points are clarified in the following examples.

Direct discrimination does not have to be intentional, or involve an intention to harm an individual. It may be done unconsciously due to an underlying bias. In some cases direct discrimination could be a well-intended action to treat someone in a way the discriminator believes is preferential, but is something that the person being treated differently objects to.

Example – direct discrimination, paternalism
A woman works in construction, and the foreman managing her team consistently gives her what he perceives to be 'lighter' work because she is a woman. This is not related to her abilities (she's very strong) or her preferences (she wants to do the same job as anyone else). The behaviour of her foreman seems common sense to him and is not carefully thought through or considered. It is based on his underlying assumptions, stereotypes and prejudices about women. If asked to reflect, he might consider his behaviour to be well intentioned, however, it would still constitute direct discrimination on the basis of sex.

Sometimes direct discrimination will be obvious because something will be said and witnessed or written down which explicitly links a decision to a ground of protection. In other cases someone may suspect that they have been discriminated against without having this kind of proof. They would need to present evidence from which an inference of discrimination could be drawn. It would then be up to the respondent to explain if this was for a reason other than discrimination.

Example – prima facie direct discrimination
A job applicant who is black attends an interview selection day with a series of tests and team exercises. He meets ten other candidates for the job he is applying for. All of the other candidates are white. He is not offered the job. He later finds out on social media that the candidate who was appointed was less qualified and had less experience than him. He writes to the company to ask whether they can provide feedback on why he was not offered the job but does not receive a response. Even though he does not have concrete evidence, he can show facts which raise an inference of discrimination so the applicant could make a discrimination complaint on the ground of race. The burden of proof then passes to the respondent, so it would be for the company in question to show what legitimate reasons (if any) they had for hiring another candidate.

It is worth noting that we intend that unlawful discrimination can occur even if the person who discriminates and the person discriminated against share the same protected characteristic.

Example – discrimination by someone with a shared characteristic
A manager who is a parent refuses to promote one of their team members on the basis that they have small children. The fact that they themselves are a parent cannot be used to justify the difference in treatment.

3.3.6 Discrimination by association

We propose 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 ground of protection were treated in the way the person associated with them had been, it would count as direct discrimination.

We believe, based on international examples, that the implications of including such a provision would be that while the discrimination could be in relation to family members or friends, 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 mothers are lesbian. 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

We are proposing that indirect discrimination should be prohibited. Indirect discrimination occurs where an apparently neutral provision would put a person at a disadvantage compared with other persons because of any of the protected grounds or a combination of the protected grounds, unless the employer or service provider can show that the provision is objectively justified (see section 3.4.2). A provision includes a practice, policy, process, condition or requirement.

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 has small children in a pushchair. She believes that the planned development will disadvantage parents of small children. 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 (for example to help the Tribunal to understand the significance of a religious practice); in other cases statistics might be used to show that a group had been particularly affected. However, we are not suggesting statistics would be mandatory in all cases.

The comparison would usually be between the disadvantaged group and people who do not belong to the disadvantaged group but who are affected by the provision.

It is important to be clear about which group is disadvantaged by the provision. While this might seem relatively straight forward in some cases, in others it might be important to be specific. It might only be a sub-set of a group that is affected. For example, the provision might affect people with a particular kind of disability rather than all disabled people; or parents of large families rather than all people with carer status.

The Tribunal would consider how the provision applies and how it impacts the specified group. This could be done in a number of ways but they might look at:

- what proportion of people with the specified characteristic are affected,
- how people with the characteristic are affected, and
- whether other people who do not have the characteristic are affected.

While proportion is considered, it may not be necessary to show that a majority of the people who have the characteristic are affected. It is relevant to consider (within the wider group of people who the provision affects) whether a higher proportion of people with the characteristic are adversely affected than those who do not have the characteristic. We are proposing that while statistics might be used to demonstrate this, they would not be required by the legislation if the case is clear without.

We are proposing that a person cannot win a case 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.

A business 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

We are 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, or a defence relating to a person not knowing that the person had a disability.

This 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 direct discrimination are also different – ordinarily for direct discrimination the person who has allegedly discriminated would need to show that the difference in treatment was not because of the ground of protection (for example, an employer did not hire someone because they were less qualified rather than because of their disability). Direct discrimination on the ground of disability cannot be objectively justified (see section 3.4.2 below on objective justification), but discrimination arising from disability can – giving employers and service providers an additional defence.

Indirect discrimination (discussed in section 3.3.7 above) has the same defence – it can be objectively justified in the same way that discrimination arising from disability can. However, indirect discrimination is different because it is based on the idea that people with a shared characteristic would be disadvantaged by an apparently neutral provision. Discrimination arising from disability, in contrast, might be quite unique to an individual, as people may respond to medical treatment or display symptoms or behaviour in ways which others with the same disability do not – so, unlike indirect discrimination, it is not necessary to show that others with a shared characteristic would be similarly disadvantaged.

Example – direct discrimination vs discrimination arising from disability
A visibly disabled person is denied access to an event because the bouncer does not think 'people like them' should be admitted. This is based on underlying prejudice and is direct disability discrimination.

In another case, a person with a disability has a tendency associated with their disability to make a lot of noise and get up and move around when they are excited. An event organiser is concerned, knowing this about the individual, that if they admit this person they may disrupt the event for other participants. Unless they can show that not admitting the person is an appropriate and necessary means of achieving a legitimate aim

(see objective justification, section 3.4.2), this will be discrimination arising from disability.

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 below.

3.3.9 The denial of an appropriate adjustment for a disabled person

We are proposing to include a duty to provide appropriate adjustments. An appropriate adjustment (in the UK 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 - appropriate adjustment (1)
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 an appropriate 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 an appropriate adjustment.

An appropriate adjustment is about treating people equally, and ensuring equality of opportunity. It should not be thought of as preferential or special treatment. Denial of an appropriate adjustment is a form of discrimination unless it would be a disproportionate burden to provide the adjustment.

It is proposed that there will be a reference in the definition of discrimination to a different section of the legislation which deals in more detail with what appropriate adjustment is. We have included a discussion of this in section 6.2 below.

Some appropriate adjustments would be a disproportionate burden on an employer or service provider[15], so the employer or service provider would not have to provide adjustments in all cases. This is discussed further in section 6.2.5 below.

[15] As previously when we use 'service provider' we mean provider of goods or services, providers of education, providers of accommodation and clubs and associations.

3.3.10 How is appropriate adjustment different from indirect discrimination?

There is some overlap between the concepts of indirect discrimination and appropriate adjustment. Both indirect discrimination and appropriate adjustment challenge an apparently neutral provision (a working practice, a policy, environment or circumstances) which disadvantages certain people.

An indirect discrimination complaint is suggesting that a provision disadvantages a group and challenges whether the provision as a whole is sound. An employer or service provider can try to defend this by objectively justifying the provision (see section 3.4.2).

An appropriate adjustment is about making an adjustment for one person specific to their case, rather than changing a provision as a whole – the provision might still apply to everyone else.

It is possible that someone may lose a case about indirect discrimination (if the Tribunal finds that the provision is generally justifiable) but win a case on the same facts by claiming they need an appropriate adjustment (that there should be an exception for this individual).

Example – appropriate adjustment vs indirect discrimination
An employee with Multiple Sclerosis would like to adjust their working hours due to a change in their symptoms. The employer's policy says that all employees must be present in the office during core working hours. The employee could say that the policy discriminates against a group of disabled people who need to be able to adjust their working time (i.e. that this is indirect discrimination). The employer might seek to objectively justify this because they need to retain the policy in order to ensure that enough staff are present to meet the demands of customers. On the other hand, the employee could register a complaint that there are exceptional circumstances associated with their disability, and that the policy should be retained as a general rule, but that due to their specific circumstances, they should have altered hours as an appropriate adjustment (if this is not a disproportionate burden for the employer to provide). The employee might be more likely to be successful with the appropriate adjustment case.

3.3.11 Multiple and intersectional discrimination

It should be noted that the proposals for direct discrimination, discrimination by association and indirect discrimination apply based on any of the protected grounds or a combination of the protected grounds. This means that, if the proposals are agreed, someone can complain that they have been discriminated against based on more than one of the grounds at the same time (multiple discrimination). It would also allow people to register a complaint of discrimination which is specific to a sub-group who have more than one of the grounds (intersectional discrimination).

Example – multiple discrimination
A trans woman of Asian ethnic origin is refused access to a nightclub. When the bouncer refuses her access they use language which indicates that this is because of the bouncer's views on both her race and the fact that she is trans. One might assume that similar behaviour from the bouncer would have been experienced by other trans people and other people of Asian ethnic origin. She can register a complaint of discrimination on both the race and trans status grounds.

Example – intersectional discrimination
A Muslim woman who wears a hijab (headscarf) is asked by her manager to remove her hijab at work because it is against company dress code. This does not affect all women or all Muslims (in particular it does not apply to Muslim men). Her experience is specific to women who are Muslims – an intersection of the sex and religion grounds.

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 people 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 4.2.4).

The circumstances in which people can make decisions based on the protected grounds 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.

Example – positive action

A local company is concerned that there are no women on their board of directors and that this reflects a pattern across the island, with women being under-represented on boards. They decide to offer special shadowing opportunities to women who might consider applying in order to encourage applications. This would not constitute sex discrimination against male applicants.

- Listed **exceptions**. We have listed some exceptions in Appendices A and B. These are intended to cover some everyday instances where we make decisions based on the listed grounds which we do not think are unfair.

Example – exceptions

Having a Guernsey men's under 18 sports team will not constitute discrimination on the basis of sex, nationality or age because there is an exception which allows this.

- Direct age discrimination, 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'.**

Example – objective justification (1)

A medical services company is recruiting and requires candidates to be qualified and registered with the relevant UK professional body. Relatively few men have the qualification in question, so less men can apply for the job. The policy of requiring qualification could, therefore, be indirect discrimination against male applicants. The company is likely to be able to justify its requirements for qualification in order to maintain its service standards.

- In employment, when there is a '**genuine and determining occupational requirement**' – see sections 4.8.2-4.8.3.

Example – genuine and determining occupational requirement

A charity working with informal carers seeks to recruit someone with experience of being an informal carer as an outreach worker. They believe that this is justifiable because the experience is relevant and necessary to undertaking the job effectively.

- Where making an appropriate 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.

> **Example – disproportionate burden**
>
> An individual with a hearing impairment applies for a role in a small company that has a low profit margin. The company explores different options (including technological solutions) with the applicant to support the person to work, but discovers that in this case a sign language interpreter would be required for at least ten hours per week. The company is not able to access funding to assist with this cost and cannot easily afford to pay an interpreter so they decide not to hire the individual. If the individual brought a discrimination complaint, then the company could defend their decision on the basis that they had explored options and providing the required interpreter would have been a disproportionate burden on their firm.

- 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 an appropriate adjustment upheld (this is discussed further in section 6.2.4 below).

3.4.2 Objective justification

In section 3.3 we explained that we are proposing that direct age discrimination, 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 and (potentially – though this is a consultation question) in justifying differential treatment for trans people's access to single-sex spaces. 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 educational organisation) 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, we expect 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."[16]
>
> In employment also: "health, welfare and safety may qualify as legitimate aims provided that the risks are clearly specified and supported by evidence."[17]

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.

[16] 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].

[17] 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].

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, the harder it will be to justify that it is proportionate (i.e. appropriate and necessary).

During this process we anticipate 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."[18]

Example – objective justification (2)

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

[18] 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 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.

3.5.1 What is harassment?

We are proposing that the legislation would prohibit harassment and sexual harassment.

What we mean 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 we mean 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.

We 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 of their sexual orientation or 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 ground, or which is sexual in nature.

3.5.2 'Unwanted'

We interpret 'unwanted conduct' to include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures, or other material.

We propose 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. An individual does not necessarily need to have expressed an objection to show that the conduct is unwanted.

Example – not objecting to unwanted conduct
Two male shop assistants loudly commented on the size of a female shopper's breasts. This could amount to harassment. Such comments could be self-evidently unwanted and she would not have to object to it before it was deemed to be unlawful harassment.

From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.115

An individual having agreed to conduct of this nature previously would not mean that it cannot become unwanted.

Example – changes in what is unwanted
Two employees at the same company were previously in a relationship. The employee who ended the relationship did not find passing comments of a suggestive nature problematic when they were in a relationship with the person giving them, but how they feel about this person has changed and this behaviour is now unwelcome. The continuation of this behaviour could constitute harassment.

3.5.3 'Related to'

Following the UK, we 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

We 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).

Examples – not directed at the complainants
A woman is waiting to be served at a DVD rental store with a group of men. The shop assistant who is talking loudly with a couple of male customers about a new film makes lewd comments about some of the sex scenes in the film. Although the comments are not specifically directed at, or concern women, the woman, who finds the comments humiliating and offensive, may have a claim of harassment.
From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.116

3.5.4 'Purpose or effect'

We intend 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**.

Example – unintended harassment
Male members of staff download pornographic images on to their computers in an office where a woman works. She may make a claim for harassment if she is aware that the images are being downloaded and the effect of this is to create a hostile and humiliating environment for her. In this situation, it is irrelevant that the male members of staff did not have the purpose of upsetting the woman, and that they merely considered the downloading of images as 'having a laugh'.
From UK EHRC (2011) Equality Act 2010: Employment - Statutory Code of Practice, p.97

When deciding whether the conduct in question has the effect of violating a person's dignity or creating a hostile environment we 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?

We propose that employers and service providers[19] are responsible for taking reasonable steps to prevent harassment occurring and to address harassment where it does arise in the workplace, or in the service that they provide. This includes:

a) staff/managers harassing students/service users/tenants,
b) service users/students/tenants harassing staff/managers,
c) staff/managers harassing other staff/managers,
d) service users/students/tenants harassing other service users/students/tenants, or
e) A person being harassed by a combination of staff/managers and other service users/students/tenants.

If an employee is harassed during the course of their duties, even if this is not at the place of employment, we think this should also be addressed by the employer.

If the employer or service provider has taken reasonable steps to address harassment which has occurred and/or to prevent harassment from occurring then we propose that 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[20].

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 if the individual then sought to register a complaint of harassment under the discrimination legislation.

We propose that an employer could also avoid liability if they had no reason to know or expect that harassment is, was or might be occurring.

[19] 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.
[20] 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 – defending against a harassment complaint (2)
An employee in a shop repeatedly experiences islamophobic abuse by a particular customer because they wear a headscarf. This tends to happen when the shop is relatively quiet and when 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, we 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.

Why?

3.5.6 How does this relate to other kinds of bullying and harassment?

There are other ways of addressing bullying and harassment in Guernsey at the moment which would continue alongside the proposed discrimination legislation.

Some forms of harassment could be considered criminal behaviour under the Protection from Harassment (Bailiwick of Guernsey) Law, 2005. This legislation covers situations where a person is alarmed or is caused distress, and also situations where a person is in fear of violence. Harassment under this legislation does not need to be connected to a protected ground and does not need to take place at work or in a service provision context. If a person feels that they have experienced harassment and wishes to make a complaint of this nature they should contact Guernsey Police.

Employers also have a duty of care for their employees. If the mutual trust and confidence between employer and employee is broken through bullying and harassment at work, then an employee could resign and register a complaint of constructive unfair dismissal under The Employment Protection (Guernsey) Law, 1998, subject to a qualifying period of one year's employment. This also covers all forms of bullying and harassment and is not connected explicitly to the grounds of protection outlined here. For further information, see the Employment Guide on Bullying and Harassment at Work produced by the Employment Relations Service[21].

The proposals for this new legislation recognise that as well as being explicitly denied opportunities to access employment and services, cultural factors and behaviour like harassment can also systematically disadvantage groups of people and make it difficult

[21] https://www.gov.gg/employmentrelations

for them to stay in work, progress, or make use of services. Consequently, it is important that addressing harassment is part of how we address inequality.

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.

We are proposing that 'victimisation' would be unlawful under the legislation. By victimisation we 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.

This would include where they 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'd given notice that they intended to undertake any of these actions.

We intend 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

(1) An employee gives evidence on behalf of their colleague who is from an ethnic-minority in a racial discrimination case. 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.

(2) 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, we believe, an unjustified sense of grievance is not 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.

Why?

3.7.1 Why positive action?

We live in a context where there is substantial unconscious bias and systematic disadvantage for some groups due to a history of their having been treated differently, or having been denied access to equal education or other resources. This can mean that some areas are heavily dominated by, or even seem to exclude, people of certain descriptions (whether women, disabled people, people from minority ethnic groups or others). This may on the surface seem like it is based on merit or preferences. However, it could also be to do with:

- who has been making decisions in the past (and consequently whose needs are taken into account in selection processes),
- who has access to certain resources (like high quality education, or time or space to study),
- who has visible role models in that area that share their characteristics,

- whether interviews for positions consider people of a certain description less 'credible' because of unstated stereotypes and unconscious bias,
- barriers to participation which may not be obvious to those who do not experience them (for example, inaccessible premises or transport),

and multiple other factors. Sometimes in order to rebalance these situations, more is required than equal treatment. The United Nations call this 'special measures'. These are permitted, or even encouraged, by the key UN Conventions on equality[22].

We want to ensure that the equality law permits people taking positive action to improve equality, diversity and representation. However, we also recognise that this needs to be balanced against the needs for individuals to be treated fairly and the need to prevent a culture of segregation developing.

3.7.2 What would be permitted?

We propose that positive measures or preferential treatment 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 their circumstances may require facilities, arrangements, services or assistance not required by others (for example: flexible working for child care).
- it is intended to remove existing inequalities that affect people's opportunities.

However, we do 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 we mean 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 we mean 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.

[22] Convention on the Rights of Persons with Disabilities (articles 5 and 27h); International Convention on the Elimination of all forms of Racial Discrimination (article 1); Convention on the Elimination of All forms of Discrimination Against Women (article 4)

We also do 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 4.8.2). 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"[23] 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, then we intend 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 fit within the criteria outlined above in 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 is 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 adverts that applications from under-represented or otherwise disadvantaged groups are welcomed (for example 'older-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.

[23] Following *Kalanke v Freie Hansestadt Bremen* (1995) C-450/93

- 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 adverts

Policy objective: to ensure that advertising aligns with the aim to promote equality of opportunity.

3.8.1 Unlawful advertising

We propose that adverts 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 4.8.2 below).

This includes adverts where a word or phrase is used which describes a post or occupation of a kind previously only held or carried out by only members of one sex, or where pictures or photographs are used which give the impression that it is attracting people of a certain sex or characteristic.

Example – discriminatory adverts
A hotel issues an advert for a chambermaid and asks for a photo to be submitted with the application. This could be taken as indicating an intention to discriminate both because of the gendered language of 'maid' and also because of the request for a photo.

We expect that people that are in the business of publishing adverts would make themselves aware of the discrimination legislation. Consequently, we are 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.

We are proposing that a person who knowingly makes a false statement in order to get a discriminatory advert published could be subject to a fine (possibly in the form of a civil penalty, though the exact form has not been determined).

Example – publishers of adverts
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 function 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 fined, 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

We intend 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 this 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 over the age of fifty for interview. Unless this can be objectively justified, this is unlawful.

In some cases the fact that this has occurred will become apparent when an individual who has been discriminated against brings a case. We are also considering, but have not decided yet, whether a civil penalty (i.e. a fine without a criminal record) could be applied. This would cover cases where it is clear this has occurred but no individual complainant brings (or is able to bring) a case.

3.10 Relationship to other laws, courts and tribunals

3.10.1 Relationship to the Human Rights Law

Public authorities have a duty under The Human Rights (Bailiwick of Guernsey) Law, 2000 ("the Human Rights Law") not to act incompatibly with rights under the European Convention on Human Rights ("the European Convention"), except when acting in accordance with other legislation. Courts and Tribunals have a duty to interpret all legislation (which would include the proposed discrimination legislation) in a way that is compatible with European Convention rights unless it is impossible to do so.

If the action which leads to a contravention of Human Rights is based on existing legislation then the Court can find that a piece of legislation is incompatible with the European Convention rights outlined in the Human Rights Law. If they do this, it does not immediately change the functioning of that legislation. Instead, the Court may issue a declaration of the incompatibility of the legislation to HM Procureur. Consideration would then need to be

given as to what changes might need to be made to the legislation to make it compatible with the European Convention.

One of the rights under the European Convention is a right to non-discrimination in relation to the rights and freedoms contained within the Convention.

3.10.2 Relationship to other laws

We are proposing that any act done to comply with a requirement of another piece of legislation in force in Guernsey will not be subject to the proposed Ordinance. If a law is found to be discriminatory (as opposed to relying on a protected ground for a well-founded and justifiable reason), then this concern should be registered with States of Guernsey policy staff. Identified issues will be evaluated, maintained in a list of identified issues and prioritised for review by policy staff, the relevant Committees and Law Officers so that they can, if required after review, be appropriately amended or repealed.

3.10.3 Relationship with planning law

Many appropriate adjustments and changes to improve accessibility would not require any changes to buildings to be made. However, in the cases where they do, if a person is denied planning permission to make a change then they would not be expected to make that change. However, they should consider if there are other adjustments that could be made to make their service more accessible. The relationship between planning, building control and accessibility is discussed further in section 6.4.

3.10.4 Applicability to the Court

The proposed discrimination legislation would apply to the court and tribunal services in relation to access to hearings, processing of paperwork, access to information and so on.

The proposed legislation would not apply to judgements or sentencing made by judges, magistrates, jurats or tribunals. If a person believes that a judgement, sentence or other form of adjudication is unfair there are usually ways for them to appeal that decision.

3.10.5 Would the legislation be a Law or an Ordinance?

There are different types of legislation in Guernsey. Projets de Loi require the sanction of Her Majesty in Council before they can come into force in Guernsey, so can take longer to introduce. In certain circumstances the States can produce Ordinances rather than Projets de Loi – Ordinances only need to be approved by the States of Guernsey before coming into force.

We are proposing the drafting of an Ordinance. This is because the States have already been given the power to make Ordinances with regard to "such provision as they think fit in relation to the prevention of discrimination" by the Prevention of Discrimination (Enabling Provisions) (Bailiwick of Guernsey) Law, 2004.

3.10.6 What about the existing sex discrimination legislation?

We are proposing that the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 would be repealed when the new legislation comes into force. The new legislation would cover protection in employment on the grounds already covered in this existing legislation. This would enable all of the grounds of protection to be treated consistently.

3.10.7 Implications for the employment protection legislation

Some aspects of the Employment Protection (Guernsey) Law, 1998 might need to be amended if these proposals are accepted. The Employment Protection Law covers employment issues, such as unfair dismissal. At the moment the awards when people win a case for both sex discrimination at work and unfair dismissal are worked out in a similar way – they are both linked to pay. If we change how awards are structured for discrimination we may need to do so for unfair dismissal also.

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?

By 'employer' we mean anyone who has entered into a contract of employment, a contract of service or an apprenticeship with a person who will be working for them. This includes when there is an unwritten agreement which functions as a contract. It also includes 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.

We intend 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, we know that small businesses often function differently. The Tribunal will take into account the size of a business, 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 managing cases.

As is the case at present, a person should be able to bring a case against an employer if they no longer work for that employer, provided this is within the time-limits given in section 8.5.5 below.

Why?

4.1.2 Small businesses

We know that this legislation might seem particularly daunting for small businesses. However, we know that a lot of people work in small businesses and we want those people to have the same protection as everyone else. The size of a firm should not excuse discrimination or harassment of employees.

We do recognise, however, that small businesses might not have the same access to advice or resources as larger firms with HR departments. We suggest that the way to manage this is by providing good quality free advice about what employers' duties are under the legislation, if and when it comes in, and ensuring people know where to go to

get this advice. The Tribunal can consider the size of the business as a factor when assessing defences in discrimination cases so that there is some proportionality to what is feasible for a business of that size. This is something which is in practice at present and we intend to retain this.

As is currently the case, we do not believe that creating an exemption for all employers below a certain size would be appropriate. This would both suggest a double moral standard and might create perverse incentives for employers who wish to discriminate to stall the growth of their business when it is under this limit, or encourage companies to restructure in order to fall below the limit.

4.1.3 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. We propose 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 the existing Sex Discrimination Ordinance.

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 – we propose that an employer should not discriminate on any of the protected grounds (or a combination of those 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 permit the harassment or sexual harassment of employees or job applicants; not to issue discriminatory adverts; 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 3.5, 3.6, 3.8 and 3.9 above).

We propose that employers should not discriminate on the ground of **age** in relation to people above school leaving age. We propose that anyone offering vocational training should not discriminate on the ground of **age** in relation to a course that is offered to people above school leaving age.

4.2.2 Access to employment

We suggest that access to employment is framed broadly.

We intend that this would include (but would not be limited to):

- not issuing adverts 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.

We intend that during the recruitment process, appropriate adjustments should be made for disabled people, where required, and where they are not a disproportionate burden on the employer to provide. Appropriate adjustments would not be considered discrimination against applicants who do not need those adjustments.

4.2.3 When can an employer ask about the protected grounds in recruitment?

What we are proposing does not specify all of the circumstances in which you can ask about protected grounds in recruitment but if you are asking about a protected ground, we suggest there should be either: a legitimate reason covered by the new legislation for you to ask about it; or it should be for diversity monitoring purposes. However, for diversity monitoring you 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. You must not ask something which could be reasonably understood as indicating an intention to discriminate.

Legitimate reasons to ask about someone's protected grounds under these proposal would include:

- information about a person's employment permit or immigration status,
- information needed to make an appropriate adjustment to the recruitment process (if an adjustment is requested),
- questions you need to ask to implement positive action measures (see section 3.7),
- information needed to determine whether someone meets a genuine and determining occupational requirement (see section 4.8.2 below), or
- information needed to determine if someone can undertake one of the essential functions of the job as outlined in the job description.

Example – essential functions of the job
A scaffolding company asks applicants whether they can climb ladders 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 you may ask them questions about their disability only in relation to legitimate reasons under this legislation (including the above). Questions should focus on what appropriate 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 an [appropriate] adjustment
At a job interview for a research post, a disabled applicant volunteers the information that as an [appropriate] 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 above circumstances, 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 or who are pregnant. They may be used to help to identify required appropriate 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 appropriate 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 appropriate adjustments are needed. This is likely to constitute direct disability discrimination.

4.2.4 Essential functions of a job in job descriptions

There is nothing in these proposals which would require an organisation to hire a person who cannot undertake the essential functions of a job.

It is important that for any jobs advertised, careful thought is given to what the essential functions of the job are. We suggest 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 case where a job function is challenged we 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 an appropriate 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

We propose 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 appropriate 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 Managing sickness absence

We have defined disability broadly in these proposals (see section 3.2.10), which means that it is not qualified by needing to have reached a particular threshold in terms of the length of

time that the person has had the disability, the severity of symptoms experienced or the impact on a person's ability to carry out day to day functions. This means that any period of sickness could potentially give rise to a complaint of disability discrimination. This could impact employers' sickness management procedures.

It would still be possible to dismiss someone who is on long-term sick leave. A person on long-term sick leave may currently be able to bring an unfair dismissal complaint. In future, they may also be able to bring a disability discrimination case. The fact that a person could make an unfair dismissal complaint means that employers should be following good process in any case. The additional factor to consider with disability discrimination is whether appropriate adjustments have been considered to support a person back to work as part of that process or procedure. If a case relating to dismissal due to sickness absence were to arise, it is likely that the employee would complain that they had been discriminated against because the length of absence was caused by the disability, rather than that they had been subject to different treatment directly because they were disabled. This would be a complaint of discrimination arising from disability (see section 3.3.8). Discrimination arising from disability is subject to an objective justification defence. The employer would need to show that they had acted in a proportionate way to achieve a legitimate aim. They would need to show that they had considered appropriate adjustments. However, this would not prevent them from dismissing someone if, even with adjustments, a person was not capable of doing their job.

The inability to draw a hard and fast line between disability and sickness would also potentially affect the use of 'trigger points' in sickness absence procedures; and the use of attendance as a factor in redundancy processes.

At present, some employers might take into account a person's attendance record when going through redundancies. Attendance can be linked to disability (and potentially also carer status or pregnancy or maternity status), so a complaint of indirect discrimination could be made if a disabled person's attendance record was taken into account in a redundancy decision. In the UK, employers sometimes exempt people who are disabled (as defined in the Equality Act 2010) from such procedures. It would not be possible to make that distinction if disability is defined as suggested in section 3.2.10. Considering attendance may not only affect disabled people, it could also affect carers and women disproportionately. We are suggesting that employers should not take into account sickness absence in recruitment decisions. We would recommend employers should not use attendance as a criteria in redundancy decisions either.

The way we have defined disability would not necessarily prevent employers from using 'trigger points' in sickness absence procedures. What we mean here, is a system (such as the Bradford Factor) which 'triggers' a certain management response when a certain

amount (or pattern) of sickness absence is recorded. If such a system is used to review the situation, identify if the pattern of attendance is connected with any known conditions, and explore with the individual whether they need appropriate adjustments, then this should not be a problem.

There will also come a point where an employee's attendance is not high enough for them to effectively perform the necessary duties, even with appropriate adjustments. At this point an employer may need to initiate capability procedures. Any such response should be undertaken with discretion, in light of the individual's particular situation and disability. Applying the same attendance rules to everyone is likely to mean that some groups of disabled people are indirectly discriminated against because they take more sick leave. Issuing automatic threatening notices to individuals whenever their attendance drops below a certain level, even when they have known medical conditions, could be considered disability discrimination. A similar situation might apply to people with carer status or pregnancy and maternity status; these should also be taken into account appropriately in the way that attendance is managed.

In the UK, some employers have set higher 'trigger points' for disabled employees. We do not recommend this as a suitable approach or blanket policy. Disabled people may have very low absence, or different absence patterns depending on their disability. Someone with endometriosis, a person with bipolar or a person who has just broken their leg may all need different patterns of leave to be permitted given their circumstances. So simply setting a slightly higher 'trigger point' for 'disabled people' would appear to be an inadequate response. Consequently, we do not recommend that employers try to distinguish a particular group of 'disabled people' for this purpose.

If an employer operated a policy where a person was not allowed to return to work for a certain period after having a highly infectious illness (for example, norovirus), then this would fall within the exception suggested in Appendices A and B on infectious diseases (no. 32).

4.2.7 Vocational training and work experience

We propose 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.

Appropriate adjustments to support a person to access training will not be considered discriminatory against employees who do not need those adjustments.

4.2.8 Promotion or re-grading

We propose 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.

Appropriate adjustments to support people to participate in an opportunity for promotion will not be considered discrimination against people who do not need those adjustments.

4.2.9 Dismissal

Nothing in these proposals would prevent an employer from dismissing a staff member for reasons such as competency or conduct. However, employers should not dismiss staff on the basis of any of the protected grounds, or any combination of the protected grounds.

4.3 Contract workers

4.3.1 What is a contract worker?

By 'contract worker' we 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). This excludes contracts of apprenticeship and contracts of service – if a person has either of these we are proposing that they are considered an employee for the purposes of discrimination law. It also does not cover self-employed, independent contractors, who would not be covered by the 'employment' section of these proposals (unless they are also 'employees').

We propose that employers of contract workers are subject to the same duties as other employers (as outlined above).

4.3.2 Duties of principals

We propose 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.

We also intend 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 Appropriate adjustments for contract workers

We propose that an employer of a disabled contract worker would have a duty to make appropriate adjustments in relation to their own policies, practices, premises, etc. where a contract worker would usually be affected by or have access to these. The employer (e.g. agency, seconding organisation) would also be responsible for appropriate adjustments in situations which would be common across principals for which the contract worker is working. This would cover:

- a provision, criterion or practice applied by or on behalf of all or most of the principals to whom the contract worker is or might be supplied, and where the disadvantage is the same or similar in the case of each principal,
- a physical feature of the premises occupied by each of the principals to whom the contract worker is or might be supplied, and where the disadvantage is the same or similar in the case of each principal, or
- the non-provision of an auxiliary aid which would cause substantial disadvantage, and that disadvantage would be the same or similar in the case of all or most of the principals to whom the contract worker might be supplied.

Example – appropriate 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 [appropriate] adjustments.
UK EHRC (2011) Equality Act 2010: Employment - Statutory Code of Practice, p.143

We suggest that principals would also have responsibility to provide appropriate 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 appropriate 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 we intend 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, we propose that employment agencies should not discriminate against people who seek their services to help them to obtain employment with another person. 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 fined (potentially in addition to a discrimination complaint, if one were brought forward). The fine would most likely be in the form of a civil penalty, though the exact detail remains to be decided.

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 a British woman under the age of 50, 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. 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 4.8.2 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

We propose that people or organisations who offer vocational training should not discriminate on the basis of any of the protected grounds or combination 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 adverts in relation to a course or facility (see section 3.8).

The provision of an appropriate 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.

We propose that anyone offering vocational training should not discriminate on the ground of **age** in relation to a course that is offered to people above school leaving age. We propose that anyone offering vocational training should not discriminate on the ground of **age** in relation to a course that is offered to people above school leaving age.

4.4.4 Trade unions, employer organisations and professional bodies

We propose 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 which 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 we take 'discrimination' to include a failure to provide an appropriate 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 we take 'discrimination' to include a failure to provide an appropriate adjustment for a disabled person to hold an office.

4.5 Equal work, equal pay and equal treatment

Policy objective: to ensure that, in line with international standards, people are not economically disadvantaged at work because of personal characteristics.

4.5.1 Introduction

We propose that the legislation allows employees to compare themselves to others working for the same, or an associated, employer who are doing equal work. 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.

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. We are 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.

- where the work performed by one is equal in value to the work performed by the other. Claiming that your work is equal based on equal value is to say that the work that you do is different to the work someone else does but that it is equal in value if you consider the skill, physical or mental requirements, responsibility and working conditions attached to the role. Note that 'equal in value' refers to the skills and efforts of the worker and not the perceived value to the employer.

Example – work of equal value
A canteen attendant in a local school claims that the work that she does is of equal value to the assistant care-taker's work in terms of effort, responsibility and skills required and that she should be paid the same as him.

Key question:
Our consultation questionnaire asks about whether there should be a delay before individuals can register complaints of equal pay for work of equal value.

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

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. We propose that employers should not establish or maintain differences in pay between employees on any of the protected grounds, or any combination of the protected grounds.

For equal pay complaints, it does not matter whether the difference is intentional, the effect is what is important.

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 nearly all female. 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 your staff who are doing work that is not materially different have the same terms and conditions. We intend this to cover, for example, working hours, holiday entitlement, rest breaks and so on. We propose that employers should not establish or maintain differences in terms and conditions between employees on any of the protected grounds, or any combination of the protected grounds (unless this is the result of positive action (see section 3.7), appropriate adjustment or other situations specified as legitimate in these proposals).

As with equal pay, when it comes to equal treatment we propose that it should not matter whether the difference is intentional, the effect is what is important.

Note that the standard for equal treatment we have outlined is different from equal pay. For equal pay, equal work is defined in section 4.5.2. For equal treatment you must establish 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’. We propose that a comparator should meet certain criteria:

- The complaint should be based on one (or several) of the protected grounds, so the comparator should have a different characteristic to the person making the complaint (i.e. a man could compare themselves with a woman or a person from Guernsey compare themselves with someone of a different national origin).
- They should both work for the same employer or an associated employer. Associated employers would cover different branch offices of a parent company, for example.
- 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'. You can use 'hypothetical comparators' in equal treatment cases. However, in equal pay complaints, we propose 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. We propose 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, or a combination 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, or a combination 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 we are 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, you 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?

We 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 we intend that this can provide a basis for different pay or terms and conditions respectively.

Secondly, we propose that the kinds of discrimination outlined in section 3 apply to equal pay and equal treatment. This means that there are differences in how you 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', our proposed exceptions are listed in Appendices A and B.

Example – equal pay exception
A retailer employs two staff members on minimum wage. One is 17 and the other is 19. In line with the minimum wage law, the employer pays the 17 year old a lower rate of pay. There is an exception for pay which is linked to the minimum wage law. So, for the purposes of these proposals, this would not constitute age discrimination.

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. More men than women claim this bonus because women are more likely to take a career break for family reasons. 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 who are disproportionately women. 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. (For clarity, in this example the claimant might alternatively choose to make a case based on their having carer status).

4.5.9 What about part time staff?

Women, older workers, carers, parents 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 legislation. 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[24]. These proposals, if accepted, would strengthen but not change that advice.

4.5.10 Discussing pay with colleagues or trade union reps

Employers sometimes write pay secrecy clauses into contracts to prevent employees from disclosing their pay. We believe that there are limits to the extent that employers should be able to enforce pay secrecy clauses in contracts. We intend 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

[24] Employment Relations Service (2016) "Employment Guide: Sex Discrimination in the Workplace", available at: https://www.gov.gg/employmentrelations

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

4.5.11 Exceptions

There are some exceptions which relate specifically to pay. These are included in the full list of exceptions in Appendices A and B.

4.6 Funding for appropriate adjustments in employment

We, as a Committee, are considering whether funding for appropriate adjustments should be made available in certain contexts or, alternatively or additionally, whether some support should be given to ensure employers have access to sound Occupational Health advice so that they can identify what adjustments are required. No decisions have been made as yet.

4.7 Special types of leave

4.7.1 Leave related to transition

We propose that if a trans person requires leave for appointments, etc. in relation to their undergoing transition this should be treated by employers or vocational training providers no less favorably than if it were an absence due to health or other reasons. This might mean that a person transitioning who feels that they have been treated in a discriminatory way could compare themselves to a colleague who has had an absence due to sickness, for example. This means it would be discriminatory for an employer to treat an employee's request differently when it is for transitioning than they would if the request were for another purpose.

4.7.2 Leave related to pregnancy and maternity

We would anticipate that the Tribunal would not allow a comparison to be made between someone taking maternity leave (or adoption leave) and a person taking sick leave. This would mean that it would not be a defence for an employer to say that they treated someone on maternity leave no worse than they would treat someone on extended sickness absence.

4.8 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 case is taken 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.

4.8.1 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 case is taken against them?

As outlined in section 3.4 we are 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 an appropriate adjustment (which is not discrimination against a person who does not need that adjustment),
- a denial of an appropriate adjustment which would be a disproportionate burden for the employer to provide (see section 6.2.5),
- a failure to provide an appropriate 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),
- indirect discrimination, direct age discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2),
- 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 4.8.2 below), and
- where the action falls within one of the listed exceptions (see the exception list in Appendices A and B).

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).

We intend that an employer would never be expected to employ someone who does not have the capacity and capability to undertake the essential functions of a role.

Please note also that in these proposals persons under school leaving age cannot make a complaint of age discrimination (though they can register a complaint of discrimination on other grounds).

4.8.2 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 Appendices A and B, we propose 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.

We suggest 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.

Example – genuine and determining occupational requirement (2)
A team of persons is employed by a security firm. Part of their role can involve doing pat-down searches. The firm tries to make sure that these are done by a person of the same sex as the person being searched. The team has four women and four men when the firm recruits an additional member of staff. No matter what the sex of the additional person, the team would be able to ensure that one person of either sex was on duty at any time during the operational hours. This would be sufficient for the service to operate. It would be difficult for the firm to justify using a genuine and determining occupational requirement to specify the sex of the new recruit in this context. However, they could do so in other contexts, for example if the only woman on the team were leaving.

4.8.3 Objective justification for genuine and determining occupational requirements

We propose 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 (3)
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.

Example – genuine and determining occupational requirement (4)
A landscape gardening firm seeks to recruit a man as a gardener. They believe that a man is needed for the role rather than a woman because key parts of the role require strength. They do not consider that women would typically have the required strength. Strength is a characteristic which varies between individuals. Some women would be able to do the essential functions of the role and some men would not. Sex is, therefore, not a reliable predictor of ability. This is unlikely to qualify as a genuine and determining occupational requirement. The firm would need to find an alternative way of determining whether applicants were strong enough to do the work required.

More about the use of objective justification can be found in section 3.4.2.

4.9 What would putting this into practice mean?

4.9.1 FAQs for employers

We have produced a separate document based on frequently asked questions from employers and service providers. This explores what the proposed changes might mean for organisations. However, it should be noted that this policy may change following this consultation and the States debate.

A leaflet on frequently asked questions for employers and service providers can be found at: www.gov.gg/discriminationconsultation

4.9.2 Initial check-list

If these proposals were approved by the States in their current form (noting that they may change yet), employers would need to consider, for example:

- encouraging staff to get in the habit of asking whether appropriate adjustments are required for meetings, appointments, interviews and so on.
- thinking through how they would go about making appropriate adjustments for employees if the need arose.
- undertaking an access audit and developing an accessibility action plan (see section 6 on accessibility).
- reviewing when questions are asked about the protected grounds in job interviews, and checking that job advertisements do not say anything that could be presumed to be discriminatory.
- ensuring that appropriate internal policies on harassment and equality or discrimination are in place (suitable to the size of the business).
- there may be a need to review other policies in light of the legislation - such as flexible working policies or sickness absence policies - to ensure that these do not lead to indirect discrimination.
- considering whether they are currently using, or wish to use, positive action, and if they do, set out the rationale, objectives and a review period for this.
- considering whether staff will need training before the legislation comes into force so that they understand their duties under the legislation.
- conducting an equal pay audit to determine whether people doing equal work in their organisation are receiving equal pay, and, if they are not, considering where the source of that difference is coming from. This would help an organisation to think about where they may face complaints of equal pay for equal work and begin to address issues if any arise.
- checking whether there are any existing policies or practices where people are treated differently based on any of the grounds of protection and confirming whether this is covered by an exception listed in Appendices A and B, or if there is another defence for this in section 4.8.1. One of the questions in our questionnaire is whether the exceptions list is right. We recommend employers review it.

4.9.3 Equality monitoring

Larger employers may, if the legislation is introduced, find it useful to undertake equality monitoring regarding recruitment, retention, promotion, training, grievances, disciplinary action, reasons for leaving or other aspects of staff management. This would assist employers to understand how they are performing with regards to their obligations under the proposed legislation.

The proposals do not recommend making this compulsory, or prescribing how an employer might undertake this. Neither is there a requirement to publish such data at this point. However, any diversity data collected must be handled sensitively in line with data protection legislation and should be kept separate from the information available to line

managers or interviewers to ensure that disclosure of a characteristic as part of diversity monitoring does not inadvertently lead to a person being discriminated against.

Section 5: Goods, services, education, accommodation, clubs and associations

5.1 Introduction

In addition to employment, we intend 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 we consider 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,
- accommodation providers, and
- clubs and associations.

At the end of section 5 we return to some areas which are applicable to all of these four areas. In these sections, as in the rest of this document, when we use 'service provider' we refer to anyone providing or selling any of the above goods, services, education or accommodation or to anyone running a club or association. We use 'providers of goods or services' to distinguish a group of service providers which excludes landlords, educational institutions and 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.

We 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 services they need.

5.2.1 Who is a provider of goods or services?

We propose 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 we intend that most of the activity of the States of Guernsey could be challenged under this legislation.

Example – adjudication
A magistrate indirectly takes age into account when issuing a sentence for a person with a driving offence, as the magistrate takes into consideration the fact that they have held a clean license for the past fifty years. This falls outside the scope of this legislation as all adjudication decisions in Courts and Tribunals are made at the discretion of the relevant judge or tribunal, which may usually be appealed through other routes.

The States of Guernsey services which we propose would fall under this legislation include what you might more commonly think 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, you 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.

Example – police functions
If an incident occurred involving three offenders, and the police arrest and handcuff only the offender who is from an ethnic minority group and give the other two offenders cautions, even though they all participated equally in the same offence, then this could be challenged as discrimination. If a person wished to challenge whether the police were acting within their powers, rather than the difference in treatment, however, they would need to contact the Police Complaints Commission.

Example – court services
A disabled person is provided with information about a court case in which they are involved in a format which is not accessible to them. When they ask for an alternative format the court administration declines to provide an alternative. The person could bring a case of disability discrimination on the basis of denial of an appropriate adjustment.

It is important to note that, while we propose that an existing service can be challenged if it is provided in a discriminatory way:

- It is not our 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 our 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, or a combination of the protected grounds, to discriminate:

- by refusing to provide a person with goods or services or access to facilities.
- by providing goods or services to a person on different terms or conditions.

- by 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).
- by issuing adverts about their goods or services which could be interpreted as displaying an intention to discriminate (see section 3.8).
- by refusing access to their premises or vehicles (see section 5.2.4).
- by harassing a service user (see section 3.5).
- by permitting the harassment of a service user (see section 3.5).
- by 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).
- cause, instruct or induce another person to undertake a prohibited act (see section 3.9).

5.2.4 Access to premises or vehicles

We propose 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.

We 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 harbor, 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).

A person may be able to register a complaint of discrimination even if a service relationship has ended if it relates to a service that was provided.

Example – harassment after a relationship has ended
A builder makes abusive and hostile remarks to a previous customer because of her race. This takes place after their business relationship has ended. This would constitute harassment.

Example – appropriate adjustment after a relationship has ended

A man with a visual impairment had completed a wine tasting course at his wine retailer. When the man initially registered for the course he made the retailer aware that he required any information to be sent to him by email and they agreed to make this [appropriate] adjustment.

Six months later, the retailer sent letters to all attendees offering a 50 per cent discount on the next course if they returned the enclosed form. The man was therefore unable to enjoy the discount for the next course afforded to the other attendees, as this was sent to him only by letter.

Failing to ensure that he was sent and able to reply to this discount offer in the appropriate format is likely to amount to a failure by the retailer to make [an appropriate] adjustment, even though the man is no longer undertaking a course with them.

From UK EHRC (2011) Equality Act 2010: Services, public functions and associations - Statutory Code of Practice, p.42-43

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 an appropriate adjustment (which is not discrimination against a person who does not need that adjustment),
- a denial of an appropriate adjustment which would be a disproportionate burden for the provider of goods or services to provide (see section 6.2),
- a failure to provide an appropriate 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),
- indirect discrimination, direct age discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2),
- where the action falls within one of the listed exceptions (see Appendices A and B).

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 and responded appropriately to harassment when it arose (see section 3.5).

Please note also we are proposing that persons under the age of 18 cannot register a complaint of age discrimination in goods or services provision (though they can do so on other protected grounds). This is something which is included in our consultation questionnaire available at: www.gov.gg/discriminationconsultation.

5.2.7 Goods or services exceptions

There are a number of exceptions which relate to goods or services provision. These are included in Appendices A and B of this document.

5.3 What duties would education providers have?

Policy objective: to ensure there is equality of opportunity in education.

5.3.1 Education providers

We envisage 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 – 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).

A person may be able to register a complaint of discrimination even if a relationship has ended if it relates to a service that was provided (see examples in section 5.2.5).

5.3.3 When must education providers not discriminate?

We propose that it should be unlawful for education providers to discriminate against a person, based on any of the protected grounds, or a combination 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, or a combination of the protected grounds. They should also not admit someone on different terms & conditions based on any of the protected grounds, or a combination of the protected grounds.

Education providers should not discriminate against students on the basis of any of the protected grounds, or a combination 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,
- by issuing adverts about their services which could be interpreted as displaying an intention to discriminate (see section 3.8),
- by refusing access to their premises or vehicles (see section 5.2.4),
- by harassing a student (see section 3.5),
- by permitting the harassment of a student (see section 3.5),
- by victimising a person who tries to enforce their rights, or support someone else to, under the proposed legislation (see section 3.6), or

- cause, instruct or induce 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.

It is worth noting that acts of collective worship in a school do not fall within any of the above forms of prohibited discrimination. A school could arrange a carol service or a nativity play and this not constitute discrimination on the grounds of religion.

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 (see section 5.2.4 above).

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 an appropriate adjustment (which is not discrimination against a person who does not need that adjustment),
- a denial of an appropriate adjustment which would be a disproportionate burden for the education provider to provide (see section 6.2),
- a failure to provide an appropriate 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),
- indirect discrimination, direct age discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2), or
- where the action falls within one of the listed exceptions (see Appendices A and B).

In harassment cases, an education provider can use as a defence that they sought to prevent their service users from being harassed and responded appropriately to harassment when it arose (see section 3.5).

Please note also that we are provisionally proposing that people can only bring an age discrimination complaint with regards further and higher education provision (not schools or pre-schools). We are inviting comment on this point in our consultation questionnaire, available at www.gov.gg/discriminationconsultation.

5.3.6 Education exceptions

There are some exceptions in relation to Education which have been included in Appendices A and B.

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

We 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.

We suggest hotels are viewed as providers of goods or services rather than accommodation providers in most circumstances.

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 – 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).

A person may be able to register a complaint of discrimination even if a relationship has ended if the discrimination relates to a service that was provided (see examples in section 5.2.5).

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, or any combination 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.

We propose 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, or a combination of protected grounds. They must not offer the accommodation or land on different terms and conditions in relation to a protected ground, or a combination of the protected grounds. They also must not use a ground of protection to give a person a lower priority on a waiting list for accommodation.

We intend that when a person has a tenant then they should not discriminate based on any of the grounds of protection, or a combination 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 where there is a good reason to do so which is not related to a ground of protection. They would only be expected to allow a person to alter a property if they have 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.

Example – reasonable alterations
An accommodation provider owns a block of flats. They receive a request from two of their tenants to redecorate their flats. They permit the older male tenant but refuse the younger female tenant permission to make these alterations. They know relatively little about their tenants and this decision is based solely upon their perception that an older male tenant will make 'sensible' alterations and do the job well and the younger female tenant would not. This could be direct discrimination on the basis of sex and age.

The proposals would also say that accommodation providers should not:

- harass tenants/prospective tenants (see section 3.5),
- permit the harassment of a 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 adverts 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 related to accommodation providers and the provision of appropriate adjustments. See section 6.2.8.

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 an appropriate adjustment (which is not discrimination against a person who does not need that adjustment),
- a denial of an appropriate adjustment which would be a disproportionate burden for the accommodation provider to provide (see section 6.2.5),
- a failure to provide an appropriate 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),
- indirect discrimination, direct age discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2), or
- where the action falls within one of the listed exceptions (see Appendices A and B).

In harassment cases, an accommodation provider can use as a defence that they sought to prevent their customers or tenants from being harassed and responded appropriately to harassment when it arose (see section 3.5).

Please note also that we are proposing that persons under the age of 18 cannot register a complaint of age discrimination in accommodation provision (though they can do so on other grounds). This is a point which we have included in our consultation questionnaire, available at www.gov.gg/discriminationconsultation.

5.4.5 Accommodation exceptions

There are some exceptions in relation to accommodation provision which are included in Appendices A and B.

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' we intend 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[25] 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.
- 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 only and many more types of associations are covered by the law.

[25] 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.

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, we propose 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.

5.5.2 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 a club 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 – 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).

A person may be able to register a complaint of discrimination even if a relationship has ended if the discrimination relates to historic membership (see examples in section 5.2.5).

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, or any combination of the protected grounds, when managing membership applications, and should not treat existing members differently based on any of the protected grounds, or a combination of the protected grounds.

This includes not treating people differently based on any of the protected grounds, or any combination 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.

The proposals would also say that clubs and associations should not:

- harass members/prospective members (see section 3.5),
- permit the harassment of a 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 adverts 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 an appropriate adjustment (which is not discrimination against a person who does not need that adjustment)
- a denial of an appropriate adjustment which would be a disproportionate burden for the club or association to provide (see section 6.2.5)
- a failure to provide an appropriate 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)
- indirect discrimination, direct age discrimination or discrimination arising from disability, which can be objectively justified (see section 3.4.2)
- where the action falls within one of the listed exceptions (see Appendices A and B)

In harassment cases, a club or association can use as a defence that they sought to prevent their members from being harassed and responded appropriately to harassment when it arose (see section 3.5).

Please note that we are proposing that persons under the age of 18 cannot register a complaint of age discrimination in relation to a club or association (though they can do so on other grounds). This is a topic which we have included in our consultation questionnaire, which is available at: www.gov.gg/discriminationconsultation.

5.5.5 Clubs and associations exceptions

There are some exceptions relevant to the membership of clubs and associations included in appendices A and B.

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).

5.7 What would putting this into practice mean?

5.7.1 Leaflet for service providers

We have produced a separate leaflet looking at frequently asked questions which may be relevant to employers and service providers. However, it should be noted that these are draft proposals and the policy may change following this consultation and the States Debate. You can find this online at: www.gov.gg/discriminationconsultation

5.7.2 Initial check-list

If these proposals were approved in their current form by the States, service providers may wish to consider the following points before the legislation came into force. However, it is worth noting that the proposals could change following this consultation and the States debate – so this does not constitute legal advice and is not an exhaustive list. Service providers may wish to:

- review the terms and conditions on which they provide services to see whether they use any of the protected grounds to vary the service they provide.
- check whether any terms and conditions which do use the protected grounds fall within the exceptions listed, or, if not, consider how they might change these. (We would encourage service providers to participate in our consultation on the exceptions list included in Appendices A and B, please see our questionnaire at www.gov.gg/discriminationconsultation or email us with your thoughts at equality@gov.gg).
- ensure their booking systems or staff have an opportunity to check whether appropriate adjustments are required by their service users.
- think through how they would go about making appropriate adjustments for disabled service users if the need arose.

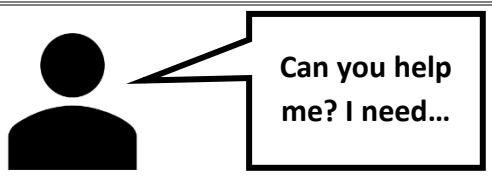
- consider undertaking an access audit and develop an access action plan (though there may be a lead-in period for this section of the law – see section 6.3).
- review when questions are asked about the protected grounds in applications forms, and check that ads do not refer to protected grounds in a prohibited way.
- ensure that appropriate internal policies on harassment and equality or discrimination are in place (suitable to the size of the organisation).
- consider whether they are currently using, or wish to use positive action and if they do, set out the rationale, objectives and a review period for this.
- consider whether staff will need training before the legislation comes into force so that they understand their duties under the legislation.

Section 6: Appropriate adjustments and accessibility for disabled people

6.1 Appropriate adjustments vs. accessibility

6.1.1 What is the difference between the duty to provide appropriate adjustments and the anticipatory accessibility duty?

When it comes to access for disabled people we are proposing two key duties: firstly, a duty to provide appropriate adjustments, and secondly an anticipatory accessibility duty. The key differences are:

Appropriate adjustment duty	Anticipatory accessibility duty
	
Reactive - about responding to individuals who are your actual employees or service users.	Proactive - about inclusive design, planning for the future so that people can access your service without asking for adjustments.
Might be tailored to the very specific needs of an individual.	About meeting common needs which are likely to arise.
Developed in discussion with the individual.	Developed based on an access audit (whether done by yourself or a professional).
Requires you to consider an adjustment to include a disabled person, unless this is a disproportionate burden.	Requires you to develop and implement an action plan to bring your service closer to accepted access standards (the plan should be appropriate and proportionate).
A form of discrimination if you do not provide an adjustment, unless it is a disproportionate burden for you to do so.	Is not a form of discrimination, in and of itself if someone fails to comply, but having an access action plan could be evidence used as part of the defence of, for example, an indirect discrimination complaint.
Enforced by the individual who is affected.	Could be referenced by an individual complaining of discrimination, but could also be enforced by the proposed Equality and Rights Organisation who could require you to develop and implement a plan, or face a fine.
Applies in all settings, except where a tenant requires structural alterations to a property they are letting (see below).	Only applies in goods or services provision and education (not in employment or accommodation provision).

6.1.2 If you get accessibility right, do you need to make appropriate 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 appropriate 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 appropriate 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 an appropriate adjustment for this person if the majority of their leaflets are printed on off-white paper.

6.2 Making adjustments to ensure equal opportunity and inclusion for disabled people (appropriate 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 an appropriate adjustment?

We are proposing including a duty to provide an appropriate adjustment to a disabled person. Not complying with the duty would constitute discrimination.

Appropriate adjustment is a common international concept. The UN call the concept 'reasonable accommodation', and in the UK it is called 'reasonable adjustment'. Appropriate adjustment is broadly the same concept.

We are proposing that appropriate adjustments should be understood as necessary and appropriate modifications or adjustments for a disabled person, where needed in a particular case. An appropriate adjustment should not impose a disproportionate burden on

the person providing the adjustment. Implementation of an appropriate adjustment should always follow consultation with the individual concerned.

As proposed, appropriate adjustments are a reactive duty. They apply in response to the need of a specific individual when they ask for an adjustment, or if the employer or service provider otherwise becomes aware that an adjustment is needed. Appropriate adjustment is not proactive. It does not require you plan in advance to make your service accessible through inclusive design. To read more about the proposed proactive accessibility duty see section 6.3.

Where usually discrimination legislation requires that you treat people in a similar way, in some cases you 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 – appropriate 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 an appropriate 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. An appropriate 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 appropriate adjustments with the employee, customer, service user, student or tenant who needs the adjustment so that it meets their needs.

Example – consultation about appropriate 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).

6.2.3 What kinds of adjustment might someone request?

It would not be possible to list all of the appropriate adjustments a person might need or request because everyone is different. However, we anticipate that appropriate 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.

We propose that appropriate adjustments can include:

- fundamental changes to make a service, facility or information source more accessible for everyone (N.B. in the case of appropriate adjustment this is initiated in response to an individual request, but the change may assist others. It is not general consideration of inclusive design - for anticipatory accessibility see section 6.3)

Example – accessibility
A law firm receive 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 decide 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 providing a catalogue which the person can order books from over the phone.

We suggest 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.

6.2.4 How do I know if someone needs an appropriate adjustment?

You should take into account disabilities that you are aware of, without necessarily requiring a person to ask each time that they need an adjustment. For example, if you have an employee who is a wheelchair user, you 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 an appropriate 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 you that they have a disability or asked for an appropriate adjustment, but you 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 you 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 let you know if they need an appropriate adjustment early on in the planning process. If you are 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?

We are proposing that an employer or service provider does not need to provide an appropriate adjustment if this is 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 an appropriate 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 introducing 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, we are proposing 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 appropriate adjustment, and

c. the availability of financial and other assistance to the employer or service provider (for example, grant funding or support from the third sector).

While there is often a focus on expensive changes to buildings, it should be remembered that appropriate adjustments may often not have any cost attached to them. Many appropriate adjustments will, therefore, not be considered disproportionate.

Example – appropriate 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.

6.2.6 – Clarification – when service providers are not required to make appropriate adjustments

Whether or not the adjustment is a disproportionate burden, a service provider would not be expected to make an appropriate 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 [appropriate] 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

6.2.7 Who has to pay for appropriate adjustments?

In most cases, we are proposing that the employer or service provider should pay for the appropriate adjustments, provided it is not a disproportionate burden on them to do so.

The situation is slightly different for accommodation providers.

6.2.8 Appropriate adjustments and accommodation providers

We propose that providers of both residential and commercial property should be under a duty to provide (and pay for) appropriate adjustments for anything which does 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 is not a disproportionate burden on them to provide such adjustments).

We propose that accommodation providers should also 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 may 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.

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 building works. 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, we are proposing that the accommodation provider would not have an 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 alterations 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.

We intend that, in the case of commercial lettings, if an accommodation provider unreasonably refuses to allow an organisation who is renting space from them to make an appropriate adjustment or accessibility adjustment, and if an individual takes a case complaining of a failure to make an appropriate adjustment against that organisation, 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 an appropriate adjustment.

6.3 Anticipatory accessibility duty

Policy objective: to ensure that people who are designing or managing services or facilities plan and implement improvements in accessibility (to both the physical and non-physical environment) in order to remove barriers for disabled people.

6.3.1 Anticipatory accessibility duty - intent

While the duty to provide appropriate adjustments would be reactive or responsive in nature, we are proposing that there is also a proactive accessibility duty. This is intended to ensure that people who are designing or managing services consider, and plan to include, people with common impairments from the outset.

What it will be important for people to show is that they have considered the needs of their service users, that they have prioritised what changes need to be made and that they are taking proportionate action which is appropriate to their context.

6.3.2 Is it all about buildings?

Accessibility 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. When thinking about accessibility, it is important to consider a wide range of impairments – including mobility and sensory impairments, but also invisible impairments like autism, learning disabilities, dementia, people who have chronic fatigue, people who experience panic attacks and so on.

6.3.3 Who does it apply to?

We are proposing that the anticipatory accessibility duty would apply to education providers and providers of goods or services.

Employers, clubs and associations and accommodation providers would have a duty to make appropriate adjustments in response to the needs of their employees, members or tenants. However, we propose that they would not be required to plan for accessibility in advance.

There are two points which are important to note when you are thinking about this:

- 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 lease 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 when the tenant is disabled, and only needs to consider the accessibility of a back office room if an employee that works there is disabled. 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 accessibility 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.

6.3.4 What does the duty require you to do?

The accessibility duty we are proposing would require education providers and providers of goods or services to show that they have considered how accessible their 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.

Unlike appropriate adjustments, which should focus on meeting the needs of individuals as soon as possible, 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 access plan.

It is important that the plan prioritises. Education, goods or services providers do not need to do everything at once or immediately, but they would need to think about what resources they have available and what changes would have the most impact in improving their services for disabled customers (and potentially other customers). When prioritising they 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.

Example – proportionality in an access plan (1) – level access
A small business which is half-way up a set of steps in town is considering their access plan. Given their location their access plan might say it is not appropriate for them to focus on creating step-free access to their property. However, they might consider alternative ways to make their service accessible (for example, clear signage, training for staff, online ordering and delivery through an accessible website).

In contrast, a large out of town store with a high footfall might consider level access to be crucial to their business model.

Example – proportionality in an access plan (2) – lifts
Best practice guidance for an access standard states that there should be lifts to allow people step free access to all floors of a building.

A small shop with an upstairs section considers whether they could install a lift in their premises. This is both beyond their financial resources and would reduce the retail space available significantly. They decide to put a sign up saying that the shop assistant would be happy to assist anyone who is unable to go upstairs by describing what was available and bringing items down for them to view.

A large educational establishment requires students to be able to access upstairs rooms for core curriculum subjects. The educational establishment might need to consider whether classes for students with mobility impairments could be rearranged to take place in rooms with level access, or alternatively, installing a lift might be a priority in such circumstances.

6.3.5 What standards would providers of goods or services and education providers need to meet?

Standards are constantly developing with regards to accessibility. We are suggesting that 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 Equality and Rights Organisation, if established).

Starting points might be, for example:

- Guernsey Technical Standard M – Access to and use of buildings, The Building (Guernsey) Regulations, 2012
- BS8300 – Design of an accessible and inclusive built environment
- BS8878 – Web accessibility. Code of practice.

We also propose that the Equality and Rights Organisation (if established, or someone else if not) would be able 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.

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 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.

6.3.6 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 you 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 an Equality and Rights Organisation) or, for larger organisations, through hiring someone who has been trained to do access audits to undertake an audit for you.

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. The access plan should focus what resources are available on these agreed priorities.

6.3.7 Review periods for access plans

International understanding of accessibility is developing. We would anticipate that access 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.

6.3.8 What would the consequences of not having an access plan be?

We are proposing that if the Equality and Rights Organisation (if established, or someone else if not) had reason to believe that an organisation either did not have an access action plan or that their plan was not appropriate or proportionate or being implemented, then they could:

- investigate to establish the facts of the matter, and then, if required
- issue a compliance notice requiring an organisation to develop and implement an access action plan.

We intend that not complying with a notice would result in a fine. If the provider of goods or services or education provider felt that their being issued with a notice was in some way inappropriate or unfair they could appeal this to the Employment & Discrimination Tribunal.

We propose that having an access plan in place might also be used as evidence that could contribute to a defence case for a provider of goods or services or an education provider if a discrimination complaint were raised:

- If a person complained that a provider of goods or services or an education provider were indirectly discriminating against disabled people, then their having considered accessibility, and their intention to address the issue (if not immediately) as specified in an action plan, would be likely to be useful evidence as part of a defence.

  Example – indirect discrimination and an access action plan
  A disabled person argues that having to go up three steps to enter a shop is indirect discrimination against people with mobility impairments, who cannot go up steps. If the shop owner had an access plan showing that they were saving up for a major refurbishment next year in which they were going to put a more accessible entrance into the shop, this would contribute as evidence to their defence case against the complaint. If however, they did not have a plan, the plan did not address this issue, or the plan was in some way not appropriate or proportionate this might stand against them.

- In some cases, we propose action plans might be relevant to appropriate adjustment complaints, though in all appropriate adjustment cases the education provider or goods or services provider must try to meet the needs of the specific individual.

Example – appropriate adjustments and access action plans (1)
A service user of a community centre complains that they have been discriminated against by the community centre failing to make an appropriate adjustment because, due to a mobility impairment, they struggle to open the front door and get through it with their mobility aid. The community centre has explored this issue with the individual and has identified that a new door would be required to allow easy access. The work to undertake fitting this new door would be substantial. The community centre is currently directing its available resources, according to its access action plan, to developing an accessible toilet. The centre knows the toilet is needed by a number of service users and (as the toilet is in the process of being built) it would not be practical to re-prioritise the plan at this stage. The centre could, therefore, use the action plan as part of its defence that it would be a disproportionate burden to meet the individual's needs at this time – though they will consider alterations to the door, when they renew their action plan, after the toilet is built.

Example – appropriate adjustments and access action plans (2)
A shop assistant receives a request from a customer to sit down somewhere as they have difficulty standing for long. The shop has an access action plan, but has not previously considered the need for seating. The shop assistant knows that there are some chairs in a backroom and brings one out to put in a quiet corner of the shop so the customer can rest. This adjustment happens to be easy to do and the shop assistant is obliged to take the action regardless of what is included in the plan.

Example – appropriate adjustments and access action plans (3)
A regular customer raises a complaint that a busy customer service desk does not have a hearing loop available – and that this constitutes a failure to make an appropriate adjustment. The service maintains that its customer service staff speaking loudly and writing things down is a suitable appropriate adjustment for people with hearing impairments. The service has an access action plan but it simply records that there is level access and that no further priorities have been identified. The inadequacy of the access action plan may actually strengthen the customer's case. In addition to any action related to the specific case, it would be possible for the Tribunal to order the service to undertake an access audit and produce an appropriate and proportionate access action plan within the next six months.

6.3.9 Timeframe for implementing action plans

We are proposing that the duty to have an action plan in place does not come into force as soon as the new legislation is implemented. This delay would be intended to give providers of goods or services and education providers time to undertake an access audit and develop their first action plan before the duty came into force.

One of the questions in our consultation relates to how long this delay should be. Our initial proposal is that the duty to have an action plan in place should come into force two years after the majority of the provisions in the legislation. However, we propose that the duty to begin to implement physical adjustments to buildings would only come into force ten years after the law comes into force – a further eight years after the action plan is formulated.

During this time period it would be possible for people to register complaints of a failure to make an appropriate adjustment, indirect discrimination complaints or complaints of discrimination arising from disability (which could relate to the physical features of the building).

Key question:

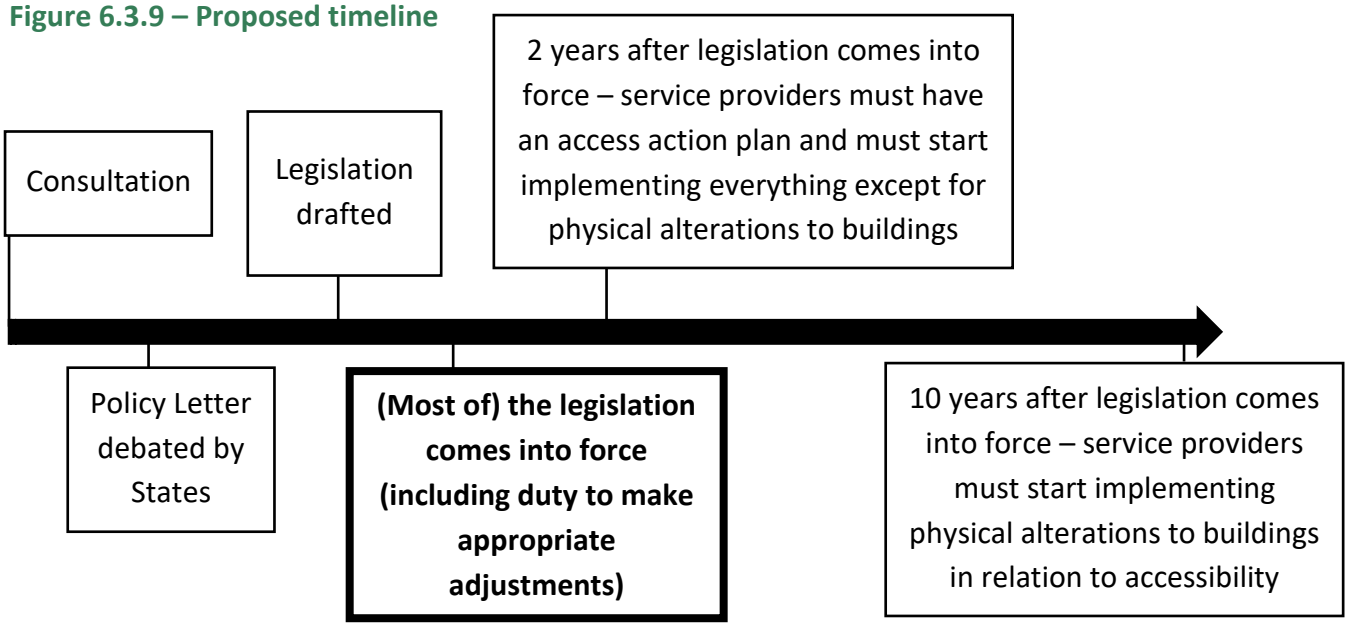
Our consultation questionnaire asks whether there should be a delay before goods or services providers and education providers are required to:

- have in place an access action plan and begin implementing it,
- begin implementing physical alterations to buildings in relation to the anticipatory accessibility duty.

It also asks whether there should be a delay in the introduction of a duty to implement physical changes to buildings in response to appropriate adjustment requests from individuals.

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

Figure 6.3.9 – Proposed timeline



6.4 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.

6.4.1 Changes in building regulations and access standards

We recognise 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.

Access plans should always be on a prioritised basis in any case, and it may not be possible for every business to be fully compliant all the time. However, for clarity, we are proposing that no one should be expected to undertake significant building operations 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 restaurant has an accessible toilet fitted which matches the required specification in the building regulations at the time the plans for it are approved. This is a substantial investment for the restaurant.

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 restaurant's access action plan. The restaurant 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.

Similarly, we propose 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.

6.5 Accessibility of roads and transport

6.5.1 Accessibility of pavements and roads

The accessibility of our roads is just as important as the accessibility of our buildings.

We intend 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 ramps, dropped kerbs or other sloped areas at appropriate places at or in the vicinity of any pedestrian crossing or intersection used by pedestrians. We expect that this would not be a provision which allowed individuals to claim compensation if a road was not made sufficiently accessible, and are instead considering alternative routes for enforcement (perhaps through an Equality and Rights Organisation).

6.5.2 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 appropriate adjustments and an anticipatory accessibility duty. 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 Equality and Rights Organisation (if there is one, or someone else if not) 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 issues directly through transport policy.

6.6 Summary

The below table summarises the duties in relation to appropriate adjustments and accessibility contained in these proposals.

	Reactive duty to provide appropriate adjustment	**Appropriate adjustments not affecting fixed physical features**	**Appropriate adjustments requiring physical alterations**	**Anticipatory Accessibility Duty**
Employment	Yes	Funded by employer unless disproportionate burden	Funded by employer unless disproportionate burden	No
Goods or Services (including Public Services and transport)	Yes	Funded by provider of goods or services unless disproportionate burden	Funded by provider of goods or services unless disproportionate burden	Yes
Education	Yes	Funded by education provider unless disproportionate burden	Funded by education provider unless disproportionate burden	Yes
Premises/Accommodation (applies also to common features in multi-tenancy buildings) (applies to residential and commercial lets)	Yes	Funded by accommodation provider, unless disproportionate burden	Should not unreasonably refuse if funded by tenant and funds available to return property to original condition	No

Section 7: Will there be an Equality and Rights Organisation?

7.1 What are the different organisations I need to know about to understand the proposed enforcement process?

7.1.1 Organisations involved in the complaints process - introduction

There are three organisations and one additional proposed organisation which you may wish to know about to understand how enforcement might work:

- the Employment Relations Service,
- the Employment & Discrimination Tribunal,
- the Royal Court, and
- a proposed Equality and Rights Organisation.

7.1.2 The Employment Relations 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 on employment issues and sex discrimination cases 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 sometimes carried out by Equality and Rights Organisations in other jurisdictions. 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.

7.1.3 The Employment & Discrimination Tribunal

The Employment & Discrimination Tribunal was established in its current form in 2005 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. Tribunal hearings are heard by three people who are selected from a wider panel. The panel of three hear and adjudicate the case. The Panel Members are trained for their roles but are not necessarily lawyers. 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 (details to be confirmed) to ensure that there would be sufficient capacity and that Panel Members have

the training that they needed to adjudicate cases under the new legislation, but we are proposing it would be this same Tribunal and not a new Tribunal that would hear cases under any new law.

7.1.4 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 (Employment) (Guernsey) Ordinance, 2005 and would continue to have a role in appeals under these proposals.

7.1.5 The Equality and Rights Organisation

The Disability and Inclusion Strategy, agreed by the States in 2013,[26] included a resolution:

> 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.[27]

Human rights include equality and non-discrimination as a cross-cutting theme, but are significantly broader – covering everything from the right to be free from torture to the right to social security. The Human Rights (Bailiwick of Guernsey) Law, 2000 has been described as "one of the most significant pieces of constitutional legislation enacted in the Bailiwick of Guernsey."[28] Human rights are promoted to seek to secure a society where all people live with dignity and the rule of law is upheld. Promoting human rights demonstrates a commitment to fundamental democratic values and seeks to prevent the possibility of atrocities and the abuse of power – whether through intention or negligence.

The Disability and Inclusion Strategy originally envisaged that this organisation would consider both equality and non-discrimination and the wider range of human rights.

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[26] Billet XXII of 2013.

[27] States of Guernsey Resolutions, 27th November, 2013: Policy Council "Disability and Inclusion Strategy", Resolution 6.

[28] States of Guernsey (2010) The Human Rights (Bailiwick of Guernsey) Law, 2000.

7.2 Would an Equality and Rights Organisation be independent of the States of Guernsey?

7.2.1 What are the Paris Principles?

The original States resolution indicated that the organisation would seek to be compliant with the Paris Principles.

The Paris Principles are regarded as setting out minimum standards for effective human rights institutions. Notably they specify the organisation should be free from the interference of the state; have the ability to allocate organisational resources as it sees fit; be free to appoint its own staff; be in possession of its own premises; have adequate funding; be able to define its own programme of work within a stable mandate or terms of reference which is set in law; the organisation must be pluralist in composition and activity; and must have the ability to consult with the public and give opinions freely[29].

7.2.2 Will the organisation comply with the Paris Principles?

The Committee is currently considering a full range of options, including options that both do and do not comply with the Paris Principles. The Committee is aware that the approach needs to be workable and proportionate for Guernsey. It would be desirable for the organisation to comply with the Paris Principles in terms of both international reputation and the effective governance and functioning of the organisation. The independence of an Equality and Rights Organisation is particularly important because it may play a role in managing concerns or complaints about government, or otherwise holding the government to account with regards to equality and human rights.

7.3 How would an Equality and Rights Organisation add value?

Some of the ways in which an Equality and Rights Organisation would add value are not directly related to the discrimination legislation proposals. Having an Equality and Rights Organisation could help to improve our compliance with international human rights treaties and improve accountability around a broad range of human rights. It could also help us to

[29] For further information on the Paris Principles see:
UN (1993) Principals relating to the Status of National Institutions (The Paris Principles) Available at:
https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx
and
Office of the United Nations High Commissioner for Human Rights (2010) "National Human Rights Institutions: History, Principles, Roles and Responsibilities". Available at:
https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf [accessed 1st March 2019].

better understand the challenges faced by people in the community and improve dialogue around equality and human rights issues and social policy development.

However, for the purposes of the non-discrimination legislation in particular, an Equality and Rights Organisation has the potential to add value if it can:

- support a smooth transition into force of the proposed discrimination legislation by providing advice, information and awareness raising.
- enable a more proactive and preventative approach to non-discrimination – this might include long-term sustained and well targeted communications campaigns to address cultural issues and prejudice; and early interventions, where it is in the public interest to take action without the need for an individual to file a formal complaint.
- be part of a structure which allows for the fast, effective and informal resolution of concerns to prevent escalation to formal hearings where possible.

7.4 What might an Equality and Rights Organisation do?

7.4.1 Scope of functions - introduction

An Equality and Rights Organisation might undertake some core functions which are standard for human rights institutions and outlined in the Paris Principles. These would not necessarily relate directly to the discrimination legislation. It might also undertake some functions in relation to the discrimination legislation.

The scope or terms of reference for such an organisation have not yet been developed, though this work is in progress. If the organisation were independent, it would be up to the organisation itself exactly how it performed its functions and what its priorities were at any one time. What will be important for the initial policy from the Committee is the outlining of a clear mandate.

7.4.2 Core functions

The Paris Principles include some functions which would be expected of an independent human rights organisation. The core functions aim to promote and protect equality and human rights. These are:

- **Promotion** – strategically targeted activities to promote equality and human rights. This could include education, training, awareness raising, media strategies, publications, seminars or workshops, community initiatives, and/or maintaining records, libraries or resources.

- **Advising government and encouraging compliance** – advising on the current equality and human rights situation in Guernsey and advising on how Guernsey's policy and legislation align with international standards.
- **Monitoring** – this would include monitoring to document situations but also monitoring to encourage positive change. This could be monitoring incidents, places of detention, long-term issues, or the general compliance situation.
- **Investigations** – It would have the power to investigate, gather evidence and make recommendations where there is a reason to believe that equality legislation is being broken or human rights violations are occurring.
- **Inquiries –** it may be able to run inquiries into serious and systemic discrimination or human rights violations. These could be desk based, through workshops, seminars or debates or be formed as full public inquiries.
- **Relationship with international organisations** – an organisation might play a role in international networks of equality and human rights institutions. It might also ensure that any submissions by the States to the UN about compliance with human rights treaties accurately reflect its work, and potentially provide shadow reports on submissions to the UN about Guernsey's compliance with human rights treaties.
- **Research –** any research required to support the above functions.
- **Core administration** – if the organisation is set up as an independent organisation it will also need to undertake some core administration, supporting its governance structure, maintaining a website, producing an annual report and accounts, strategic planning, and so on.

If Guernsey's organisation were Paris Principles compliant it would need to undertake all of these functions to a greater or lesser extent. No decisions have been made yet. This is something that we are still considering.

7.4.3 Potential functions in relation to discrimination legislation

There are some functions which we feel must be done in order for the legislation to function. In relation to the existing Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, the Employment Relations Service currently has powers to:

- Undertake investigations and issue **compliance notices** ('non-discrimination notices')
- Develop statutory **Codes of Practice**
- Provide **conciliation**
- Provide **advice and information** to people with rights and duties under the legislation

- Support developing **access action plans**

We intend that either the Employment Relations Service or the Equality and Rights Organisation (or possibly both) would need to undertake these functions for the future legislation.

We are exploring what other functions the Equality and Rights Organisation might have. This could include other ways of supporting people to reach informal agreements to resolve situations where rights have been violated, supporting people to bring cases under the legislation, bringing public interest cases itself, assisting with Accessibility action plans (see section 6), and potentially issuing civil penalties where violations occur. Again, what these functions are and who will undertake them have not been finalised yet.

7.4.4 How would an Equality and Rights Organisation interact with the Employment Relations Service and the Employment and Discrimination Tribunal?

It is currently envisaged that the Employment and Discrimination Tribunal (and Royal Court on appeal or for Human Rights cases) would retain the adjudicative function for formal complaints. This means that the Employment and Discrimination Tribunal would remain separate from the Equality and Rights Organisation. The Equality and Rights Organisation would not undertake adjudication.

We are considering a range of options with regards to how the Employment Relations Service could relate to an Equality and Rights Organisation. This could potentially involve the transfer of some functions the Employment Relations Service (under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005) to the Equality and Rights Organisation. These questions have not been decided as yet.

7.5 How is the business case progressing?

We had previously been planning to develop a business plan for an initial phase of the establishment of an Equality and Rights Organisation for publication in early 2019, followed by a second Policy Letter on the later phases of the work in 2020. We have since decided to develop a full proposal for the organisation – covering all stages, rather than to publish an interim report for an initial stage. This will take a little more time and is the reason why nothing has been published yet. We are hoping to make progress on this over the summer in order that a proposal is ready before April 2020. We are considering a full range of options.

Section 8: The complaints process

8.1 Structure of this section

There are a number of different topics that need to be considered in this section, these include:

- **how people get advice** (sections 8.2-8.4) – section 8.2 looks at advice for people who would have responsibilities under the proposed legislation and 8.3 is about advice for people who would have rights under the proposed legislation. Section 8.4 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 bringing a case.
- the **complaints process -** from formally registering a complaint to a Tribunal Hearing and on to appeals (section 8.5)
- the **impact on the parties to the hearing** – this section (8.6) covers the awarding of costs, support, protection and confidentiality during the hearing process
- the **outcome –** this section (8.7) looks at awards, remedies and who would be liable to pay compensation
- **evidence and determining cases –** this section (8.8) looks at rules about how evidence is managed and how cases are decided
- **investigations and compliance notices –** this section (8.9) looks at the basic actions available to intervene in the absence of an individual bringing forward a complaint.

Please see section 7.1 if you are unsure of the different organisations referred to in this section.

8.2 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.

8.2.1 Getting things right to start with

Preventing discrimination from happening is far better than responding to it after the event. We think that often people do not intend to discriminate, but do so through bad practice or lack of awareness. We do 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.

We are proposing that, before the legislation comes into force we would be able to provide employers and service providers with free advice on their responsibilities. We would also suggest that there should be education and communications campaigns to make sure that people are aware that the law is changing. This advice might be produced by the Equality and Rights Organisation, the Employment Relations Service, or someone else. This is a question we are considering. In our consultation questionnaire, we ask where people would feel most comfortable looking for advice.

Key question:

Where would you feel most comfortable going for advice about discrimination legislation if you were an employer or service provider?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

In addition to this information and education, we intend that either the proposed Equality and Rights Organisation or the Employment Relations Service would be able to develop statutory codes of practice in relation to the discrimination legislation.

8.2.2 Codes of practice

We are proposing that there is a power included in the legislation 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.

We propose 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 you did not do what the code of practice advised, you 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 you 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.

8.3 Advice about your rights

Policy objective: to support people to secure their rights by providing them with advice about what the law says.

8.3.1 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. We know 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[30]. In order to address this, we believe that we need both education and awareness raising (so that people are aware of their rights) and free, confidential advice when someone feels that they may have been discriminated against.

We have not decided yet who will provide this advice. One of the questions in our consultation asks who people feel most comfortable going to for advice when they have been discriminated against.

[30] See Committee *for* Employment & Social Security (2018) Discrimination Legislation Project: Sex Discrimination Ordinance: Summary of Consultation findings. Available at: www.gov.gg/sexdiscrimination

Key question:
Who would you feel most comfortable going to for advice if you had been discriminated against?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

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 bring a case.

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.

8.4 Representation and support to bring a case

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.

8.4.1 Representation

A person can represent themselves in Employment & 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 you 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.[31]

We are not proposing to change these rules.

[31] The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 – Schedule 2(c)

8.4.2 Why might a person want representation?

A person's representative might help them to prepare evidence for the case 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 witness statement.

8.4.3 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. You cannot currently access legal aid for the purposes of an Employment & Discrimination Tribunal hearing. This is because the Tribunal is designed to allow people to represent themselves if they wish. However, subject to means testing, you can receive 2 hours of 'green form' legal advice from an Advocate on your employment related matter, paid for by legal aid.

We are currently considering whether there should be particular cases where people do get some additional support to bring cases forward in order to ensure that people have fair access to justice.

8.5 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.

8.5.1 Overview of the process

The process for registering a complaint will be similar to the process used today for Employment & Discrimination Tribunal cases, with some slight modifications to the timescales and 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 8.5A** and **Figure 8.5B.**

Figure 8.5A – Overview of the complaint process: employment

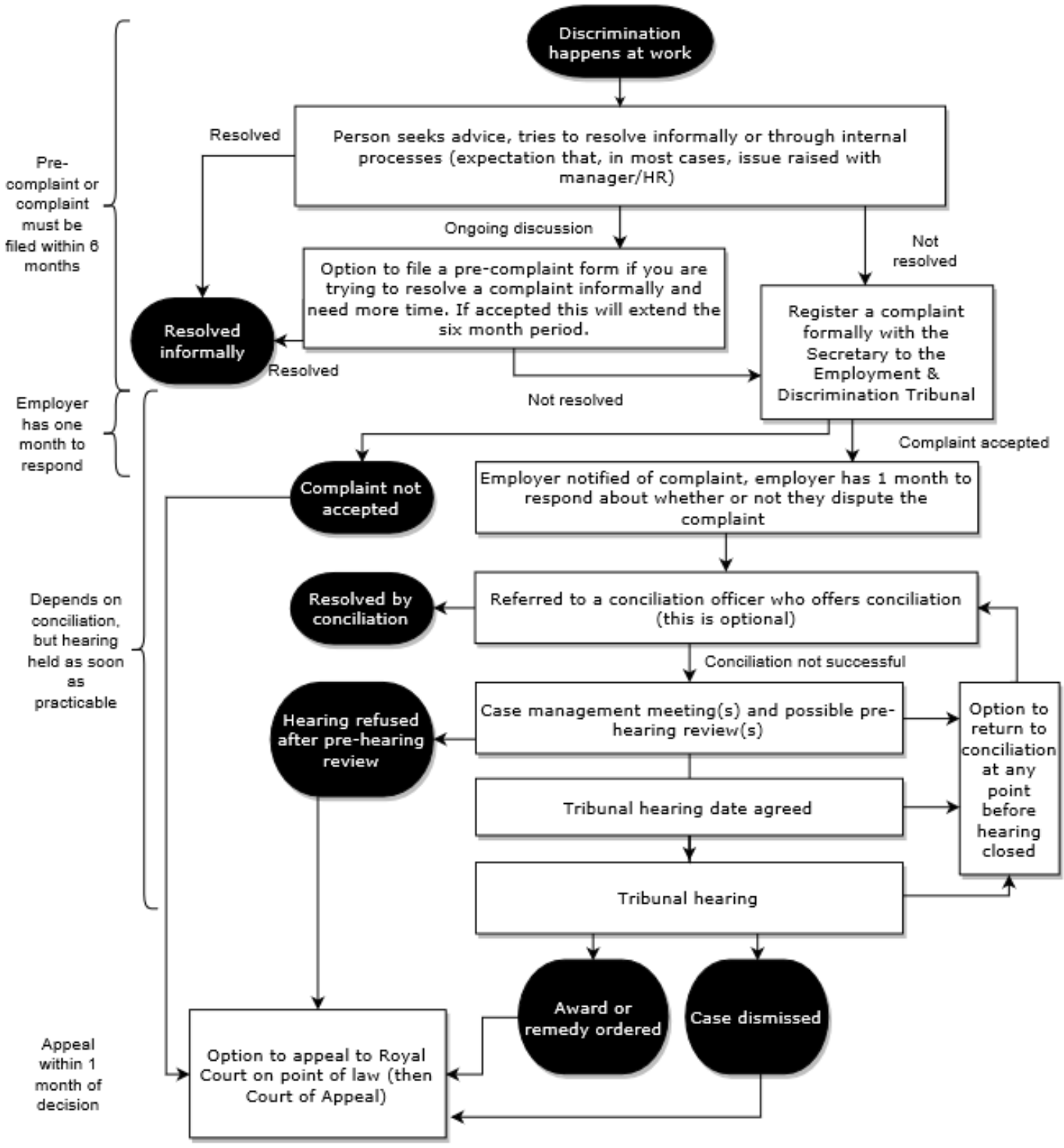
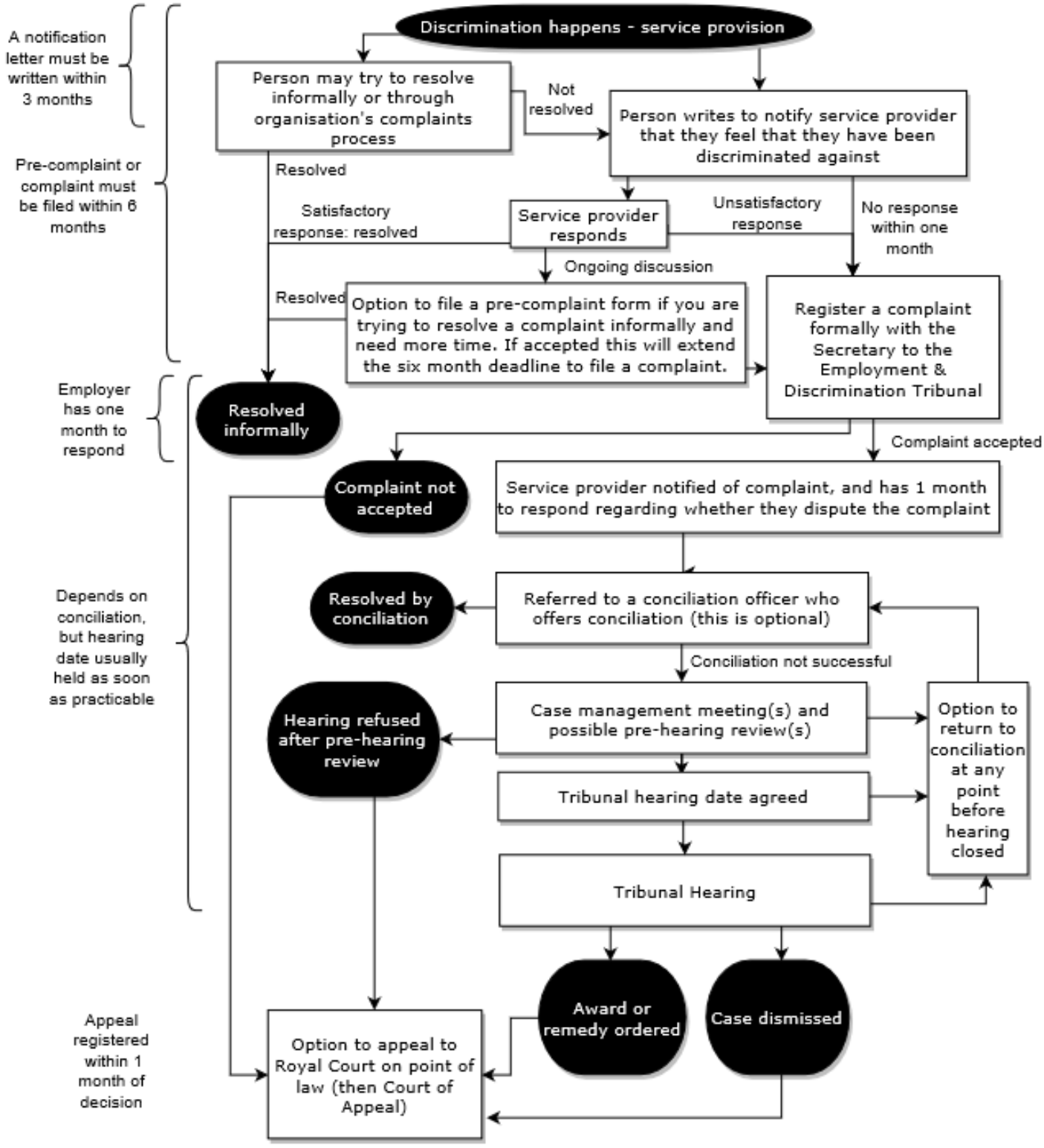


Figure 8.5B – Overview of the complaint process: service providers



We 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 we are 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 was discriminated against by a service provider (including accommodation providers, education providers, and clubs and associations), then they should write to notify the service provider that they feel that they have been discriminated against and that, unless they are able to resolve their concerns satisfactorily, they may bring a complaint.

The following sections look at these stages in more detail.

8.5.2 Written notification

We are 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 – giving them an explanation of what has occurred. They should also mention that, if a resolution cannot be reached, they may exercise their right to make a complaint under the legislation.

There would be no need for it to be a lawyer that gives the written notification. Advice on what a notification letter to a service provider would need to contain, would be available from either the Employment Relations Service or the Equality and Rights Organisation (which is to be determined).

The notification should take place within three months 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 we would expect 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 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 we propose, 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.

8.5.3 Pre-complaint notification

Ordinarily, a person would have to register a complaint within six months of the discrimination occurring. In some cases, a person might find that they are nearing the six months' time limit, but are in a process of seeking to resolve a complaint through an internal process or through informal discussions. In such situations, if they do not wish to formally register the complaint yet, but wish to retain the option of doing so, we propose that they may complete a 'pre-complaint notification'. This would be intended to advise the Tribunal that they may wish to make a complaint, but that they were in discussions with the employer or service provider about the issue. Some evidence may be required that discussions to seek to resolve the issue were underway. If accepted by the Tribunal, this would extend the time frame. A date might be specified, at which point the individual would have to update the Tribunal, to either close the possibility of making a complaint, seek a further extension, or make a complaint.

8.5.4 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 an appointed guardian or parent may act on their behalf to register the complaint (subject to certain verification requirements, and provided this is consistent with Guernsey's new capacity legislation, which is currently being drafted).

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 6 months of the discrimination occurring (unless a pre-complaint form has been filed, see section 8.5.3).

At any stage in the process, the Tribunal can dismiss a complaint:

- if it is frivolous, vexatious, trivial or misconceived.
- if the parties have signed a compromise agreement on the matter in question, or have otherwise settled the complaint in a legally binding agreement.

- if the parties have signed a form to say that they have settled the complaint through conciliation.
- if additional information has been requested by the Secretary to the Tribunal and has not been provided by the person making the complaint.

If the Tribunal refuse to accept or dismiss a complaint, then the person trying to make the complaint can appeal this decision on a point of law via the Royal Court.

A person registering a complaint may withdraw it at any time.

The Tribunal would also have the power to strike out a complaint that is not being actively pursued.

8.5.5 Time limits for registering a complaint

We propose that the complaint must be registered within 6 months of the discrimination occurring (unless a pre-complaint form has been filed and accepted). This 6 months could be extended by the Tribunal if there are good reasons why it was not possible to bring the complaint within six 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. N.B. the six month period, proposed in this paragraph, would be an extension on the time period specified in the Sex Discrimination Ordinance, which is currently three months, and, if agreed, may lead to a review of the time limits for other employment protection cases.

We propose that the time limit for Equal Pay complaints can be brought within the normal contractual limitation period of six years. Though, 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 six 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.

8.5.6 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 dispute 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 disputes 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 dispute the complaint, then the complaint is likely to be passed to a conciliation officer in the Employment Relations Service to resolve what will happen next.

8.5.7 Conciliation

We are 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 case, 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 case or 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 case, 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 case can be referred back to the Secretary to the Tribunal.

The parties can return to conciliation at any stage before the Tribunal hearing is closed.

You can read more about this in the Employment Relations publication 'Conciliation for Individuals' at: www.gov.gg/employmentrelations

8.5.8 Case management meeting and setting of a date for the hearing

Again, we are 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 case 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.

Witnesses must have something to say which is relevant to the questions that need to be determined. Witnesses should be able to talk about what happened, not what kind of person someone is – a character witness is unlikely to be relevant to the questions at hand. Parties to the case are ordinarily responsible for letting witnesses know when the hearing is scheduled and when they will be needed. They should do this in writing and keep a copy of the correspondence. If an important witness refuses to attend, then the party who has requested that witness can write to the chairperson and ask them to issue a summons. It is up to the chairperson whether they issue this or not. Similarly, to witnesses, if a person approached by one of the parties refuses to produce a document in evidence, the relevant party can write to the chairperson who may require that the evidence be provided.

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.

8.5.9 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. This may involve the three Tribunal Panel members reviewing paper based evidence on the particular key question that has been identified, which might determine whether the complaint can go ahead.

If, on the basis of the evidence in the paperwork in front of them, the Tribunal members are clear that the facts mean that the case cannot go ahead, they can issue a decision to this effect and dismiss the case. If the complaint can go ahead, it will proceed to a hearing.

The pre-hearing review decision will be published on ww.gov.gg[32]. A dismissal of a case can be appealed to the Royal Court on a point of law.

8.5.10 Tribunal Hearing

We are 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 will be given in writing, as soon as is practicable following the date of the hearing. This will be posted and/or emailed to the parties by the Secretary so that they receive it at the same time. The decision will be displayed at the Royal Court for seven days after it has been issued. It will also be published on www.gov.gg.

[32] https://gov.gg/article/151621/Employment--Discrimination-Tribunal-Decisions

8.5.11 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.

8.5.12 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 decision will be made on each complaint.

8.6 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.

8.6.1 The impact on parties to the hearing – introduction

This section looks at a number of topics which are related to how the hearing might impact a person, how accessible the hearings are, what costs they might face associated with a hearing and so on.

8.6.2 Accessibility of hearings

If either of the parties or any of the witnesses need appropriate 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.

8.6.3 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 case 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[33].

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.

We are not proposing to change this process.

8.6.4 Confidentiality

Similar rules around confidentiality of evidence apply in the Tribunal as they do in the Royal Court in Guernsey. We are 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 write up of a 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

[33] See section 6 of the schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 and also The Sex Discrimination (Recoverable Costs) Order, 2006

used if required to protect a child or vulnerable person who is bringing a case or who is a witness where, even if granted anonymity, it would be possible to identify them from the evidence given.

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. This means that there may be significant publicity around a case and, in most circumstances, people bringing cases would need to be prepared for the fact that their dispute will be in the public domain.

Why?

8.6.5 Why are hearings generally held in public?

There is an important underlying principle that justice is seen to be done. This is arguably part of what makes the Court and Tribunal system legitimate: the general public can observe cases and understand how decisions are reached. If all Court cases were held in private, there might be concerns that the Court or Tribunal was corrupt. Cases generally being heard in public (unless there is a particularly strong reason to do otherwise, as explained above) improves the accountability of adjudicators.

Having public hearings and judgements is also important because it allows people to better understand how the law is applied and what their responsibilities are. Access to cases means that people can refer to 'case law' or relevant historic cases to show where there have been patterns of making decisions in similar circumstances that can be used to help to understand new situations.

8.7 The Outcome of a Hearing

Policy objective: to ensure effective, proportionate and dissuasive remedies are available which can not only compensate individuals, but also reduce the chances of similar events from happening again.

8.7.1 Outcome of the hearing - introduction

If the Tribunal finds that the complaint is well-founded, then these proposals suggest that they 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.

8.7.2 Financial compensation (not including equal pay)

We are proposing that financial compensation should be proportionate to the loss that someone has experienced, as far as this is possible. We suggest that this would be calculated based on two elements:

- Actual financial loss, and
- Injury to feelings

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. This might include lost wages when unemployed if they were dismissed, for example, loss of increased earnings if they had not been promoted or denied access to employment, or loss of pensions. 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 employer or service provider would be able to challenge what they had put down if they felt what was being claimed was not linked to the act which is disputed or 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 not 'material'. 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. We propose 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 (in the UK, and we would not necessarily have the same band limits, the lower band is currently for awards up to £8,800). Cases where the relationship is more sustained might be higher (the middle band in the UK is currently £8,800-26,300). 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 (currently £26,300-44,000 in the UK) is for the most serious cases, with very exceptional cases being able to exceed the upper band[34].

[34] For further information, see UK Equality and Human Rights Commission (2018) "How to work out the value of a discrimination claim", available at:

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 will also increase the amount. 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.

Why?

8.7.3 Why the change in the award system?

The award for sex discrimination in Guernsey at the moment is three months' pay. The disadvantages of this system include the way that the award is linked to pay and the fact that people generally get the same amount – it acts like a fixed award – rather than an amount that is proportionate to the loss that they have experienced. The link to pay is problematic both because not all discrimination cases in future will come from employees (and for service-provision there is not an equivalent to pay to call upon), and because it means that higher paid people receive higher compensation, even if what has happened to them is not as bad.

Internationally, both the UN and EU standards say that awards for discrimination should be effective, proportionate and dissuasive[35]. The current award system in Guernsey is not proportionate to the severity of the act complained of. Arguably, the fixed award system, at its current level, is also not dissuasive. Compensatory awards are used around the world, including in Jersey, and we think that – from the perspective of justice – they are more appropriate than our current system.

https://www.equalityhumanrights.com/sites/default/files/quantification-of-claims-guidance.pdf

[35] UN Committee on the Rights of Persons with Disabilities (2018) General Comment no. 6 and Tobler (2005) Remedies and sanctions in EC non-discrimination law

8.7.4 Should there be an upper limit on the amount an employer or business has to pay?

In some national systems there is an upper limit on the amount that can be paid. There would be different ways of doing this. In the UK for example, there is an upper limit of £44,000 on the amount someone can be paid in compensation for injury to feeling – though this can be exceeded in exceptional cases. In Ireland, on the other hand there is an upper limit on the total financial compensation that can be ordered, of €40,000 or 2 years' pay (whichever is highest). Upper limits do not necessarily reduce the level of awards in general – under a proportionate system a lot of the awards would not be at the highest end of the scale. How high awards are will depend on the severity of the cases. The attraction, from a policy perspective, of the upper limit is that they might give some peace of mind to employers or service-providers about the worst-case scenario if a complaint is made against them. On the other hand, upper limits also reduce the amount of compensation in the most severe cases.

The Committee would like to understand what the community's views on upper limits for compensatory awards are. This is one of our questions in our consultation questionnaire.

?

Key questions:

- Do you think that there should be an upper limit to compensation for financial loss?
- Do you think that there should be an upper limit to compensation for injury to feelings?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

8.7.5 Equal pay cases

If the case is related to equal pay, then the Tribunal can order that the person's pay be increased, so that it is the same as the person that they are comparing themselves to, who is doing equal work but being paid more.

The Tribunal can also order arrears of up to 6 years before the date the complaint is registered with the Tribunal. This means that the employer will need to pay back-pay to the individual to make up the difference in pay between the amount that they were paid and the amount that they would have been paid if they were paid the same as the person that

they are comparing themselves to, who does equal work to them. Note that if claiming arrears in the early years of the legislation, it would not be possible to claim for years that were before the legislation came into force.

8.7.6 Non-financial remedies

We are proposing that in addition to, or instead of financial compensation, a person might request that the Tribunal 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 said action and is possible to check to see whether the person has done it.

Actions that the Tribunal could require would include:

- an order for equal treatment (e.g. to hire someone or to provide an appropriate 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, we propose that they would be subject to a fine.

Why?

8.7.7 Why introduce non-financial remedies?

Non-financial remedies have not been used in Guernsey before. In part, this is because many cases are to do with unfair dismissal and there has been an assumption that – if the relationship between a person and their employer had led to them having a public hearing – it would be inappropriate, in terms of the quality of their relationship, for the Tribunal to order the employer to reinstate a person in their role. However, there may be cases where an employee can be employed to do the same job in a different team, where they may require an appropriate adjustment but have not been dismissed, or other circumstances where an action would be beneficial to the person making the complaint. Of course, if an employment relationship had been damaged to the extent that a person would be in an uncomfortable environment if they returned to work in their previous job,

then they are unlikely to request this as a remedy, and the Tribunal would be able to consider whether such a reinstatement would be appropriate.

The intention of this legislation to improve equality of opportunity for everyone in Guernsey. Sometimes the best way to do this is to change behaviour or to address something which is at the cause of discrimination, rather than to issue financial awards which act like a fine for bad behaviour.

Having orders for non-financial remedies means that the Tribunal will be able to require a person or organisation to undertake actions like changing a policy or practice that is discriminatory, undertaking training, making a change for accessibility, or providing an appropriate adjustment. These will help to address the cause of some of the problems that are raised with the Tribunal.

8.7.8 How would this relate to unfair dismissal complaints?

At the moment, if you are dismissed and there is sex discrimination involved in the events leading up to your dismissal, then you can bring two complaints – one for sex discrimination and one for unfair dismissal. These are heard in the same Tribunal hearing. You can be awarded up to three months' pay if you win a sex discrimination case. If the Tribunal finds that you were unfairly dismissed, you can receive up to 6 months' pay in addition to the three month's pay (i.e. nine months' pay in total).

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.

8.7.9 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 & Discrimination Tribunal are treated as 'judgement debts'. There is a law that allows for judgement debts to be charged interest[36], so any awards would follow these general rules. Usually this interest rate is set at 8%.

8.7.10 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 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 they can approach H.M. Sheriff at the Royal Court.

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.

8.7.11 Who has to pay compensation when this is awarded?

It is the employer or service provider who has to pay the compensation. In many cases, this means that the individual staff member who behaved in a discriminatory way does not have to pay themselves, the organisation does. If it is an individual who is the employer or service provider, then they will need to pay themselves.

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.

[36] The Judgements (Interest) (Bailiwick of Guernsey) Law, 1985

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 clear internal policies which cover discrimination.

8.7.12 So are there any consequences for employees who discriminate?

We would anticipate that employees who are involved in discrimination would not usually be liable to pay compensation. It would, in most cases, be the employing organisation who is liable.

However, this does not mean that there are no consequences for the individual. Many employers will take disciplinary action in such circumstances. If the case involves harassment, it may be possible to also bring a criminal case against the person who undertook the harassment, under the Protection from Harassment (Bailiwick of Guernsey) Law, 2005.

8.7.13 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.

8.8 Evidence and determining cases

8.8.1 Gathering information before making a complaint

If someone thinks that they are in a situation which might allow them to bring a case 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, our 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 case is brought.

8.8.2 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 case 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.

8.8.3 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.

8.8.4 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 follows European standards).

8.8.5 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 case 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 a young woman. Other factors are considered including her level of experience, inter-personal skills and commitment to the firm. If the firm allows the fact that she is a young woman to be one factor amongst many that leads 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.

8.8.6 Assessing equal pay cases

We believe that assessing equal pay cases (particularly equal pay for work of equal value cases) may require additional expertise and a slightly different process. This is still under consideration.

8.9 Investigations and compliance notices

Policy objective: to provide a mechanism to correct unlawful conduct without individual complaint where this is in the public interest.

Why?

8.9.1 Why investigations and compliance notices?

The powers to undertake investigations and issue compliance notices are similar to those that already exist within Guernsey's sex discrimination legislation as 'non-discrimination notices'. At the moment, the powers to undertake investigations and issue compliance notices rests with the Committee *for* Employment & Social Security but is delegated to the Employment Relations Service. We are suggesting that, whether or not these powers are transferred to an Equality and Rights Organisation (if established), the powers should be retained.

While the powers in the non-discrimination notices section of the law have been used infrequently to date, they have been effective when used. It is possible that they could be used more frequently in future. However, whether they are used more frequently or not, we think it is an important tool within the legislation to enable a way to challenge poor practice without requiring an individual to make a complaint.

From the perspective of employers and service providers, it is also potentially beneficial in that it may identify and prompt an employer or service provider to change something which could, if left unchanged, increase the chances of a case being brought against them.

From the perspective of people who may experience discrimination, it is better if discriminatory practice is addressed early on in an official capacity, than left to individuals to bring cases.

8.9.2 Investigations

We are 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 adverts; procuring someone else to discriminate on their behalf; or not complying with a non-discrimination notice – see below) there would be a power to allow investigation of this matter. Who would have this power has yet to be decided but it would most likely be either the Employment Relations Service (who currently have this power under the existing legislation) or the proposed Equality and Rights Organisation.

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 & Discrimination Tribunal.

8.9.3 Compliance notices

If it is found that someone has, in fact, acted unlawfully, then we propose retaining a power 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. Again, it has not been decided yet who would have this power in future, but it is likely that it will be either the Employment Relations Service (who currently has powers to issue 'non-discrimination notices) or the proposed Equality and Rights Organisation.

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 issuer of notices, 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 bring a case. 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 found against them.

If someone fails to comply with a non-discrimination notice they may be fined.

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 & 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, lastly, it might uphold the notice. The decision of the Tribunal could then be appealed to the Royal Court.

The issuer of notices will keep a register of non-discrimination notices, which will be available to the public.

Notices will not appear in the register, and fines or convictions 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 9: Implementation

9.1 Outline of points that the Committee intends to consider further

There are a number of points which require further consideration in terms of how to bring about the implementation of these proposals (if agreed), before returning a Policy Letter to the States. They include:

- The need to ensure that the public has appropriate forewarning and information about the new legislation so that they can prepare before it comes into force.
- The need to ensure that there are sufficient people who have undergone the necessary training to provide advice to individuals about their rights and duties.
- The need to ensure that the conciliation service has sufficient training and capacity to conciliate discrimination cases.
- The need to ensure that the Tribunal (and their Secretariat) has sufficient training, capacity and other support that they might require and that they are equipped to hear cases when the legislation comes into force.
- The need to resolve questions about what role an Equality and Rights Organisation might have, how this would relate to the Employment Relations Service and how it would be established.
- The need to further consider how to implement the adjudication of equal pay for work of equal value complaints.
- The need to consider which other services will be affected, both inside the States (for example, Planning and Building Control might be affected by the accessibility provisions) and elsewhere (for example, do employers have sufficient access to Occupational Health advice for appropriate adjustments).

The exact details, costs, funding and plans have not been determined yet.

9.2 Should it come in all at once or should we phase introduction?

We recognise that a balance is needed between a desire to protect people's rights as soon as possible and the need to ensure that the Island can keep pace with the rate of change.

We think that it is most effective and efficient for the legislation to be drafted to cover the full scope of the proposals to start with, even if it is not all implemented at once. This is important to ensure that there is consistency, that everyone's rights are taken into

consideration and that the community is aware, from the start, about what the legislation will (eventually) cover and how.

We will need to make some decisions about when the legislation comes into force.

It will be possible to bring all of the provisions into force at once on an agreed date. However, it is also possible to put different commencement dates on different sections of the legislation. This would mean that some sections of the legislation might come into force after other sections of the legislation.

We would like the views of employers and service providers as to which sections they feel that they need more time to prepare for, and the general public about whether they think a delay to some sections is reasonable. This will help us to plan what commencement dates might be appropriate.

Key question:
Do you think the legislation should come into force all at once or should it be phased in?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

9.3 Independence from government

We recognise that there is need for a separation of duties. The States of Guernsey is the largest employer on the island and provides services to the whole of the island's population. It is likely that some cases may be about the States of Guernsey. We, therefore, think that in the ideal situation the Equality & Rights Organisation, Employment Relations Service and Employment & Discrimination Tribunal would all have a degree of independence from the executive function of government. We are considering whether there are practical options available for implementing a greater degree of independence.

9.4 Which case law will Guernsey follow?

The Tribunal will follow judgements from more senior courts in Guernsey, and previous Tribunal judgements may be persuasive in a case.

There is no guarantee that the Tribunal will follow case law from other jurisdictions, so it should not be relied upon. However, many of the fundamental ideas, definitions and principles in the proposals are substantially similar to those contained in the discrimination laws of other countries, particularly Ireland, the UK, Jersey and Australia. So cases from other countries could be presented to the Tribunal to be considered and may be persuasive; in particular, if the intention of the States is to base a particular clause/section of our law on the law of another jurisdiction it is likely that the case law of that jurisdiction will be persuasive with regard to that clause/section.

9.5 Developing equality data

While the proposals do not propose any requirement on businesses and other organisations to keep equality monitoring data, we are aware that we may need to develop the data that the States of Guernsey holds regarding equality.

This will be to support both the wider equality agenda and to monitor the effectiveness and impact of any new legislation.

We have yet to decide exactly what is needed but recognise that this might include surveys of social attitudes, and rates of perceived discrimination as well as data about the diversity of the population as a whole and how this is changing.

This is important because it would help us to have a clearer understanding of where different groups of the population are under-represented or over-represented. In some cases there might be acceptable reasons for their under-representation or over-representation, in other cases this would give us a good indication of where systemic discrimination might be occurring.

Section 10: Other questions

If you have any further questions please contact us at:

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Appendix A – Exceptions list – organised by field

A1 – Introduction - Exceptions

If the discrimination legislation is agreed and comes into force then, as a general rule, any discrimination on the basis of age, carer status, disability, marital status, pregnancy and maternity status, race, religion, sex, sexual orientation or trans status will be unlawful.

However, there will be exceptions to that rule where different treatment is not considered discrimination for the purposes of the proposed legislation. This list sets out our initial proposals about what those exceptions should be. It should be noted that this list might change, both following the consultation and States Debate, and also at the legal drafting stage – if the legal drafters identify something that is required to make this legislation coherent with other legislation or the legal system in Guernsey.

The exceptions are numbered for ease of reference.

This list is identical to the list in Appendix B but has been organised on the basis of field (i.e. employment, accommodation provision etc.) rather than ground (i.e. what applies for sex, disability, race etc.).

A2 – Reasons for different treatment which are not exceptions

Our proposals include some provisions that are not exceptions but which can allow people to act in ways that would otherwise be considered discrimination. These include positive action measures (which treat people differently to promote equality), providing appropriate 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 occupational requirements.

These are discussed in more detail in sections 3, 4 and 5 of this document.

A3 – Exceptions that apply to all fields

We are proposing that the exceptions in this section would apply in all or multiple fields – employment, goods or services provision, education provision, accommodation provision and in membership of clubs and associations.

Requirements of the law (no. 1)

We propose 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.

We also intend that the ability to make a discrimination complaint should not apply to anything done which 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)

We propose 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)

We propose that people will be allowed to introduce or maintain preferential fees, charges or rates for anything offered or provided to people in specific age groups, people with children, carers or people with disabilities.

Privacy (no. 4)

We propose that if people are treated differently based on sex for the sake of privacy where they believe that embarrassment or infringement of privacy can be reasonably expected to result from the presence of a person of another sex, this is permissible.
Access to single sex spaces and services for trans people is discussed in section A13.

Transitional arrangements (no. 5)

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. We propose 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.

Health and safety – pregnancy (no. 6)

We propose that an employer may treat a person who is pregnant, has recently given birth or is breast feeding differently if there are strong, demonstrable reasons based on health and safety to do so, including a reallocation of duties or a temporary suspension from duties. However, steps taken to protect the health and safety of a pregnant person should not result in them being treated unfavourably.

In a service provision context, or with regards membership of an association, we propose provision of a service (or membership) might be varied or refused to a person who is pregnant, but only where a service would similarly be refused to a person with another physical condition. This should only be where the service provider or association reasonably believe that providing the service would create a risk to the person's health or safety. This might cover, for example, not being permitted to fly after a certain stage of pregnancy, or undertake certain extreme sports activities.

A4 – Exceptions related to public functions

National security (no.7)

We propose that acts done for the purposes of safeguarding national security are exempt, but only where this is justified by the purpose.

Immigration (no. 8)

We propose that the Guernsey Border Agency would not be discriminating where it was acting in a way required to give effect to relevant UK immigration law or policy.

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 our 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.

We propose 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 age, 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 and pregnancy and maternity status 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)

We propose that any income assessment for grants, loans or benefits provided by the States of Guernsey may take into account household characteristics, or family composition as part of the income assessment.

Determinations (no. 11)

We propose 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 age, 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)

We propose 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 A12.

A5 – Employment – pay and other financial benefits

Minimum wage (no. 13)

We suggest that, for the purposes of the proposed legislation, it would not be considered direct or indirect discrimination for employers to base pay structures for apprentices or young people on the rates set out in minimum wage legislation – including where more than the minimum wage is paid, but this is related to the age bands within the minimum wage legislation.

Pay during statutory leave (no. 14)

In accordance with the Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016, offering paid leave, unpaid leave or reduced pay during maternity leave, maternity support leave or adoption leave does not constitute discrimination for the purposes of the proposed legislation.

Length of service and seniority (no. 15)

We intend that if older people are, on average, paid more than younger people or have different terms and conditions and this is because they are more senior or have longer service then this would not constitute age discrimination for the purposes of the proposed legislation.

Occupational benefits and pension schemes (no. 16)

By occupational benefits we mean schemes that provide benefits to all or a category of employees on their becoming ill, incapacitated or redundant. We propose that employers or providers of occupational benefits and pension schemes can use age criteria when administering occupational benefits and pension schemes:

- to fix ages for admission to a scheme or to fix an age at which you can claim benefits from it,
- to use ages in actuarial calculations when operating a scheme, or
- to provide different rates of severance payment based on the difference between the current age of the employee and their State Pension Age.

We propose that occupational pension schemes may also impose a maximum length of pensionable service or set different age-banded contribution levels for money purchase schemes (where the aim is to equalise the resultant benefit for comparable members).

A6 – Employment - other

Immigration and population management (no. 17)

We intend 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. 18)

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, we suggest 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.

Providing accommodation proportionate to family size (no. 19)

We propose that if an employer offers accommodation and this is proportionate to the occupant(s) family size this would not constitute discrimination for the purposes of the proposed legislation against employees with a different family size.

Family situations (no. 20)

We suggest 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 children or family members) without this being a disadvantage to employees that do not have those responsibilities (e.g. flexible working, a crèche, priority car parking),
- provide a benefit to an employee in relation to a family situation, for example, additional paid leave during a period of family illness or following a bereavement, or giving a wedding gift,
- provide benefits in relation to an employee's family members (e.g. health insurance for a spouse or children) without that being considered a disadvantage for employees who do not have those family members.

Qualifications (no. 21)

We propose 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. 22)

We suggest 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. 23)

We intend that a provider of employment services (including vocational training) may restrict access to their training or services where employers they provider services to are operating Genuine and Determining Occupational Requirements which mean that they require persons of a particular description for those roles.

Ministers of religion (no. 24)

We propose that the grounds of marital status, religion, sex, sexual orientation and trans status, may be taken into account when a person is recruited into employment which is for the purposes of organised religion.

By 'recruitment for the purposes of organised religion' we mean primarily, the recruitment of ministers, celebrants or leaders of that religion, but this may also include, in a limited range of circumstances, others employed in religious capacities where the job involves representing or promoting the religion (e.g. youth workers who have a role in promoting a religion). It does not cover individuals recruited by religious organisations to undertake roles which are not related to representing or promoting that religion.

This exception may only be applied if the grounds of protection specified in recruitment are in line with the doctrine of the religion or if a significant number of the followers of the religion would be offended if a person who has a certain characteristic falling within the listed grounds of protection were to hold the post.

Safeguarding (no. 25)

We do 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 which is unlawful and there are relevant safeguarding concerns.

A7 – Education

Mature students (no. 26)

We propose that further and higher education institutions can treat mature students differently in the allocation of places and fees chargeable. Income assessments in respect of the award of higher education grants may set an age at which to treat a student as financially independent from their parents.

Different treatment based on assessed needs (no. 27)

We propose 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. 28)

We propose 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 appropriate 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.

We propose that religious schools can take religion into account in their admissions policies.

We also propose that single sex schools may take sex into account in their admissions policies. Schools that are primarily single sex may admit pupils of another sex only to particular classes or particular year groups. Boarding schools may offer boarding to only one sex, while taking mixed sex day pupils.

See section A13 also on proposed trans status exceptions.

Curriculum (no. 29)

We propose 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.

We intend that religious schools may alter their curriculum so that they focus religious education on their own religion and/or may provide only a chaplain of one religion.

Carers supporting more than one person (no. 30)

We suggest that where a carer provides care or support for more than one person, an education provider or provider of goods or services may allocate places preferentially to include both or all of the persons for whom care or support is provided. For the purposes of the proposed legislation, this would not be considered discrimination against carers who provide care or support for only one person who was not prioritised for a place. This would cover, for example, a school prioritising the sibling of a child already in attendance over an only child if both are applying for a limited number of places in the same year group.

Please note that some of the other exceptions may be relevant for education providers. In particular see exceptions 48 on drama, 49 on sport, 55 on accommodation and 57 on trans status.

A8 – Financial services and pensions

Risk (no. 31)

We intend that people who provide pensions, 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.

We suggest the relevant grounds should be:

- age
- disability

This does not include pregnancy or maternity status, sex or trans status – we are suggesting broadly following the UK position with regard to risk and the original exceptions in the UK Equality Act for sex, pregnancy and gender reassignment were repealed by the Equality Act 2010 (Amendment) Regulations, 2012 (SI 2012/2992).

We would welcome the views of industry as to whether these grounds are correct as part of this consultation.

See also provisions on Occupational Pensions in section A5.

A9 - Health and care related

Infectious disease (no. 32)

We propose 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. 33)

We propose that if the difference in treatment of a person is solely based on a medical professional's clinical judgement this would not be discrimination for the purposes of the proposed legislation. This is not intended to protect medical professionals from complaints if their use of a protected ground is prejudicial and not clinically relevant.

Legal capacity (no. 34)

We intend to include an exception which 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. 35)

We propose 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 our services in this area are reliant on support from the UK NHS and, in order to ensure continuity of these essential services for Guernsey, we need to maintain a position that is consistent with the UK's.

Preventative public health services (no. 36)

We intend 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. This may take into account: age, carer status, disability, pregnancy and maternity status, sex, sexual orientation, or trans status.

Care within the family (no. 37)

We suggest 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.

Adoptive and foster parents (no. 38)

We suggest that it would be permissible to specify age requirements for a prospective adoptive or foster parent where the requirement is reasonable in light of the needs of the child or children concerned.

See also 'carers supporting more than one person (no.30)', in the education section above.

A10 - Goods or Services (other)

Cosmetic services that require physical contact (no. 39)

We suggest that it would not be discrimination, for the purposes of the proposed legislation, to treat a person differently on the basis of sex or trans status in relation to services of an aesthetic, cosmetic or similar nature, where the services require intimate physical contact between the service provider and the client.

Holidays aimed at particular age groups (no. 40)

We suggest that organisations may provide package holiday services aimed at particular age groups.

Requesting identification (no. 41)

We propose that age restricted services can request identification and refuse to serve individuals who appear to be below the required age who do not provide satisfactory identification.

Special interest services and services only suitable to the needs of certain persons (no. 42)

We intend 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 regarded as only suitable to the needs of certain persons. Segregation on the basis of colour is not permissible.

Broadcasters and publishers (no. 43)

We propose 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.

Web information services (no. 44)

Information Society Services Providers (ISSPs) provide services through a website. We intend 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.

A11 – Community, religion, cultural, entertainment, charities, sports, clubs and associations

Religious events and services (no. 45)

We propose that it would not be discrimination, for the purposes of the proposed legislation, to provide goods or services for a religious purpose only to people of a particular religious group.

We propose that acts of worship and religious ceremonies are not subject to this legislation including (but not limited to) the format of worship, the choice and use of religious texts, language and teaching, the nature of rituals and symbolism, who is permitted to participate in certain rites and so on. However, this exception is not intended to exempt religious organisations from any requirement to comply with the legislation. For example, religious organisations should still consider the access needs of disabled people; and should not arbitrarily exclude or deny the attendance of a person at an event generally open to the public, on the basis of a protected ground, where the reason for doing so is not connected to the religious requirements or doctrine reasonably associated with the nature of the event taking place.

We intend that religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their marital status (i.e. for divorcees), religion, sexual orientation or trans status.

See also hiring of religious premises in section A12 and recruitment of ministers of religion in section A6.

Charities acting within their constituted aims (no. 46)

We propose 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. 47)

We are proposing that clubs and associations can restrict their membership to people who share a particular characteristic related to a protected ground. Religious organisations may restrict their membership based on religious belief and practice. In both of these cases, however, it is not permissible to racially segregate on the basis of colour.

Drama and entertainment (no. 48)

We suggest that the legislation should permit differences in treatment in relation to age, disability, race, sex or trans status 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. 49)

We intend 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 an appropriate 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.

We also intend that it would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to age, disability, nationality, national origin or sex 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. This would allow, for example, the formation of a Guernsey, women's, under 21 basketball team.

See in section A13 below a proposed exception on trans status and sports.

A12 - Accommodation and premises

Premises not generally available to the public (no. 50)

We propose 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.

Religious buildings (no. 51)

We propose that organisations managing religious buildings, such as places of worship, may take their religious ethos into account in lettings policies.

Social housing and housing association allocations (no. 52)

We intend 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: age, carer status, disability, and residency status (in so far as this is associated with the race ground).

Specialist accommodation (no. 53)

We propose that accommodation which is set aside for a particular use or for a particular category of people is permitted. For example, retirement homes, refuges, accommodation for particular categories of religious persons, accommodation for people with care needs and sheltered accommodation. Age criteria may be used with respect to accommodation for older people.

Accommodation provided in someone's home (no. 54)

We propose 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. We intend 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.

Communal accommodation (no. 55)

Communal accommodation is accommodation with shared sleeping or sanitary facilities for men and women which may, for reasons of privacy, need to be used only by persons of one sex. We propose that if someone providing accommodation excludes a person because of sex or trans status, then they must consider: whether and how far it is reasonable to expect that the accommodation should be altered or extended; whether further accommodation could be provided; and the relative frequency of demand or need for the accommodation by persons of each sex. *(A discussion in relation to trans status is included in section A13).*

Boarding schools, employers who accommodate staff, youth clubs and others for whom this is relevant may take their ability to provide accommodation according to this exception into account in admission or recruitment decisions.

Population Management (no. 56)

We propose 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.

Children in rental properties - We also intend to include an exception clarifying a limited range of circumstances in which it might be permissible to refuse a tenant on the basis that they have children. This is a question being asked in the consultation and is included in section A13 below.

A13 - Exceptions which we are asking questions about

Access to single sex services and spaces, sports and accommodation for trans people (no. 57)

We recognise that access by trans people to single sex services and spaces has been a subject of debate in the UK and elsewhere. It is worth noting, however, that the UK debate has arisen in relation to a proposed change to the UK gender recognition legislation which would make it easier for a person to legally change their gender, including on their birth certificate. We do not currently have gender recognition legislation in Guernsey.

Guernsey's existing discrimination legislation includes a 'gender reassignment' ground. We are proposing to retain a ground along the lines of 'gender-reassignment' (though we have

suggested calling it 'trans status'). With regards access to single sex spaces there are a range of options, with three positions commonly put forward:

- The first position would be that sex should be defined biologically and the expectation should be that trans people continue to use services based on biological sex regardless of whether they have transitioned. This would mean that trans women[37] would be expected to use services for men and trans men[38] would be expected to use services for women.
- Secondly, a position where it is assumed that trans people should be included as the gender that they present as, but that an employer or service-provider could exclude a trans person from a single-sex role, space or service in some circumstances if they could objectively justify doing so. It is possible further guidance could be produced on when exclusion is objectively justifiable in future, for example, by an Equality and Rights Organisation if it is established.
- Lastly, it would be possible to say that, in all circumstances, trans women should be treated as women and trans men should be treated as men. This would mean that in no circumstances would it be legal to exclude a trans woman from a service or facility for women or a trans man from a service or facility for men.

The majority of the Committee's preferred option would be to allow a case by case approach and discretion where this can be justified. This reflects the complexity of needs associated with different stages of transition and different contexts where a trans person might be treated differently either for their own benefit (e.g. when accessing medical services) or because of the potential impact on other service users (e.g. when working with women recovering from sexual abuse who find people with male characteristics to be triggering).

A question on which position is preferable is included in our questionnaire.

Key question:

On what basis do you think trans people should have access to single sex spaces and services?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

[37] By 'trans women' we mean people whose original birth certificate states that they are male who have transitioned, or are transitioning to identify as a woman

[38] By 'trans man' we mean people whose original birth certificate states that they are female who has transitioned or is transitioning to identify as a man

If the Committee's preferred position was adopted we would also expect to include the following exceptions:

- If a competitive sport is arranged based on sex, the organisers may restrict the participation of a person on the grounds of trans status but only if this is necessary in that case to secure fair competition. We would expect sports organisations to consult the evolving national or international best practice guidance on the question of trans inclusion.
- Where providing communal accommodation a provider may exclude a person on the basis of trans status if this can be objectively justified, but only if they have considered whether or how far it is reasonable to expect that the accommodation should be altered or extended to include that person appropriately, or whether further accommodation could be provided.
- We would anticipate that schools would also follow the above exception on single sex services where a school, or a particular activity is segregated on a sex basis. This would mean that trans pupils should usually be treated according to the gender that they present as, but that this should be managed on a case by case basis and different treatment in some contexts is permissible where this is objectively justified. Different treatment should never be such that it would impact the pupils' right to education.

There is not an exception relating to employment or recruitment, however, as with the other grounds, treating a trans person differently in recruitment would be subject to there being an objectively justified Genuine and Determining Occupational Requirement, as discussed in section 4.8.

Children in rental properties (no. 58)

We know that, in many cases, private landlords currently advertise properties as not accepting children. The inclusion of carer status in the grounds of protection will mean that, in general, landlords will not be allowed to refuse to rent to someone based on the fact that they have children.

The Committee's initial thoughts about when it is acceptable to exclude children are as follows: Landlords may only take age, family composition (i.e. carer status), or pregnancy of a tenant or prospective tenant into account when letting a property if:

- the property is a care facility, such as a residential home or another special category of housing reserved for particular persons,
- the property is part of a development intended to be 'retirement housing' for older people,

- the family size is such that the dwelling would not comply with best practice guidelines provided by environmental health, or
- the property is a house of multiple occupation with communal facilities and there are safeguarding concerns related to children sharing these facilities with unfamiliar adults.

However, there is an opportunity to share your views with us on this point as part of the consultation questionnaire.

Key question:

What is your view on whether landlords should be able to specify "no children"?

Let us know what you think and why.
Questionnaire available at www.gov.gg/discriminationconsultation

Appendix B – Exceptions list – organised by protected ground

This list outlines the same policy on exceptions as the list in Appendix A (but in some cases has been summarised). However, it has been organised on the basis of the grounds of protection (i.e. what applies for sex, disability, race and so on) rather than field (i.e. employment, accommodation provision, etc.). For further detail on the proposed exceptions please see Appendix A.

Please note that the numbering, which is included for ease of referencing, corresponds with the numbering in Appendix A, so is not sequential.

B1 - Applicable to all grounds

We propose the following exceptions are applicable to all grounds:

- **Requirements of the law (no. 1)** - If someone is doing something that they are required to do by law, order of a court or tribunal, or something done in a judicial capacity, this would not be discrimination for the purposes of the proposed legislation.
- **Wills and gifts (no. 2)** - Making a will or giving a gift would not be subject to discrimination complaints.
- **Transitional arrangements (no. 5)** - There may be some historic schemes that have treated people differently with regards to the protected grounds (for example in social insurance, insurance or pension plans). These would not be 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.
- **National security (no. 7)** - Acts done for the purposes of safeguarding national security would be exempt, but only where this is justified by the purpose.
- **Immigration and population management (nos. 8, 17 and 56)** - The Guernsey Border Agency would not be discriminating where it was acting in a way required to give effect to relevant UK immigration law or policy. Employers and accommodation providers must continue to appropriately take into account population management and immigration requirements.
- **Genuine and determining occupational requirements in part of a role (no. 18)** - 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, we suggest 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.

- **Genuine and Determining Occupational Requirements and Employment Services (no. 23)** - 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.
- **Safeguarding (no. 25)** - Nothing 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 which is unlawful and there are relevant safeguarding concerns.
- **Curriculum (no. 29)** - 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.
- **Blood donation services (no. 35)** - 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 our services in this area are reliant on support from the UK NHS and, in order to ensure continuity of these essential services for Guernsey, we need to maintain a position that is consistent with the UK's.
- **Care within the family (no. 37)** - If people are providing care to other people as if they were a family member the arrangements made for how, to whom, and where they provide care are not subject to this legislation.
- **Special interest services and services only suitable to the needs of certain persons (no. 42)** - A goods or services provider 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 regarded as only suitable to the needs of certain persons. Segregation on the basis of colour is not permissible.

- **Broadcasters and publishers (no. 43)** - 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.
- **Web information services (no. 44)** - Information Society Services Providers (ISSPs) provide services through a website. We intend 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' (see Appendix A for further details).
- **Religious events and services (no. 45)** - Acts of worship and religious ceremonies are not subject to this legislation including (but not limited to) the format of worship, the choice and use of religious texts, language and teaching, the nature of rituals and symbolism, who is permitted to participate in certain rites and so on. However, this exception is not intended to exempt religious organisations from any requirement to comply with the legislation. For example, religious organisations should still consider the access needs of disabled people; and should not arbitrarily exclude or deny the attendance of a person at an event generally open to the public on the basis of a protected ground where the reason for doing so is not connected to the religious requirements or doctrine reasonably associated with the nature of the event taking place.
- **Charities acting within their constituted aims (no. 46)** - 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. 47)** - Clubs and associations would be able to 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.
- **Premises not generally available to the public (no. 50)** - 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.
- **Religious buildings (no. 51)** - Organisations managing religious buildings, such as places of worship, may take their religious ethos into account in lettings policies.

- **Specialist accommodation (no. 53)** - Accommodation which is set aside for a particular use or for a particular category of people is permitted. For example, retirement homes, refuges, accommodation for particular categories of religious persons, accommodation for people with care needs and sheltered accommodation.
- **Accommodation provided in someone's home (no. 54)** - 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. We intend 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.

B2 – Age

We propose the following exceptions would apply to age (in addition to those that apply to all grounds in section B1).

- **Preferential charging (no. 3)** - Preferential fees, charges or rates for people in specific age groups would be permissible.
- **Population Management (no. 9)** - 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 age (see Appendix A for further detail).
- **Determinations (no. 11)** - An officer or panel (with delegated authority) may make determinations which take into account age 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 relevant Committee thereof.
- **Minimum wage (no. 13)** - It would not be considered direct or indirect discrimination for employers to base pay structures for apprentices or young people on the rates set out in minimum wage legislation – including where more than the minimum wage is paid, but this is related to the age bands within the minimum wage legislation.
- **Length of service and seniority (no. 15)** - If older people are, on average, paid more than younger people or have different terms and conditions and this is because they are more senior or have longer service then this would not constitute age discrimination for the purposes of the proposed legislation.

- **Occupational benefits and pension schemes (no. 16)** - By occupational benefits we mean schemes that provide benefits to all or a category of employees on their becoming ill, incapacitated or redundant. We propose that employers or providers of occupational benefits and pension schemes can use age criteria when administering occupational benefits and pension schemes:
    - to fix ages for admission to a scheme or to fix an age at which you can claim benefits from it,
    - to use ages in actuarial calculations when operating a scheme, or
    - to provide different rates of severance payment based on the difference between the current age of the employee and their State Pension Age.

  We propose that occupational pension schemes may also impose a maximum length of pensionable service or set different age-banded contribution levels for money purchase schemes (where the aim is to equalise the resultant benefit for comparable members).
- **Mature students (no. 26)** - Further and higher education institutions can treat mature students differently in the allocation of places and fees chargeable. Income assessments in respect of the award of higher education grants may set an age at which to treat a student as financially independent from their parents.
- **Risk (no. 31)** - People who provide pensions, annuities, insurance policies or any other services related to the assessment of risk would be allowed to use age to undertake assessments and vary the service that they provide accordingly (see Appendix A for further detail).
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).
- **Adoptive and foster parents (no. 38)** - It would be permissible to specify age requirements for a prospective adoptive or foster parent where the requirement is reasonable in light of the needs of the child or children concerned.
- **Holidays aimed at particular age groups (no. 40)** - Organisations may provide package holiday services aimed at particular age groups.
- **Requesting identification (no. 41)** - Age restricted services can request identification and refuse to serve individuals who appear to be below the required age who do not provide satisfactory identification.
- **Drama and entertainment (no. 48)** - The legislation should permit differences in treatment in relation to age where this is reasonably required for the purposes of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.

- **Sports, games and other competitive activities (no. 49)** - It would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to age 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. This would allow, for example, the formation of a Guernsey, women's, under 21 basketball team.
- **Social housing and housing association allocations (no. 52)** - Social housing providers and housing associations can treat people differently in relation to age when allocating accommodation or managing waiting lists based on prioritisation in line with an allocations policy related to people's needs.
- **Specialist accommodation (no. 53)** - Age criteria may be used with respect to the provision of accommodation for older people.

B3 - Carer status

We propose the following exceptions would apply to carer status (in addition to those that apply to all grounds in section B1).

- **Preferential charging (no. 3)** - Preferential fees, charges or rates for carers or people with children would be permissible.
- **Population Management (no. 9)** - 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.
- **Household composition for grants, loans, or benefits (no. 10)** - An income assessment for grants, loans or benefits provided by the States of Guernsey may take into account household characteristics or family composition as part of the income assessment.
- **Determinations (no. 11)** - An officer or panel (with delegated authority) may make determinations which take into account carer status 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 relevant Committee thereof.
- **Providing accommodation proportionate to family size (no. 19)** - If an employer offers accommodation and this is proportionate to the occupant(s) family size this would not constitute discrimination for the purposes of the proposed legislation against employees with a different family size.
- **Family situations (no. 20)** - 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 children or family members) without this being a disadvantage to employees that do not have those responsibilities (e.g. flexible working, a crèche, priority car parking),
  - provide a benefit to an employee in relation to a family situation, for example, additional paid leave during a period of family illness or following a bereavement, or giving a wedding gift,
  - provide benefits in relation to an employee's family members (e.g. health insurance for a spouse or children) without that being considered a disadvantage for employees who do not have those family members.

- **Carers supporting more than one person (no. 30)** - Where a carer provides care or support for more than one person, an education provider or provider of goods or services may allocate places preferentially to include both or all of the persons for whom care or support is provided. For the purposes of the proposed legislation, this would not be considered discrimination against carers who provide care or support for only one person who was not prioritised for a place. This would cover, for example, a school prioritising the sibling of a child already in attendance over an only child if both are applying for a limited number of places in the same year group.
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).

  Social housing and housing association allocations (no. 52) - Social housing providers and housing associations would be able to treat people differently in relation to carer status when allocating accommodation or managing waiting lists based on prioritisation in line with an allocations policy related to people's needs.

Children in rental properties (no. 58) - There is a question asked about this in our questionnaire. For further discussion see section A13.

B4 – Disability

We propose the following exceptions would apply to disability (in addition to those that apply to all grounds in section B1).

- **Preferential charging (no. 3)** - Preferential fees, charges or rates for disabled people would be permissible.
- **Population Management (no. 9)** - 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 refer to disability but only when considering the extension and/or type of permit for people who are already resident (see Appendix A for further detail).
- **Determinations (no. 11)** - An officer or panel (with delegated authority) may make determinations which take into account 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 relevant Committee thereof.
- **Supported employment (no. 22)** - 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.
- **Different treatment based on assessed needs (no. 27)** - It would not be considered discriminatory, for the purposes of the proposed legislation, 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. 28)** - 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 appropriate 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.
- **Risk (no. 31)** - People who provide pensions, annuities, insurance policies or any other services related to the assessment of risk would be allowed to use disability to undertake assessments and vary the service that they provide accordingly (see Appendix A for further details).
- **Infectious disease (no. 32)** - 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. 33)** - If the difference in treatment of a person is solely based on a medical professional's clinical judgement this would not be discrimination, for the purposes of the proposed legislation. This is not intended to protect medical professionals from complaints if their use of a protected ground is prejudicial and not clinically relevant.
- **Legal capacity (no. 34)** - We intend to include an exception which 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.
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).
- **Drama and entertainment (no. 48)** - The legislation would permit differences in treatment in relation to disability 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. 49)** - 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 an appropriate 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.

  We also intend that it would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to disability 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.
- **Social housing and housing association allocations (no. 52)** - Social housing providers and housing associations can treat people differently in relation to disability when allocating accommodation or managing waiting lists based on prioritisation in line with an allocations policy related to people's needs.

B5 - Marital status

We propose the following exceptions would apply to marital status (in addition to those that apply to all grounds in section B1).

- **Family situations (no. 20)** - It would not be considered discrimination for the purposes of the proposed legislation, for employers to:
    - provide a benefit to an employee in relation to a family situation, for example, additional paid leave during a period of family illness or following a bereavement, or giving a wedding gift, or
    - provide benefits in relation to an employee's family members (e.g. health insurance for a spouse or children) without that being considered a disadvantage for employees who do not have those family members.
- **Ministers of religion (no. 24)** - Marital status may be taken into account in recruitment decisions for the purposes of organised religion (see Appendix A for details).
- **Religious events and services (no. 45)** - Religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their marital status (i.e. for divorcees).

B6 - Pregnancy or maternity status

We propose the following exceptions would apply to pregnancy or maternity status (in addition to those that apply to all grounds in section B1).

- **Health and safety – pregnancy (no. 6)** - An employer may treat a person who is pregnant, has recently given birth or is breast feeding differently if there are strong, demonstrable reasons based on health and safety to do so, including a reallocation of duties or a temporary suspension from duties. However, steps taken to protect the health and safety of a pregnant person should not result in them being treated unfavourably. In a service provision context, or with regards membership of an association, we propose provision of a service (or membership) might be varied or refused to a person who is pregnant, but only where a service would similarly be refused to a person with another physical condition. This should only be where the service provider or association reasonably believe that providing the service would create a risk to the person's health or safety. This might cover, for example, not being permitted to fly after a certain stage of pregnancy, or undertake certain extreme sports activities.
- **Population Management – (no. 9)** - 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 refer to pregnancy and maternity

status but only when considering the extension and/or type of permit for people who are already resident (see Appendix A for further detail).

- **Pay during statutory leave (no. 14)** – In accordance with the Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016 - offering paid leave, unpaid leave or reduced pay during maternity leave, maternity support leave or adoption leave does not constitute discrimination for the purposes of the proposed legislation.
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).

B7 – Race

We propose the following exceptions would apply to race (in addition to those that apply to all grounds in section B1).

- **Population Management (no. 9)** - 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 nationality, or national or ethnic origins (see Appendix A for further detail).
- **Residency status (no. 12)** - 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.
- **Qualifications (no. 21)** - 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. (Both for employers and for vocational bodies).
- **Drama and entertainment (no. 48)** - The legislation should permit differences in treatment in relation to race where this is reasonably required for the purposes of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.
- **Sports, games and other competitive activities (no. 49)** - It would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to 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. This would allow, for example, the formation of a Guernsey, women's, under 21 basketball team.

- **Social housing and housing association allocations (no. 52)** - 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 residency status (in so far as this is associated with the race ground).

B8 - Religious belief

We propose the following exceptions would apply to religious belief (in addition to those that apply to all grounds in section B1).

- **Ministers of religion (no. 24)** - A person's religion may be taken into account in recruitment decisions for the purposes of organised religion (see Appendix A for details).
- **Admissions policies (no. 28)** - Religious schools can take religion into account in their admissions policies.
- **Curriculum (no. 29)** - Religious schools may alter their curriculum so that they focus religious education on their own religion and/or may provide only a chaplain of one religion.
- **Religious events and services (no. 45)** - It would not be discrimination, for the purposes of the proposed legislation, to provide goods or services provided for a religious purpose only to people of a particular religious group. We also intend that religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their religion.
- **Clubs and associations – restricted membership (no. 47)** - Religious organisations may restrict their membership based on religious belief and practice.

B9 – Sex

We propose the following exceptions would apply to sex (in addition to those that apply to all grounds in section B1).

- **Privacy (no. 4)** - If people are treated differently based on sex for the sake of privacy where they believe that embarrassment or infringement of privacy can be

reasonably expected to result from the presence of a person of another sex, this is permissible.

- **Ministers of religion (no. 24)** - A person's sex may be taken into account in recruitment decisions for the purposes of organised religion (see Appendix A for details).
- **Admissions policies (no. 28)** - Single sex schools may take sex into account in their admissions policies. Schools that are primarily single sex may admit pupils of another sex only to particular classes or particular year groups. Boarding schools may offer boarding to only one sex, while taking mixed sex day pupils.
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).
- **Cosmetic services that require physical contact (no. 39)** - It would not be discrimination, for the purposes of the proposed legislation, to treat a person differently on the basis of sex in relation to services of an aesthetic, cosmetic or similar nature, where the services require intimate physical contact between the service provider and the client.
- **Drama and entertainment (no. 48)** - The legislation should permit differences in treatment in relation to sex where this is reasonably required for the purposes of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.
- **Sports, games and other competitive activities (no. 49)** - It would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to sex 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. This would allow, for example, the formation of a Guernsey, women's, under 21 basketball team.
- **Communal accommodation (no. 55)** - Communal accommodation is accommodation with shared sleeping or sanitary facilities for men and women which may, for reasons of privacy, need to be used only by persons of one sex. We propose that If someone providing accommodation excludes a person because of sex then they must consider: whether and how far it is reasonable to expect that the accommodation should be altered or extended; whether further accommodation could be provided; and the relative frequency of demand or need for the accommodation by persons of each sex. Boarding schools, employers who accommodate staff, youth clubs and others for whom this is relevant may take their

ability to provide accommodation according to this exception into account in admission or recruitment decisions.

B10 - Sexual orientation

We propose the following exceptions would apply to sexual orientation (in addition to those that apply to all grounds in section B1).

- **Ministers of religion (no. 24)** - A person's sexual orientation may be taken into account in recruitment decisions for the purposes of organised religion (see Appendix A for details).
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).
- **Religious events and services (no. 45)** - Religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their marital status (i.e. for divorcees), religion, sexual orientation or trans status.

B11 - Trans status

We propose the following exceptions would apply to trans status (in addition to those that apply to all grounds in section B1).

- **Ministers of religion (no. 24)** - A person's trans status may be taken into account in recruitment decisions for the purposes of organised religion (see Appendix A for details).
- **Preventative public health services (no. 36)** - Preventative public health interventions targeted at particular groups would be permissible where this is objectively justified through epidemiological or other relevant data (see Part A for details).
- **Cosmetic services that require physical contact (no. 39)** - It would not be discrimination, for the purposes of the proposed legislation, to treat a person differently on the basis of trans status in relation to services of an aesthetic, cosmetic or similar nature, where the services require intimate physical contact between the service provider and the client.

- **Religious events and services (no. 45)** - Religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on the basis of their trans status.
- **Drama and entertainment (no. 48)** - The legislation should permit differences in treatment in relation to trans status where this is reasonably required for the purposes of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.

Access to single sex services and spaces, sports and accommodation for trans people (no. 57) – This is something which is addressed in our consultation – for a discussion see section A13.