Committee *for*
Employment & Social Security

Discrimination legislation: draft proposals
Frequently Asked Questions
Employers and service providers

Last updated: July 2019

This leaflet has been created in order to answer some of the questions that have been asked to date regarding the discrimination legislation draft proposals.

The content of this leaflet explains **what it would mean for employers and service providers if the proposals for discrimination legislation were agreed by the States in their current form**. The draft proposals are currently out for consultation and could be amended as a result of the consultation or by the States. Consequently, this leaflet provides an explanation of the draft proposals and **does not constitute advice** about what the legislation will contain, as this may change.

More information, as well as an opportunity to give your views on the draft proposals, is available online at www.gov.gg/discriminationconsultation.

Question 1: **How long do I have to get my organisation ready for the new legislation?**

Answer 1: The Committee is aiming to return a final set of proposals to the States for debate by April 2020. If the States approves the proposals then the legislation would need to be prioritised for drafting, drafted and return to the States for final agreement. There would also need to be work undertaken to ensure that everything is set up to give people advice about the new legislation and to hear cases. The very earliest the legislation could come into force would be 2021.

Question 2: If the proposals are agreed by the States what would my duties be?

Answer 2: If the proposals set out in the consultation document are approved by the States, then you and your organisation must not treat people differently based on a list of ten characteristics referred to as 'grounds of protection'. This would cover how you treat job applicants, employees and company directors, but it would also cover how you would treat customers, clients, students, tenants and, where applicable, how you manage membership of a club or association.

The ten proposed grounds of protection are: age, carer status (people who provide care or support for a dependent child or a disabled person over the age of 18), disability, marital status, pregnancy or maternity status, race (which includes colour, descent, national or ethnic origin and nationality), religious belief (including lack of religious belief), sex, sexual orientation and trans status.

The proposals say that you must not directly discriminate – i.e. treat a person less favourably compared to others in a similar situation based on any of these grounds of protection (whatever your intention in doing so) or as a result of something arising from their disability (unless the latter can be objectively justified).

They say that you also must not indirectly discriminate – i.e. put rules or arrangements in place that apply to everyone, but that disadvantage a person or group of people who have a protected characteristic, unless you can objectively justify this.

The proposals also say that you must not treat someone worse because they tried to enforce their rights under this legislation (victimisation) and that you must not harass or sexually harass your employees or service users, or allow them to be harassed.

The proposals contain a duty not to publish adverts which give the impression that you might discriminate.

If someone requires an appropriate adjustment you must provide it unless it is a disproportionate burden on you to do so.

Lastly there is an anticipatory accessibility duty for education providers and goods and services providers to anticipate common needs that might arise and how they can be accommodated in advance by carrying out an access audit, developing an accessibility action plan and taking steps to implement the plan.

Further detail is available in the technical draft proposals document available at: www.gov.gg/discriminationconsultation

Question 3: What is an appropriate adjustment?

Answer 3: An appropriate adjustment is a modification or adjustment, made in response to a disabled person's needs in order that they can be included or have equal opportunities to participate. This could include making changes to someone's job role, working hours, training other staff, providing special equipment or making modifications to working space in order to enable someone to do a job. It could also involve changes to make your services to customers more accessible such as providing information in different formats, altering your facilities or buildings to make them more accessible or providing a service in a different way.

Some adjustments might not cost you anything – like seating someone with a hearing impairment near a window so they have good light to lip read. Other adjustments might be more expensive, but if it is a disproportionate burden for you to provide this, you would not have to. What is disproportionate is considered on a case by case basis taking into account the size of the organisation, the cost of the adjustment requested, and whether this would have an impact on other people. For example, level access to a shop might not only benefit wheelchair users, it could also be helpful for older people who walk with difficulty, people trying to carry a lot or using a trolley, and parents with pushchairs – this might strengthen the case for making the change.

Question 4: Would these proposals mean that I have to put lifts into all my buildings – what if I can't afford it?

Answer 4: Not necessarily. The proposals contain a duty on education providers and providers of goods and services to consider accessibility proactively and to develop an access action plan, however, what it is appropriate to include in such a plan will depend on the context and the size of the organisation.

A large business, like a conference centre for example, that routinely has meetings upstairs, where the centre has a high footfall of customers and has a reasonably high turnover might be expected to consider putting a lift in if they didn't have one already. This might not be immediately. As part of their action plan, they might plan to undertake this in a couple of years' time as part of a refurbishment, for example. A small café that has a low turnover and has most of its tables downstairs and a few extra upstairs, with no space on their premises to fit a lift, would be able to demonstrate that this would be disproportionate. The small café might try to ensure that customers who

cannot go upstairs are able to sit downstairs as an alternative way of meeting their customers' needs.

Organisations will need to decide what physical accessibility changes they might need to make (if any) based on the nature and size of their business. You could review the accessibility of your service against best practice (for example by comparing your building specification to the Guernsey Technical Standard Part M from the building regulations), and then decide what changes are your highest priorities. Or you could hire an access auditor to advise you on what changes you might consider making and what would be a high priority for your organisation. You would need to think about when it would be reasonable to implement changes with the resources you had available.

What needs to be accessible is your service and not necessarily your buildings. If a small mail order company operates from a back office where only staff go, you would only need to consider modifying this premises if you had a disabled employee who needed an appropriate adjustment – but to comply with the anticipatory accessibility duty you would need to think about the accessibility of your service. This might involve, for example, whether you had an email or text-chat service as well as a phone number so that people with hearing impairments that couldn't use the phone could get in touch; and whether your website is designed so that it is accessible.

It is never possible to design a service to meet everyone's needs. Accessibility certainly helps, but having an accessible building that meets current best practice standards does not mean that you no longer need to think about discrimination. This legislation would be about an ongoing process of responding well to individuals' needs and seeking to be proactively inclusive in service provision.

One of our questions relates to how soon the anticipatory accessibility duty should come into force. The questionnaire, and the technical draft proposals (which contain more detail on the anticipatory accessibility duty and appropriate adjustments), are available at: www.gov.gg/discriminationconsultation

Question 5: Would I need planning permission to make adjustments to my premises?

Answer 5: Many appropriate adjustments would not require alterations to premises. However, if they did, you would still need permission from planning and/or building control. If you are denied planning permission for an adjustment, for example for a protected or listed building, then you will not be expected to make it. You should think about whether there are alternative ways of

working around this though – for example, could you provide a service to a customer in a different way (by phone or a home visit, for example) if they can't access your premises?

Question 6: What if my organisation routinely makes decisions based on someone's age, nationality or other things?

Answer 6: The proposals include some circumstances in which it is legitimate to treat someone differently based on one (or more) of the grounds of protection:

- If an appropriate adjustment is made, it would not be discrimination against someone else who does not need that adjustment.
- You can treat people differently if it is positive action to address disadvantage and promote equality (for example, offering work experience or shadowing opportunities for people from under-represented groups to increase applications from that group and improve workforce diversity; though this does not go so far as using quotas in appointments).
- If you have a provision, policy or practice that indirectly disadvantages a group of people but you can justify that it is an appropriate and necessary means of meeting a legitimate aim (called 'objective justification').
- You may directly discriminate against a person on the grounds of age if it can be objectively justified.
- Objective justification is also permitted in cases arising from disability.
- If you are recruiting to a job which has a 'genuine and determining occupational requirement' – i.e. you need someone with a particular characteristic in order to do the work for a reason that you can objectively justify (e.g. if a charity working with visually impaired people felt it important to have a person with a visual impairment as their outreach worker).
- If the different treatment in question is listed in the proposals as an 'exception' then this would be permitted. The proposals contain a detailed list of exceptions. These include things like permitting different treatment on the basis of nationality for population management and immigration and allowing people to offer concessionary fares for older people, families and disabled people.

It would always be the case that if the different treatment could be demonstrated to be based on a legitimate reason other than the protected grounds, this would not be discrimination. If a person cannot do the essential functions of a job (with an appropriate adjustment, if applicable) you are not required to hire or retain them.

You can read the detailed proposals at www.gov.gg/discriminationconsultation.

Question 7: What does equal pay mean for employers?

Answer 7: The proposals say you should not pay someone differently in a way that is related to any of the protected grounds. You should pay someone the same if they are doing the same or substantially similar work, and providing there are no reasonable explanations for differences in pay (like performance linked bonuses or increments related to length of service). For the purpose of this legislation, pay would include any financial benefits and benefits in kind given to the employee. In order to register an equal pay complaint an employee would have to compare themselves to someone else in the employing organisation (or in an associated organisation, like another branch or a parent company). If someone wins an equal pay case you must increase the pay of the lower paid person so that they are paid the same as the higher paid person – you cannot level pay rates down.

The Committee is also considering the ability to register a complaint of 'equal pay for work of equal value'. This means that people with very different jobs might be able to say that their pay should be the same because their work requires the same level of skill, effort, responsibility and so on. This might allow, for example, your head of IT to compare themselves to your head of finance or for a canteen attendant to compare themselves to a caretaker and claim that they should be paid the same. We want to know more about how much work would be required for Guernsey employers to prepare for 'equal pay for work of equal value'. The questionnaire is available at: www.gov.gg/discriminationconsultation

Question 8: If the Committee's proposals are approved by the States, what would I be able to do to reduce the risk that a complaint would be made against my organisation?

Answer 8: How this is approached will depend on the size, nature and culture of your organisation. Some companies may already be following good practice and will have very few changes to make.

If the proposals are agreed, then before the legislation comes into force, you may wish to consider:

- getting into the habit of asking people whether they need appropriate adjustments when you do interviews, send out meeting invites, or set up appointments or events.
- offering to provide information in different formats.

- thinking through what other appropriate adjustments your staff or clients might need and how you might be able to respond if a request was made of you.
- training your staff so they know what the new law means for them in terms of duties to service users and rights as employees.
- making sure you have policies that deal appropriately with harassment and discrimination.
- updating other policies to bring them in line with any changes you make (for example, flexible working policies, sickness absence policies).
- auditing your payroll to make sure that you are not paying people different rates for doing equal work unless there is a good reason for doing so.
- thinking about accessibility (in a wide sense: this would include your building, information you provide and your staff's ability to respond to people's needs). This is particularly important in public-facing areas. You might be able to do this by using a self-assessment tool or commissioning an access audit and beginning to develop an access plan outlining how and when you intend to implement changes.
- reviewing your recruitment processes and checking that you do not ask discriminatory questions on application forms or in job interviews and that you do not use health questionnaires or screenings before a provisional job offer has been made.
- ensuring you can justify 'positive action' if you are taking it. What disadvantage are you attempting to correct? How will it work and when will it be reviewed?
- reviewing how and where you use the grounds of protection in your processes at the moment and checking that these are either covered by an exception on the exceptions list or, if they are direct age discrimination, indirect discrimination or discrimination arising from disability, whether you can objectively justify treating people differently. This would be important to make sure that what you are doing could not be considered discrimination.

We understand that smaller companies might take a more informal approach and have fewer written policies. It would still be important that you make sure that: your business does not treat people differently in a way that is not permitted; your staff are aware of their responsibility not to discriminate; and how they should respond to discrimination or harassment if it arises.

Question 9: When would I be able to ask people about grounds of protection in job applications or interviews?

Answer 9: The proposals would mean that if you asked unnecessary questions about any of the grounds of protection this might indicate an intention to discriminate. So, if the proposals are approved, it would be advisable only to ask questions about the grounds of protection for legitimate reasons under the legislation. These would include:

- if you are asking about whether someone has an employment permit;
- if you are asking someone to confirm they can do the essential functions of the role (for example, asking an applicant for a scaffolding job if they can climb ladders is not disability discrimination);
- if you are asking if someone needs an appropriate adjustment to the recruitment process;
- if the information is about a genuine and determining occupational requirement (where you have a very strong, objectively justifiable reason why you need a person of a particular description to do a job); or
- if you need to ask something to implement a positive action measure.

Question 10: Could I use pre-employment health screening if these proposals are agreed?

Answer 10: Except in the circumstances outlined above, these proposals say that if you made a decision not to offer someone a job based solely on the outcome of a health screening or disclosures about their sickness absence record without exploring whether they could undertake the job, with appropriate adjustments, this would be disability discrimination.

This does not prevent you using health screenings for other reasons – for example, to help to ensure the wellbeing of your staff or to consider what might be an appropriate adjustment for a person. If you wished to do this you would not ask questions about health until you have decided who to offer a job to and made them a provisional offer. Once you have made a provisional job offer you would be able to refer someone to an occupational health screening or use a health questionnaire before confirming the job offer.

If a health issue were identified during a screening the employer should explore whether appropriate adjustments are required to enable the person to do the job. If it emerges that either: even with appropriate adjustments the person could not undertake the essential functions of the role, or that the appropriate adjustments needed would be a disproportionate burden on the employer to provide, then the employer could withdraw the offer of

employment. However, appropriate adjustments must be considered and discussed with the individual before this decision is made.

Question 11: Will having a wide definition of disability mean that you can never dismiss someone who has been unwell?

Answer 11: No. You are not required to employ someone who is not competent or capable of doing their job. At present, someone who is dismissed while on long-term sick leave could bring an unfair dismissal case, in future they may also be able to bring a disability discrimination case. The fact that a person could register an unfair dismissal complaint already means employers should be following good process when considering a dismissal. The additional factor to consider with disability discrimination is whether appropriate adjustments had been considered to support a person back to work as part of that process or procedure.

If such a case were to arise it is likely the employee would claim that they had been discriminated against because of their length of absence which is discrimination 'arising from disability'. 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.

We invite comments on our working draft definition of disability in our questionnaire which is available at: www.gov.gg/discriminationconsultation

Question 12: Could I still dismiss someone in their probationary period if they were unwell?

Question 12: Employers will need to follow good process with new employees as well as with established employees since this legislation would be effective immediately (and, in fact, would cover the recruitment process as well as new employees). This would mean that if employers had been in the practice of dismissing anyone showing signs of long-term health issues or mental health issues quickly (say within the first six months of their employment) they would need to stop doing this. Instead, they would need to consider whether that employee needed an adjustment to undertake their role and undertake capability procedures if they were not performing satisfactorily.

Question 13: Will employers be able to access Occupational Health advice?

Answer 13: It has been highlighted that if disability discrimination legislation is introduced that there will be increased demand for Occupational Health

advice. Employers may want to use occupational health to support their decisions about how to appropriately manage employees with health issues, since, in all cases, these could lead to disability discrimination complaints. This may mean that Occupational Health services will need higher capacity when the legislation first comes in.

There have been some discussions about the supply of Occupational Health advice in relation to the SOHWELL (Supporting Occupational Health and Wellbeing) project. It is suggested that this is factored into any discussions relating to that work.

Question 14: Do mental health conditions count as a disability? What about stress?

Answer 14: Yes. The definition of disability included in the proposals is wide. It would include both mental health conditions and stress. As in other situations, if a person is not able to do the essential functions of a role due to an impairment, including a mental health condition, you would not have to retain them in that role. Proper procedures should be followed if you are considering dismissal. You would have to consider, however, whether there are appropriate adjustments you could make that would enable them to continue in that role. In larger organisations it may also be appropriate to consider whether a transfer to another role may be possible.

We invite comments on our working draft definition of disability in our questionnaire which is available at: www.gov.gg/discriminationconsultation

Question 15: What about employing older and younger workers?

Answer 15: Currently, organisations are able to pay under 18s less in line with the lower minimum wage rate for young people. There is an exception in the proposals for new legislation for pay which is linked to the minimum wage law for under 18s, so, if agreed, this would be lawful under the new legislation. Similarly, if younger people in your workforce are paid less than older people and this is related to length of service or seniority, then this is permissible under the legislation.

You will be able to set retirement ages for older workers where this can be objectively justified. Similarly you may be able to set upper age limits for recruitment to roles where significant training or experience is required for a person to become competent in their role and there is good evidence that they would not be likely to be able to undertake that role above a certain age, which they will reach before the end, or shortly after the end, of their training period. In some cases you may be able to objectively justify measures related to succession planning also.

Question 16: Does this mean I have to offer everyone flexible working?

Answer 16: It is possible that someone might claim your flexible working policy (or lack thereof) indirectly discriminates against staff who are parents, carers or disabled people. It is also possible that someone might ask for an appropriate adjustment to their working hours.

Consequently, if the proposals are agreed you would need to seriously consider requests for flexible working. However, if your organisation would simply not function if you granted permission to a request, you could justify your policies and decisions based on your business need.

Question 17: If a disabled person cannot completely fulfil the vacancy, am I allowed to adjust the salary to compensate for that part of the work which will have to be undertaken by someone else?

Answer 17: If a disabled person is the best candidate for the job, and, with an appropriate adjustment if required, they can fulfil the essential functions of that job, then they should be paid the full salary attached to the role. The employer would have a duty to provide any appropriate adjustment required unless it was a disproportionate burden on them to do so.

If the disabled person cannot perform the essential functions of the job, even with an appropriate adjustment, and the appropriate process(es) have been followed, then nothing in the legislation would require the employer to offer them that job.

If the disabled person could not fulfil the vacancy even with an appropriate adjustment, but could carry out an alternative role (that had a different job description, different essential requirements and required a different level of skills and experience) then the salary for this alternative role might be different (in line with an objective job evaluation). It may be appropriate to consider the disabled person for this alternative role with a different salary. However, dialogue with the person would be key to ensure that they were interested in the alternative role and that, if they preferred the original role, appropriate adjustments to enable them to undertake that role had been discussed with them and found not to be feasible. The proposals do not include a requirement to create an alternative role, this would be at the discretion of the employer.

Question 18: Would I be required to collect or publish data on the diversity of my workforce?

Answer 18: No. The proposals do not currently include a requirement to undertake diversity monitoring or publish data relating to diversity. Even though not

required, you may wish to collect this data to help inform your decision making in relation to diversity, however. Such data could also potentially be used as evidence if you needed to defend a discrimination case.

Question 19: Who could bring cases against me if the proposals are agreed?

Answer 19: The proposals say that cases could only be brought by people who were themselves disadvantaged by discrimination. This could include your past, current or prospective customers, employees, apprentices, tenants, members or students.

A person can register a complaint if they have experienced unfavourable treatment because of their association with a person who has a characteristic protected under the legislation. In this case they do not need to have the characteristic in question themselves, but they must have experienced unfavourable treatment.

The proposals also suggest the possibility of establishing an Equality and Rights Organisation. Such an organisation (or an alternative if it is not established) may be able to undertake an investigation if they think that you have a practice or policy that is discriminatory. Compliance notices could be issued that might require you to make changes if it was found that you were doing something discriminatory. These could be appealed if you thought what you were doing was justified and legal. This is not entirely new, we already have a system like this under the existing sex discrimination legislation.

Question 20: What would happen if someone took a case against me?

Answer 20: Under these proposals, you would be able to get advice (our questionnaire at www.gov.gg/discriminationconsultation includes a question about who people would be most comfortable getting advice from). Once a complaint has been registered, conciliation will be offered to seek to resolve the issue informally. If either party does not want to try conciliation or if conciliation does not work then a hearing will be arranged. We are proposing this would be with the Employment & Discrimination Tribunal. Before the legislation is implemented, the Committee would make sure that the Tribunal Panel have the capacity, skills and knowledge to hear cases under the new legislation.

Question 21: What would I have to do if someone won a case under the proposed legislation?

Answer 21: This would depend on what they were asking for. You may have to pay them financial compensation and/or you may be required to undertake a remedial

action (like training your staff to prevent the same thing from happening again or making an appropriate adjustment).

Unlike today's fixed awards, the proposals suggest that the compensation would be proportionate to the loss experienced. One of the things we are asking in our consultation questionnaire is whether people think there should be an upper limit on the amount of compensation an employer or service provider could be required to pay. Let us know your views at www.gov.gg/discriminationconsultation

What do you think?

We are publishing our draft proposals now to get people's views. You can read a summary or a detailed version of the draft proposals, and answer a questionnaire on some of the key points. These documents are available at www.gov.gg/discriminationconsultation

You can also contact us directly if you have questions or to let us know what you think about the draft proposals at:

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If you require this leaflet in a different format please email equality@gov.gg or call 01481 732546.