States of Guernsey

Consultation Findings:

Draft Policy Proposals for Discrimination Legislation

January 2020

Executive summary

The Committee *for* Employment & Social Security ('the Committee') received over a thousand responses to its consultation on draft proposals for multi-ground discrimination legislation (available at: www.gov.gg/discriminationconsultation) and would like to thank all those who participated for the time and effort invested in responding.

The Committee asked focused questions on a number of aspects of its proposals but also invited respondents with an interest to comment on any aspect of the proposals that they wished to.

Feedback on wider aspects of the proposals

Many respondents did not comment on the general principle of whether we should have discrimination legislation. However, where respondents did comment, opinions were divided. Some strongly advocated for the need for discrimination legislation and an Equality and Rights Organisation (ERO) to be introduced as soon as possible. Others strongly opposed arguing that there was a lack of evidence that discrimination happened in Guernsey. A third position was to argue against the Committee's proposals in particular rather than the principle in general, with some feeling the proposals went too far and were not similar enough to what was in place in Jersey and the UK. Those holding this position argued that this could increase the cost of compliance for businesses and make Guernsey less competitive as a jurisdiction. The need for an ERO was also questioned, with suggestions that the Employment Relations Service should be expanded as an alternative. As the decision to develop proposals for disability discrimination legislation and an ERO were already agreed by the States of Guernsey in November 2013, the comments from some of those opposing the general principles challenge the foundations on which the Committee based their work.

A range of other issues were raised about the proposals including discussion about the scope of the grounds of protection (particularly around carer status and whether religion should extend to philosophical belief); the need for consideration of retirement and succession planning in relation to age discrimination; queries over the resourcing of the ERO and Tribunal; concerns about mechanisms for handling vexatious complaints; the role of legal aid in discrimination claims; the need for legally qualified chairs in the Employment and Discrimination Tribunal; queries over whether proposed equal pay provisions extended too far; divided opinion on some points such as harassment and accessibility provisions with regard to whether the proposals went too far or not far enough; suggestions that employers should be required to monitor equality; and suggestions to broaden the definition of employment to include more casual workers.

Overview of responses to the Committee's questions

It is important to note that the questionnaire was not intended to be a representative survey or opinion poll. The consultation was intended to help the Committee to understand what people think and why so that this, along with other considerations, could be taken into account in finalising the Committee's policy proposals for debate by the States.

Focusing on the specific questions that the Committee asked:

- **Definition of disability** – the Committee received a range of comments on its draft definition of disability with some welcoming a broad definition and highlighting the importance of the Tribunal focusing more on whether or not the conduct a person experienced was discriminatory than whether the person was disabled enough to be protected by the law. On the other hand, significant concerns were raised about the implications for employers of such a broad definition – particularly if it were not possible to distinguish between sickness and disability.
- **Sex and gender grounds** – strong and opposing views were expressed in relation to the Committee's questions about how to define the sex ground. The most popular response was that it should be based on the gender a person identifies as. Regarding access to single sex spaces, there was roughly equal support for access being based on the gender a person identifies as, unless it could be objectively justified to treat them otherwise and access being based on the gender a person identifies as in all cases.
- **Age** – slightly more respondents agreed than disagreed with the Committee's proposal to prevent children and young people from bringing discrimination claims on the basis of their age in relation to nursery and school provision, or from making age discrimination complaints in relation to employment when they were younger than school leaving age. Slightly more respondents disagreed than agreed with the Committee's proposal to prevent under 18s from making discrimination complaints on the basis of their age in relation to accommodation provision, clubs and societies and goods and services provision.
- **Families in rental properties** – on the whole, more respondents agreed than disagreed with the Committee's specification of a limited range of circumstances in which accommodation providers could refuse to accommodate children. However, the majority of accommodation providers felt that they should always have discretion to refuse to accommodate children.
- **The Equality and Rights Organisation** – when considering a list of potential functions for an ERO, respondents prioritised: promoting equality and human rights, providing advice and information to individuals, employers and service providers and helping to resolve disputes informally. When asked where they would go to seek advice

(both if they personally had experienced discrimination and if they were seeking advice as an employer or service provider) 'an independent ERO' was the most popular response.

- **Compensation limits** – A compensation system containing two elements was suggested – firstly, actual financial loss (for example, lost wages) and secondly, injury to feelings (which looks at the personal impact of the experience on the individual, whether the conduct complained of continued over a long period of time, etc.). The Committee asked if there should be an upper limit to the amount of compensation a person could receive. [Note that in most cases compensation would be proportionate to the case and would not reach an upper award limit]. The most popular option in relation to financial loss was that there should be no upper limit on how much compensation a person could receive. However, more respondents felt that there should be a limit than not in relation to injury to feelings.
- **Whether the introduction of the legislation should be phased –** there was a fairly even split on whether the legislation should be phased in or not. More respondents thought that equal pay provisions should be brought in immediately than thought there should be a lead-in period. The opposite was true for the proposed anticipatory accessibility duty with more respondents thinking a lead-in period was required for employers and service providers to prepare. In relation to appropriate adjustments that would require a physical alteration to a building, more respondents thought there should be a lead-in than those who did not. However, it was argued that the right to reasonable accommodation in the UN Convention on the Rights of Persons with Disabilities should be immediately effective and not delayed.
- **Exceptions** – a wide range of varied comments were made on the exceptions with areas of particular interest including exceptions related to occupational benefits and pensions, exceptions relating to sex and trans status, and exceptions related to religious organisations.

<u>The content of this report</u>

Due to the volume and technicality of some of the responses, this report aims to give an overview of feedback and includes anonymised quotes to illustrate the range and nature of responses received. To be clear, the Committee has reviewed all of the responses it has received, including responses not quoted in this document. The views quoted in this document are the views of respondents and not the views of the Committee.

<u>What next?</u>

The Committee is now giving further consideration to the various policy issues raised in the feedback received, which may result in substantial changes to the policy proposals. Due to

the quantity of feedback and in order to manage workload the President of the Committee announced in November 2019 that the proposals would be refocused on fewer grounds of protection with disability and carer status as a priority.

The Committee intends to bring a policy letter to the States before the end of the current political term later this year.

Background

In November 2013, as part of the Disability and Inclusion Strategy, the States agreed that proposals should be developed for legislation to prevent discrimination against disabled persons and carers based on the social model of disability. The scope of this work stream was broadened in June 2018 when the States agreed to include additional grounds of protection.

Due to the technical complexity of discrimination law, in early 2018 the Committee engaged Drs Lucy-Ann Buckley and Shivaun Quinlivan from the National University of Ireland, Galway's Centre for Disability Law and Policy ('NUI Galway'), following a competitive procurement process, to provide expert advice and guidance on the development of these proposals.

At the Committee's request, Drs Buckley and Quinlivan carried out a comparative study of six countries' disability discrimination/equality laws against a set of evaluation criteria agreed by the Committee following engagement with stakeholders. Based on the outcome of this analysis, the Committee decided to model the proposals on equality legislation from the Republic of Ireland and disability discrimination legislation from Australia.

The Committee's advisers were then tasked to prepare a 'straw man' which was essentially an amalgamation of key provisions from the Irish and Australian models. The straw man was not intended to be a draft Ordinance – instead it was intended for use as a basis for discussion with stakeholders regarding what would be appropriate for Guernsey. The straw man was presented to key stakeholders in November 2018 and feedback was requested.

During the development of the Committee's policy proposals, the Committee moved away from the straw man in several important respects, and the detailed policy proposals on which the Committee subsequently consulted were based largely on equality legislation in force in the Republic of Ireland and the UK.

Throughout the development of the draft proposals, the Committee proactively engaged with representatives of the third sector, the business community, legal professionals, groups who might be affected by the legislation, States Committees and other States entities.

The Committee published its draft policy proposals for multi-ground discrimination legislation for consultation in July 2019.

The consultation

The Committee published proposals for consultation on multi-ground discrimination legislation on 9 July 2019. The consultation ran for 12 weeks until 30 September 2019.

Several documents were published:

- a technical consultation document aimed at those with existing subject specialism;
- a summary of the proposals (which was also available in Latvian, Polish and Portuguese);
- an Easy Read version of the proposals;
- Frequently Asked Questions (for employers and service providers, rights holders and accommodation providers); and
- a consultation questionnaire (an online version and a paper version).

In addition, various meetings were held with interested groups throughout the consultation period (see **appendix 1**).

Consultation responses were accepted via a range of methods, including via the online or paper version of the consultation questionnaire, in writing by post or via email.

The questionnaire was divided into three parts[1]. The Committee received an excellent response to the questionnaire with the following numbers of responses: Part A – 1,163; Part B – 392; and Part C – 154. The Committee also received 57 separate letters and emails, some of which provided extensive and detailed feedback. A list of organisations that responded to the consultation by letter or email is included in **appendix 2**. Responses to the consultation by States' Committees, Boards or Authorities are included in **appendix 3**.

[1] Part A included questions regarding some of the proposed grounds of protection; Part B included questions regarding compensation limits, the mandate of the Equality and Rights Organisation and phasing implementation; Part C asked for feedback in respect of the list of proposed exceptions to the legislation.

Key findings from the consultation are summarised in sections 1 to 16 below. The comments and quotes that are included in this report are not exhaustive, but are intended to give a flavour of the responses received and to highlight the key themes, viewpoints and policy issues raised. All comments published in this report have been anonymised, with the exception of the formal comments from States' Committees, Boards and Authorities.

1. Choice of model legislation

Although this question was not specifically posed in the consultation questionnaire, a number of responses (approximately 21, some of which represented groups of individuals or organisations) commented on the Committee's original decision to model the proposals on equality legislation from the Republic of Ireland and disability discrimination legislation from Australia (even though the proposals consulted upon had evolved since this decision was taken and were largely based on equality legislation in force the Republic of Ireland and the UK).

While some respondents supported this approach, others felt that it would be more appropriate to model the legislation on just the UK Equality Act 2010 or the Discrimination (Jersey) Law, 2013 as this legislation was more familiar to locally based businesses which operate cross-jurisdictionally, as well as to employment lawyers and HR practitioners. There were also concerns about the availability and applicability of case law given that the Committee's proposals drew inspiration from more than one jurisdiction. One respondent commented that, to overcome these issues, guidance notes or codes of practice should be published ahead of, or concurrently with, the entry into force of the new legislation so that employers and service providers[2] knew what was expected in Guernsey.

Some respondents were pleased that the approach was guided by the UN Convention on the Rights of Persons with Disabilities and felt the proposals would enhance the island's international reputation and attractiveness as a jurisdiction.

Comments from those against the approach included:

> "There is a very real risk that, if enacted in their current form, the proposals will drive potential business away from Guernsey and/or lead some existing Guernsey businesses to leave Guernsey's shores. Guernsey and Guernsey businesses face jurisdictional arbitrage all the time and the Committee would do well to remember that many businesses who are in Guernsey at present or who are looking to come to Guernsey have a choice."

> "It would make much more sense for Guernsey to look to and adopt a regime which is similar to the UK or Jersey. This would be easier for Guernsey businesses to work with and easier for Guernsey's courts and tribunals to apply."

[2] Where the term 'service provider' is used in this document, we mean education providers, accommodation providers and clubs and associations as well as providers of goods and services.

2. The proposed definition of 'disability'

In **Part A** of the consultation, the Committee invited respondents to give "any comments on, or suggested changes to, the following working draft definition of 'disability'":

> "'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, 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."

The responses to this question were polarised. Broadly speaking, responses from those representing and working with business organisations were strongly against the proposed definition of 'disability'. Responses from individuals who would be potential rights holders under the proposed legislation and groups or organisations representing potential rights holders tended to support the draft definition. However, this division was not universal.

Those in support of the Committee's definition of 'disability' were pleased that it recognised that discrimination could occur because of perceptions, assumptions and prejudice, even if a person did not have a long-term disability or if their disability had no impact, or minimal impact, on day-to-day functioning. They argued that litigation should focus on whether or not discrimination had taken place and the impact of that discrimination on the individual, rather than on how long an impairment had lasted or the level of its impact on the person's ability to function, which might be totally unrelated to the discrimination that had taken place. Concerns were raised in this regard about the functioning of the definition of 'disability' in the UK Equality Act 2010. Supporters noted the Committee's proposed definition's breadth and its alignment with the social model of disability as key positives.

The principal concern expressed by those opposed to the draft definition was that it was too broad. Several respondents were concerned that the list of disabilities had been framed in a non-exhaustive way which, it was felt, would make it difficult for employers to know whether a particular impairment or medical condition was covered. Two respondents argued that the definition of disability was so broad that it might actually undermine the chances of people with a medically diagnosed disability to secure employment.

The lack of a clear distinction in the draft definition between short-term illness and longer-term medical conditions or impairments was considered to have the potential to be highly problematic for employers in terms of managing sickness absence and capability issues. Several respondents were concerned that there was no requirement for the disability to have a substantial or long-term adverse effect on the ability of a person to function. There was a perception, therefore, that a disability could be 'self-certified'.

Several responses mentioned the need to ensure that someone who came to work under the influence of alcohol or drugs could still be subject to capability proceedings or disciplinary action. One respondent suggested explicitly excluding from the definition of disability addiction/dependency on alcohol, nicotine or any other substance (although noting that this exclusion should not apply where the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment), tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism, voyeurism, tattoos and body piercings – as under the UK Equality Act 2010.

Some respondents were concerned about whether the definition included all mental health conditions. Some respondents listed conditions they felt should be covered by the definition although they were unsure if they were – these included chronic pain, endometriosis, sensory processing disorders, Ehlers-Danlos Syndrome, genetic disorders, fibromyalgia and chronic fatigue syndrome (ME).

Comments made in support of the Committee's draft definition included:

> "It would be a travesty and do disabled islanders a significant disservice if the Committee bent to uninformed calls for a UK style definition. Those jurisdictions which have adopted definitions restricted by longevity and effect of impairment have been plagued with litigation and some persons with disabilities have been poorly served and protected. People can be discriminated against by attitude to their impairment, without that impairment otherwise restricting their ability to carry out day to day activities."

"I think these proposals are very good overall. I am particularly pleased with the proposed definition of disability and think it will provide better protection for people … than would a narrower medical model. I think it offers better protection for individuals whilst maintaining the principle of any adjustments or accommodations being proportionate."

"Respondents to claims will often take every point to try and establish the member is not disabled, this often occurs even in many cases where it is fairly obvious that they are actually disabled and a tribunal will find in their favour. We have long argued that the [UK] definition of disability should be based on the social model, i.e. focusing on the barriers to equal participation placed by society, rather than a medical model looking at the impairment. Certainly we believe this is likely to be a much better approach than the definition in the UK Equality Act. The definition would appear to be helpful in that it is not exclusive, so that tribunals would have discretion to apply a purposive approach. We also particularly welcome the final part of the working draft which makes it clear that the source, duration or extent of the disability is not relevant."

"Focus should be on establishing whether there is, on the face of it, a case of disability discrimination to answer, rather than on whether a person meets a narrow definition."

"…supports the proposed broad impairment based definition of disability… [recommends] ESS rejects calls to restrict the definition by adding qualifications of longevity of impairment or that impairment must affect the ability to carry out day to day functions."

Comments against the proposed definition of disability included:

"The proposals differ from Jersey and other places because apparently a person will be able to self-diagnose an illness/disability but in Jersey and other places they cannot and disability/illness can only be taken into account for discrimination issues after proper medical diagnosis 6 or 12 months ago."

"Concern that scope of definitions mean that decisions of the tribunal will necessarily need to be tested in the Royal Court."

"The broad definition of disability, which brings together the definitions of sickness and disability, will result in employers feeling very hesitant about managing all sickness. Such a broad definition with no emphasis on time or impact means anyone

could claim to fit the definition. An employer would therefore have to go through the same HR process for someone who is essentially playing the system as someone who has a genuine disability. Potentially this could create an additional HR burden for employers resulting in a reluctance to provide opportunities for disabled people."

"The single biggest concern with what is proposed is the absence of any requirement for an individual to show that the condition is long-term or has any impact on their ability to perform their day to day duties".

"This asymmetry causes real concern within the business industry because this would make Guernsey's employment regime very restrictive as compared to others, particularly our two closest neighbours, the UK and Jersey, but also the EU where it was specifically stated that the concept of disability involves a long term condition which leads to a degree of limitation. Closer to home, compare this to the UK position (requiring a "substantial adverse effect") or Jersey (requiring an "adverse effect")."

"It is concerning that the proposals are generally very vague, as this would allow practically anyone, irrelevant of the credibility of their claim, to register a complaint or ask for change."

Some respondents suggested minor changes to the wording of the draft definition:

- a minor clarifying amendment to part (a) so that it reads (new addition in bold): "the total or partial absence of **one or more** bodily or mental functions, including the absence of a part of a person's body";
- replace sub-paragraph (c) with "disfigurements which are conditions, syndromes and scarring/marks that affect the shape, functioning or appearance of a person's face or body";
- include reference to sensory processing disorders in sub-paragraph (e);
- remove "resulting in disturbed behavior" from sub-paragraph (e);
- including guidance within the legislation that: "…while it may be necessary, in a particular case, to evidence the physical or mental impairment associated with an alleged discriminatory act; that in order to respect the right to privacy and dignity of the claimant, such evidence should not be routinely required.";
- extend protection specifically to cover genetic predisposition to prevent discrimination on the basis of the possibility of developing a disability in the future.

3. The proposed definition of 'carer status'

Several respondents sent in comments on the proposed definition of 'carer status', although this aspect was not part of the questionnaire. 'Carer status' was defined in the technical draft proposals as: "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."

Some cited the inclusion of carers in the list of proposed protected characteristics as a positive change in attitude and understanding.

Others considered the proposed definition of carer to be too broad. Some respondents queried whether carers of dependent children should be covered by this ground of protection or if it should instead focus on the protection of carers of disabled persons. Two respondents warned of the potential to promote positive discrimination of parents to the detriment of those who without children. Some respondents suggested that the introduction of a right to request flexible working would be a more proportionate and equitable mechanism to assist parents (and others) to obtain (subject to business requirements) a greater degree of flexibility in their working hours and/or conditions.

Some respondents suggested that the definition should be narrowed by including a requirement for the care-giver to be living with the person with a disability that they provided care for or to be related to that person. Some respondents suggested that there should be a qualifying period in respect of carer status in terms of how long care had been provided for. A few respondents asked for clarification regarding the meaning of "continuing, regular or frequent". Some respondents were concerned that the bar would be set too low.

Comments in support of carer status as a protected ground included:

> "Grateful to see that the proposals include protection for carer status. We would strenuously object to any attempt to restrict the definition, for example by imposing a requirement for the carer to reside with the person they care for. To do so would overlook those who provide care to elderly parents or neighbours, parents of children with disabilities, parents of children with disabilities who are separated and carers with a loved one in residential care. Fundamentally, we consider the test of cases should be on the nature of the perceived discrimination (whether they were treated unequally due to their caring responsibilities) and not on the nature of the relationship between the carer and the cared for."

> "We are particularly pleased to see that carer status is included, we have long argued for this in the UK. We believe that carers are often at risk of discrimination at work, because of restrictions on their time or inability to attend events outside of work, so we are pleased that this is in the list of protected grounds and having this as a specific protected ground will avoid the often tortuous arguments of bringing these cases as indirect sex discrimination or associated disability discrimination."

> "Would support the introduction of a right for such carers to attend medical appointments, training, etc. without having to use part of their annual leave allowance to do so."

Comments opposed to the proposed definition included:

> "The definition of carer [status] is far too broad and will essentially apply to a large majority of the work force, especially given the fact that someone can be defined as a carer even if the individual they are caring for does not reside in the same property as them. There is also no distinction made between the caring for a child and the caring for an unwell relative, which are going to be very different demands on an employee."

> "It is suggested that the definition follows the EU directive on work life balance, limiting the definition to those caring for a relative or person who lives in the same household and whose needs for care or support are significant."

4. Other comments on the proposed protected grounds

Several respondents provided their views regarding other proposed grounds of protection. The sub-sections below outline the types of viewpoints expressed.

4.1 Religious Belief

Two organisations advocated, on the basis of different rationales, that the proposed protected ground of 'religious belief' should be reframed as 'religion or belief'. One respondent argued for discrimination on the basis of a person's philosophical beliefs analogous to religion (such as humanism) to be unlawful. Another respondent felt that the proposed definition of religious belief was too broad, as it referred to "outlook, viewpoint or perspective", but argued in favour of broadening the scope of the ground to include philosophical beliefs (in addition to religious belief), as set out below:

"On religion, we believe the protected ground should be 'religion or belief' rather than religious belief. It is important to ensure this protection applies to other deeply held beliefs. There is a body of case law in the UK defining a belief that would be covered and a similar approach could be taken in Guernsey (in Grainger plc v Nicholson 2010 the court held that to be protected the belief would need to be genuinely held, be a belief as to a weighty and substantial aspect of human life and behaviour, it must have a level of cogency, seriousness, cohesion and importance, and it must be worthy of respect in a democratic society)."

"We have concerns with the proposed wording. It represents a considerable dilution of the concept of a "belief", which is generally much stronger than a mere "outlook", viewpoint or perspective. If adopted, this would open the gates to much wider protection than was envisaged in the Strategy without any evidence of an issue meriting such an expansion nor any explanation as to why this additional protection should be provided. The gates are opened further still because of the proposal that one is protected on the basis of one's religious background or upbringing. Thus, for example, if one has been raised in a particular religious sect since a young age, protection is available even if one no longer conforms to or practises that religion. This together with the breadth of the proposed definition devalues the protection and raises the possibility that this protection could be exploited by vexatious litigants as happened in the early days of the UK regime. Crucially, in the UK such protection is subject to a qualifying requirement that the 'philosophical belief must be "genuinely held" and "worthy of respect in a democratic society." We suggest that a similar caveat is needed here, and in particular if the very broad definition incorporating religious "outlook" is adopted (which we do not think it should be)."

4.2 Marital Status

One respondent commented that under the Committee's proposals this definition was wider than in the UK in that it was not just limited to marriage or civil partnership.

"Both the technical proposals and Straw Man propose that Guernsey adopts the Irish definition of marital status, as "being single, married, separated, divorced or widowed." In the UK, the definition covers those who are married or in civil partnerships and so has a focus on the currency of the legal relationship, rather than the fact that someone has been in such a relationship in the past. What about those who are cohabiting and/or engaged to be married? On balance, given how rarely this factual scenario arises in practice our preference would be to adopt the UK approach instead of the Irish. This appears more in keeping with the overall policy aim and also maintains a consistent approach with the UK and Jersey."

4.3 Pregnancy/Maternity

Comments received included:

> "We largely agree with the proposals relating to the comparisons for direct discrimination as set out at section 3.3.1 [of the technical draft proposals]. However we do not think there should be any comparison required in respect of pregnancy and maternity. Rather than a construction of 'less favourable' treatment than a comparator, the legislation should provide for discrimination where someone is treated 'unfavourably' because of their pregnancy or maternity status. This would avoid the difficulties of finding a direct comparator and the old arguments employers used to run in the UK that they would have treated a man off work on sickness absence in the same way (which of course is an inappropriate comparison). For example less favourable treatment on the grounds of part time status is likely to disproportionately affect women, tribunals should be allowed to take account of their knowledge and perception of this without requiring claimants to produce detailed statistical evidence."

4.4 Race

One respondent said:

> "We welcome the inclusion of 'descent' within the definition of race. We also believe it is important in defining 'race' in the legislation that it is clear that a racial group can comprise two or more distinct racial groups (e.g. a person may describe themselves as black, African or Nigerian, so the racial group they belong to would comprise all three)."

4.5 Sexual Orientation

One respondent said:

> "Given the approach in relation to the protection for gender whereby protection is offered to those who identify as non-binary[3], it is surprising that the proposal in the Straw Man seeks to restrict sexual orientation to just three orientations: heterosexual, homosexual and bi-sexual. If (as is stated in the Straw Man) the Committee wishes the legislation to be future-proofed, we query the wisdom of defining sexual orientation in this way; it may be that a more simple term is used such as 'sexual orientation'. This would be inclusive of all groups and simple."

[3] This is not correct - the draft proposals did not extend protection to people who identify as non-binary.

4.6 Other

Two respondents wanted to see less discrimination toward those who have served a custodial sentence.

One respondent wanted protection for trade union membership status and a signifier of class, e.g. accent. Another wanted to include discrimination on the basis of part-time employment and was disappointed that the Committee considered, but did not include, protection for trade union members and representatives, and asked for this to be reconsidered.

One respondent said that tenants who live in States Housing should be protected from discrimination.

Comments included:

> "The areas proposed to be covered by the new legislation are very close to the subjects covered by the original Article 14 of the European Convention on Human Rights dealing with discrimination but it appears no consideration has been given to the last three words of the Article which read "or other status."

> "Being unable to find legal representation is another form of discrimination which should be considered under the proposed law."

> "We agree with the point at 3.2.3 that this new discrimination legislation is not the place for protection against detriment on other grounds, such as whistle blowing, union members or representatives etc. However we do feel strongly that protection against dismissal or detriment on the grounds of whistle blowing and trade union membership or activities is an important requirement for general employment protection legislation and we strongly recommend that these issues are looked at separately with the intention to bring forward appropriate legislation in the future."

5. Age discrimination

5.1 When should young people be protected from age discrimination?

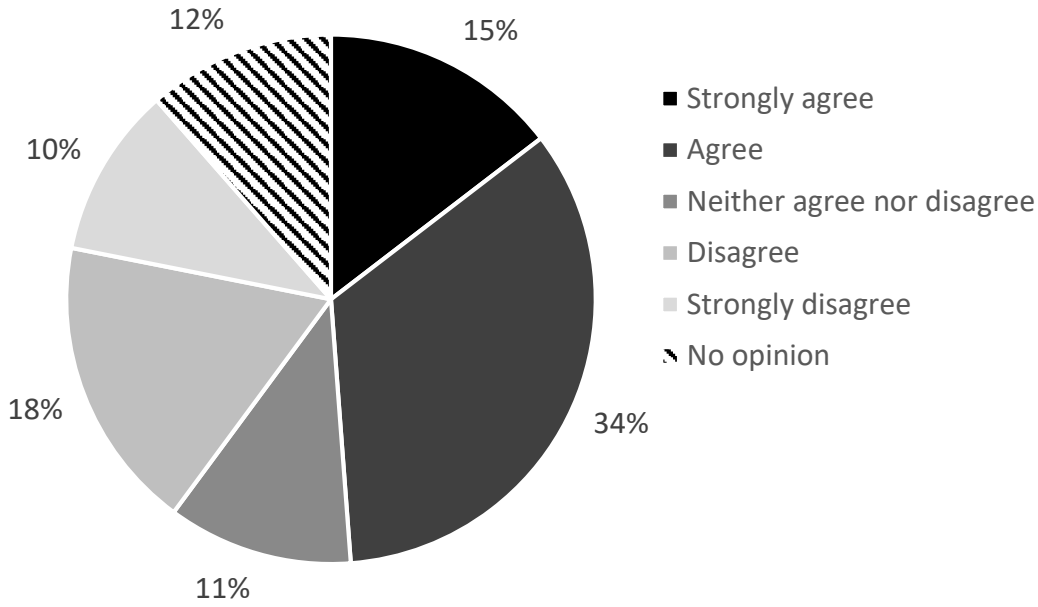
Part A asked "**Do you agree that protection from age discrimination in the field of education should only apply in further or higher education (i.e. not schools, pre-schools and nurseries)?**"

795 respondents answered this question.

388 respondents (49%) strongly agreed or agreed that protection from age discrimination in the field of education should only apply in further or higher education (i.e. not schools, pre-schools and nurseries). 226 respondents (28%) strongly disagreed or disagreed. 90 people (11%) neither agreed nor disagreed. 91 respondents (11%[4]) had no opinion.

The breakdown of responses is set out in **Figure 5.1.1** below.

Figure 5.1.1 - Responses to the question "Do you agree that protection from age discrimination in the field of education should only apply in further or higher education (i.e. not schools, pre-schools and nurseries)?"



The following comments were received from those who strongly agreed or agreed with the Committee's proposal that protection from age discrimination in the field of education should only apply in further or higher education (i.e. not schools, pre-schools and nurseries):

> "Adults should not have rights to attend school with children."

> "As a nursery provider we cater for a specific age group - that includes training of staff and the environment within which we operate. This is dictated by registration requirements set out by our regulator. It would be inappropriate for nurseries to be

[4] This figure is rounded to 12% for the purposes of figure 5.1.1 so all percentages add up to 100%.

> forced to take children of all ages. It would require a change to the regulatory environment and would also have a detrimental effect on the development of children of current nursery age."
>
> "Children are educated with their own peer group for social and developmental reasons that go beyond the purely academic educational."
>
> "If otherwise, it undermines ability to safeguard the interests of children & young people effectively."

It was apparent, following review of the comments made by respondents who disagreed or strongly disagreed with the Committee's proposal in this regard, that some respondents' opinions were based upon the misapprehension that the Committee was proposing that children would not be able to make a discrimination complaint against a school, pre-school or nursery on any of the proposed ten grounds of protection. In fact, the proposal that the Committee was seeking feedback on was that age discrimination complaints could not be made against schools, pre-schools and nurseries, but could be made against further and higher education settings. To clarify, discrimination complaints against schools, pre-schools, nurseries and further and higher education settings could be made on any of the other grounds of protection (e.g. disability, sex, sexual orientation, race, etc).

Comments from those who disagreed or strongly disagreed with the Committee's proposal included:

> "We do not agree that age discrimination should be limited to the field of higher education and feel that protection from discrimination should be extended to young people who are in school, pre-school and nurseries. Any concerns regarding actions, inactions or decisions for safeguarding reasons in this context would, we note, be caught by the safeguarding exemption, which we have responded to separately and confirm that we strongly agree with."
>
> "While I do not support discrimination, I also do not support discrimination being banned by law, therefore (legal) protection from age discrimination should not apply anywhere. But if you're going to have a law, the law should not discriminate on who enjoys protection from discrimination. What sort of an "anti-discrimination" law discriminates as to who can avail itself of it?"
>
> "Discrimination can be anywhere - it's not limited to certain environments."

> "I believe that the age at which age discrimination complaints can be made should be the same in all areas. I believe that this should be 14, as it is minimum working age."

Part A asked "**Do you agree that only people who are at or above school leaving age (currently 16) should be able to register an age discrimination complaint in the field of employment?**"

795 respondents answered this question.

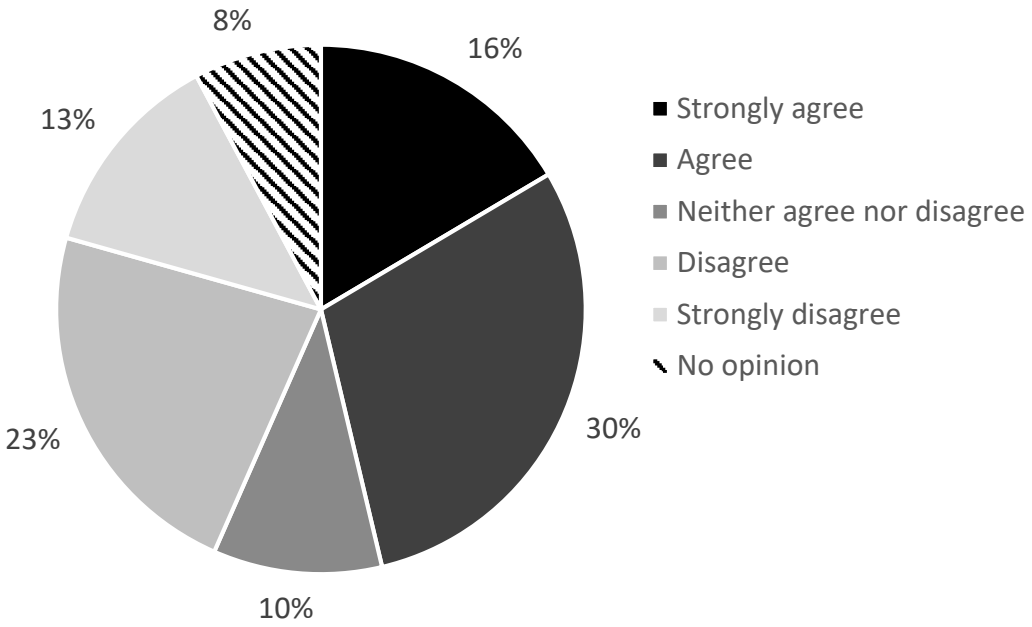
368 respondents (46%) strongly agreed or agreed that only people who are at or above school leaving age (currently 16) should be able to register an age discrimination complaint in the field of employment.

The response in favour of limiting age discrimination complaints in this way was higher from respondents who could be described as representing business. 58% of the 88 respondents to this question who identified themselves as 'an employer' strongly agreed or agreed. 53% of the 32 respondents to this question who identified themselves as 'a provider of goods or services' strongly agreed or agreed. 67% of the 12 respondents to this question who identified themselves as 'a business or trade association' strongly agreed or agreed.

283 respondents (36%) strongly disagreed or disagreed that only people who are at or above school leaving age should be able to register an age discrimination complaint in the field of employment. 82 respondents (10%) neither agreed nor disagreed. 62 respondents (8%) had no opinion.

The breakdown of responses is set out in **Figure 5.1.2** below.

Figure 5.1.2 - Responses to the question "Do you agree that only people who are at or above school leaving age (currently 16) should be able to register an age discrimination complaint in the field of employment?"



Some respondents who agreed with the proposal expressed some concern that this left persons under the age of 16 open to being discriminated against in part time jobs while in full time education.

Some respondents qualified their agreement of the proposal by saying that persons aged 16 or 17 should only be protected by the legislation if they were in full-time employment.

Although agreeing with the proposal, one respondent suggested that young people should possibly be able to register an age discrimination complaint in the field of employment from the age of 14, on the basis that this is often the age at which young people start part-time work. One respondent who agreed with the proposal suggested that persons under 16 should be able to make a complaint in exceptional circumstances. Although not directly relevant to the question, some respondents felt that people should not be able to work before the age of 16.

One respondent who strongly agreed felt that using the term 'school leaving age' would help future-proof the legislation if the school leaving age increased in the future.

Respondents who disagreed or strongly disagreed with the Committee's proposal tended to do so on the basis of one of the following opposing views - either that there should be no

minimum age for age discrimination claims in the field of employment, or that 16 and 17 year olds should not be protected from age discrimination in this field.

Some respondents noted additional concerns in relation to young people, for instance intersectional discrimination and discrimination in relation to accommodation.

The following comments were received from those who strongly agreed or agreed with the Committee's proposal that only people at or above school leaving age should be able to register an age discrimination complaint in the field of employment:

> "Employment, full or part-time at 16 must confer equal rights enjoyed by other employees and the self-employed."
>
> "They are part of the working world, they have the right to register a complaint just like the rest of the people involved in that job."
>
> "Employment generally is very minimal prior to age 16 and we want students to stay in education until at least 16."
>
> "There is a difference between having a Saturday job and earning a living after leaving school."
>
> "Young adults have the understanding and capabilities to know when they are being discriminated against and therefore should be able to take action."

Comments from those who disagreed or strongly disagreed with the Committee's proposal included:

> "Whilst claims by children below 16 should be rare, I do not believe there are any policy grounds for having a minimum age."
>
> "Employees who are fourteen and fifteen should not be discriminated against, especially if they are vulnerable to being underpaid as there is no minimum wage applying to them."
>
> "I do not believe anyone should be able to complain to the government or to the courts about discrimination. Simply move to an employer or school who does not discriminate, and the discriminating entity will be isolated and driven out of business. But if you're going to have a law, the law should not discriminate on who enjoys protection from discrimination."

Part A asked "**Do you agree that only people aged 18 or over should be able to register an age discrimination complaint in the fields of goods or services provision, accommodation provision or the membership of clubs and associations?**"

788 respondents answered this question.

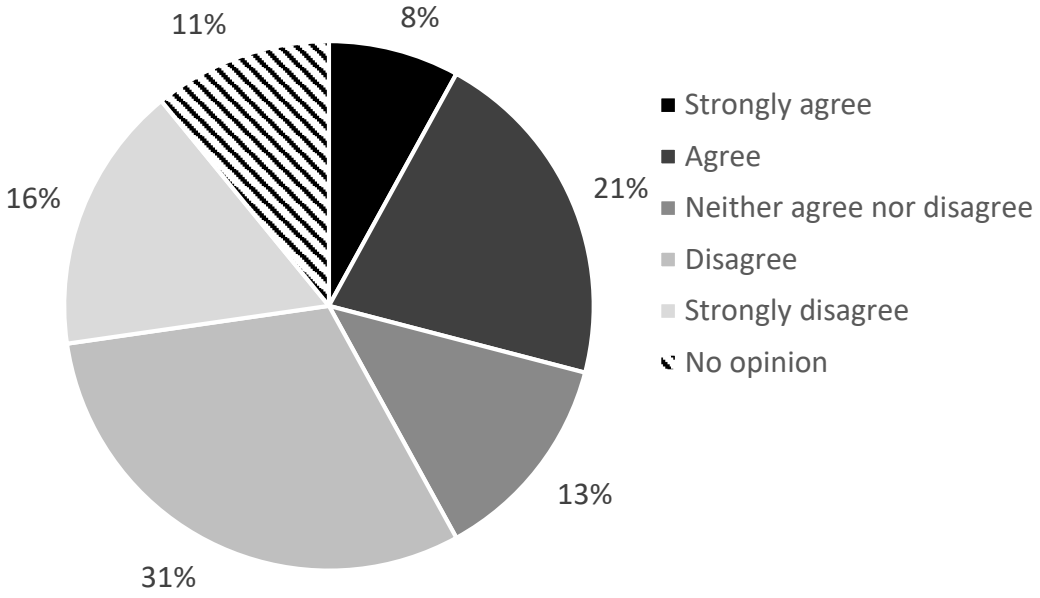
229 respondents (29%) strongly agreed or agreed that only people aged 18 or over should be able to register an age discrimination complaint in the fields of goods or services provision, accommodation provision or the membership of clubs and associations.

371 respondents (47%) strongly disagreed or disagreed that only people aged 18 or over should be able to register an age discrimination complaint in the fields of goods or services provision, accommodation provision or the membership of clubs and associations. 102 respondents (13%) neither agreed nor disagreed. 86 respondents (11%) had no opinion.

The categories of respondent who disagreed with this policy position the most were those respondents who identified themselves as 'member of the public', 'education provider' and 'other' (which included a lot of students). 49% of people who responded who identified themselves as members of the public strongly disagreed or disagreed compared to 28% who strongly agreed or agreed. 61% of respondents who identified themselves as education providers and 55% of respondents who identified themselves as 'other' disagreed or strongly disagreed compared to 18% and 22% respectively who strongly agreed or agreed with this policy position. Opinion was pretty evenly divided amongst respondents who identified themselves as 'an employer' (40% strongly disagreed or disagreed and 39% strongly agreed or agreed) or as 'a provider of goods or services' (41% strongly disagreed or disagreed and 41% strongly agreed or agreed).

The breakdown of responses is set out in **Figure 5.1.3** below.

Figure 5.1.3 - Responses to the question "Do you agree that only people aged 18 or over should be able to register an age discrimination complaint in the fields of goods or services provision, accommodation provision or the membership of clubs and associations?"



Comments included:

"I often find that teenagers receive some of the most age discrimination. I don't think it's fair to limit the ability to register a complaint to over 18s."

"There was a feeling that school leavers who were in employment should be able to bring a complaint for age discrimination if they were refused accommodation simply because they were not yet 18."

"Further consideration of how the proposal to restrict the ability of younger persons to complain on the basis of age should not unreasonably affect or deny the possibility of a claim which also relates to another protected ground (intersectional discrimination); The proposal is that persons under the age of 18 will not be able to claim discrimination in the field of goods or services. In the main, this seems reasonable (sale of alcohol, etc.). However, we have considerable concerns that certain services, such as some diagnostic services, have in the past been restricted on an age basis and that such restrictions might not be open to challenge."

"Depending on the situation, if it is a restricted good dictated by law, there should be no issue regarding discrimination since there is already a reason. If people are

denied access to a service based on just age and prejudice even when they are legally allowed to have it, people under 18 should still be able to complain."

"Let's not encourage children to take legal action."

5.2 Age discrimination (older people/retirement)

While questions on older people/retirement were not specifically asked in the questionnaire, several comments were made.

Some respondents sought clarification about the proposal that retirement ages would need to be objectively justified. Others raised questions about succession planning, access to pensions, and occupational benefits such as health insurance and death in service. Professionals/businesses in this area suggested changes to the exceptions regarding occupational benefits and pensions, which are explained later in Section 14 of this report. In addition, the issue of reviewing capability proceedings in case someone was no longer capable of performing their role was highlighted.

Comments included:

"Contractual retirement ages in Guernsey are commonplace, although many employers retain employees post-retirement on fixed term contracts. Rather than making contractual retirement age unlawful, it is suggested it remains lawful (no earlier than States Pension Age) but that employees have the right to request re-engagement post retirement and that their employer must consider the request against statutory factors. Failure to re-engage then carries a fixed penalty. Further consideration would need to be given to the contractual terms on which an employee might be re-engaged and any enforceable retirement age (which is a preferable alternative to a long serving employee being managed out on capability grounds). Upper age limits for the provision of insured benefits should also be introduced (e.g. medical and permanent health insurance) to address the issue of increasing cost as employees get older."

"Succession planning should be an exception to age discrimination so that younger staff can be developed internally. An employer should have the freedom to develop younger staff and not necessarily retire older employees but move them into an alternative role to develop the team beneath."

"The addition of age as a protected ground will have a bearing on retirement provisions predominantly and in particular on fixed retirement ages. Employers will

have to revise their current contracts for some employees in order to comply with the proposed legislation…..The perception among staff that they cannot afford to retire may exacerbate issues for employers."

6. Families in rental properties and other feedback on accommodation

Part A asked **"In your view should landlords always be able to specify no children, be able to refuse to accommodate children in a limited range of circumstances or never be able to refuse to accommodate children?"**

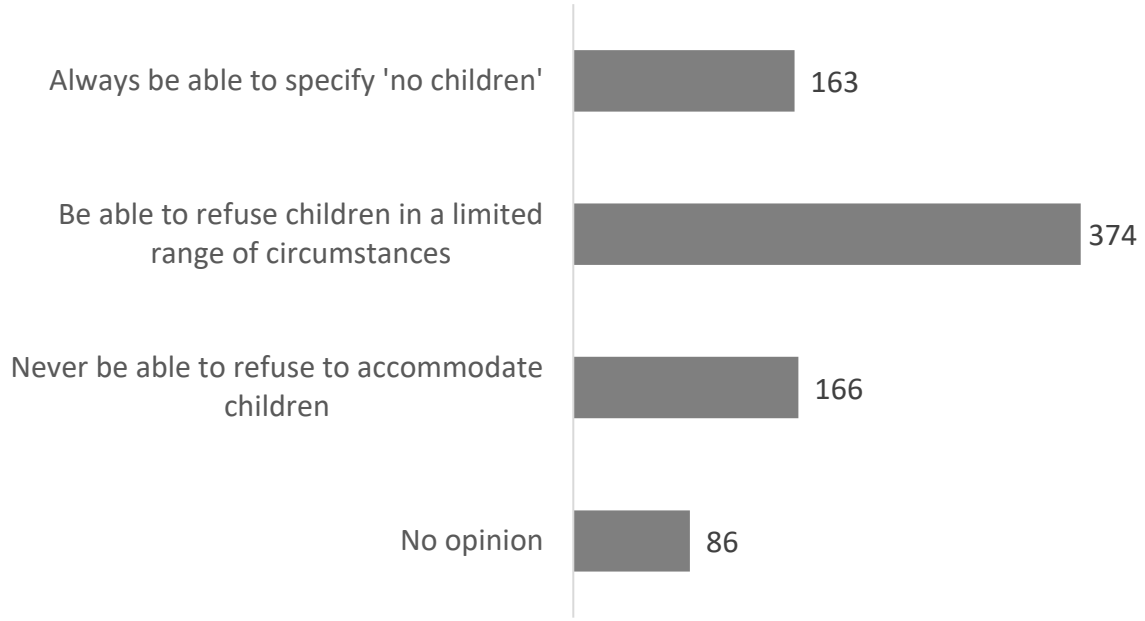
789 respondents answered this question.

374 respondents (47%) agreed that landlords should be able to refuse to accommodate children in a limited range of circumstances. 166 respondents (21%) were of the view that landlords should never be able to refuse to accommodate children. 163 respondents (21%) said that landlords should always be able to refuse to accommodate children. 86 respondents (11%) had no opinion on this question.

Further analysis based on the self-categorisation of respondents showed that 58% of the 36 respondents who identified themselves as 'accommodation providers' held the view that landlords should always be able to refuse to accommodate children. All of the other respondents who identified themselves as 'accommodation providers' were of the view that landlords should be able to refuse to accommodate children in a limited range of circumstances.

The breakdown of responses is set out in **Figure 6.1** below.

Figure 6.1 - Responses to the question "In your view should landlords always be able to specify no children, be able to refuse to accommodate children in a limited range of circumstances or never be able to refuse to accommodate children?"



In its draft proposals, the Committee proposed that landlords may only take age, family composition (i.e. including carer status) or pregnancy of a tenant or prospective tenant into account when renting a property, in the following limited range of circumstances:

- 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.
- The property is a house of multiple occupation with communal facilities and there are safeguarding concerns related to sharing these facilities with unfamiliar adults.

Part A asked **"If a limited range of circumstances are introduced, do you agree with the Committee's proposals?"**

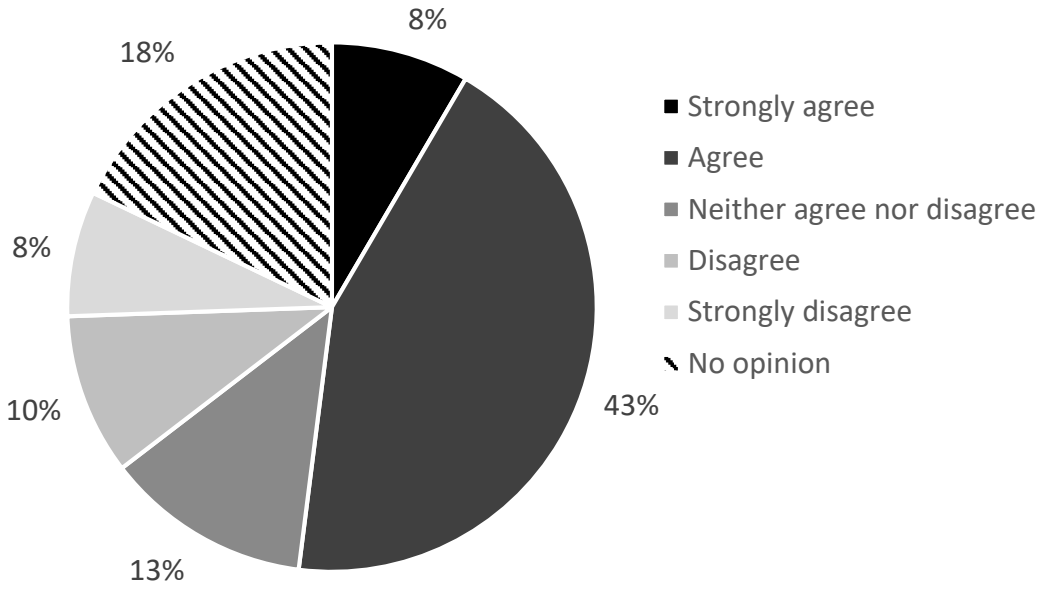
771 respondents answered this question.

401 respondents (52%) strongly agreed or agreed with the limited range of circumstances specified by the Committee in which landlords should be able to refuse to accommodate children. 135 respondents (18%) strongly disagreed or disagreed with the Committee's draft

proposals. 97 respondents (13%) neither agreed nor disagreed and 138 respondents (18%) had no opinion on this question.

The breakdown of responses is set out in **Figure 6.2** below.

Figure 6.2 – Responses to the question "Do you agree with the limited range of circumstances specified by the Committee in which landlords should be able to refuse to accommodate children?"[5]



Comments in favour included:

> "We support the proposal to prevent landlords being able to specify 'no children' except in very limited circumstances. Often victims of abuse who do not meet the income thresholds for social housing find it very difficult to find private rental property that will take children. To make discrimination against tenants with children illegal would provide a wider range of options for women escaping abusive relationships."

> "There should be only very limited circumstances where a landlord can refuse to allow children in their properties. Most of the houses to let are family-sized so why would you refuse children? If landlords refuse to allow children where are these

[5] The percentage of people who 'agreed' marginally rounds up to 44% (meaning that the total of people who 'strongly agreed' or 'agreed' was 52%) but for the purposes of figure 6.2 this percentage has been rounded down to 43% so the whole pie chart adds up to 100%.

families supposed to live? Not everyone can afford a mortgage or are eligible to live in a States' house because of their earnings."

"Landlords should only be able to refuse a family with children (or one which is about to contain children) in the narrow, but reasonable, set of conditions described by the Committee above. It is unacceptable in all other (i.e. regular) circumstances. It is particularly unacceptable in Guernsey, where there is limited affordable private rental housing suitable for families. A landlord benefits significantly from his tenants - and landlords already have a privileged position in society through their ability to own at least two dwellings - the balance needs to be righted by the proposed legislation."

"We recognize that this represents a significant change in practice and culture but broadly agree with the limitations and proposals sought."

Comments opposed included:

"It is important to me as a landlord to be able to choose the right applicant to fill my property. The needs of the applicant need to match the suitability of the property, the type of property, the neighbourhood etc., and my assessment of character and personal situation."

"If I have a quiet tenant on the lower floor I should be able to choose a tenant who doesn't have children to put in the floor above."

A number of accommodation providers also provided comments on other aspects of the proposals, including any requirements to make adjustments for disabled tenants:

"As a private landlord, with a single property providing my 'pension', I object to any external control, limitation, or other interference in the process by the state."

"I think in the easy-read document it says the tenant has to pay for alterations to buildings, but in the technical document and in the Accommodation FAQs it is most unclear who has to pay for what. It seems the landlord is expected to pay for some things. In the FAQs it says 'the landlord has to pay for appropriate adjustments which do not involve physical alterations to the building', then immediately it says this includes fittings like door handles. Surely that is a physical alteration. What about taps? All these things cost money. So it needs to be very clear who pays for what, then we should be re-consulted."

"I feel very strongly that physical alterations to my house should not be FORCED on me as landlord, whoever has to pay for them."

"Private landlords, with one or maximum two properties to rent should be excluded from having to make costly facility changes for accessibility."

7. How the sex and trans grounds relate and access to single sex spaces

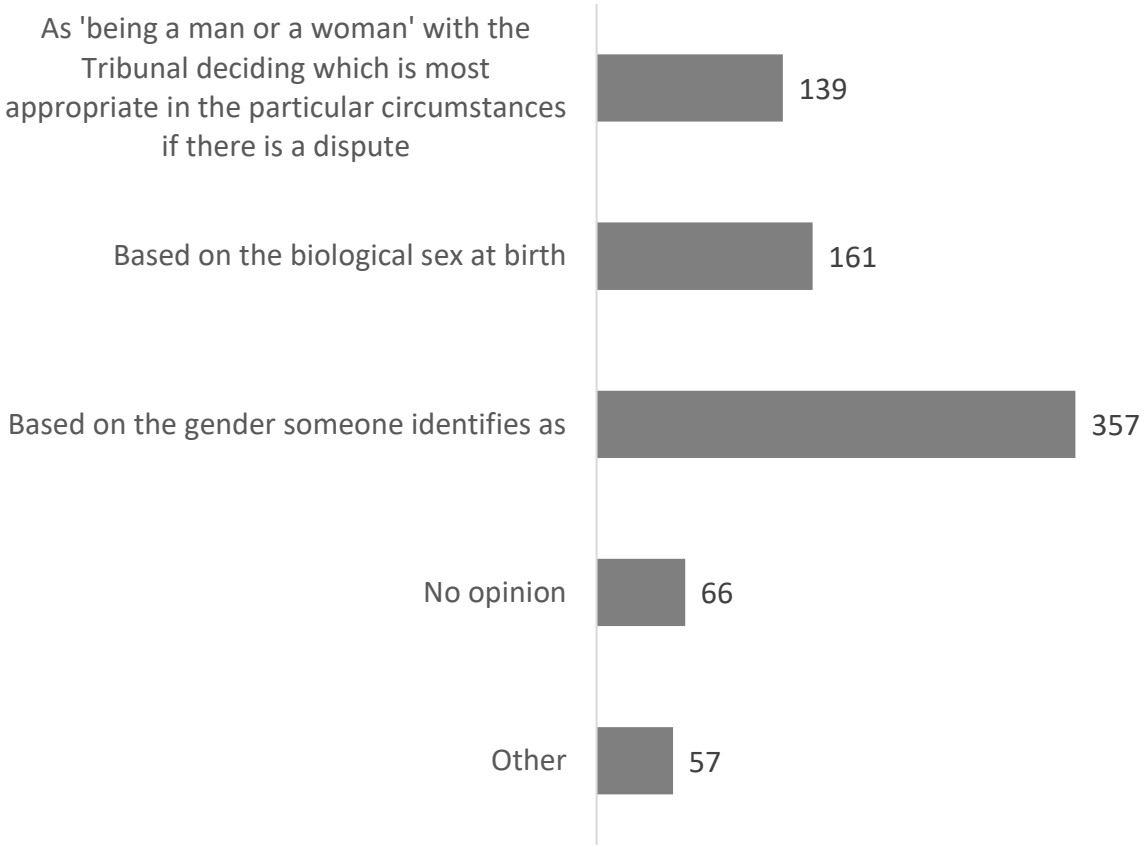
In Part A, respondents were asked to **"…select how you think sex should be defined in the legislation."**

780 respondents answered this question.

357 respondents (46%) were of the view that sex should be defined in the legislation based on the gender someone identifies as. 161 respondents (21%) thought it should be based on biological sex at birth. 139 respondents (18%) thought it should be defined as 'being a man or a woman' with the Tribunal deciding which is most appropriate in the particular circumstances if there is a dispute. 66 respondents (8%) had no opinion and 57 respondents (7%) answered 'other'.

A full breakdown of the responses to this question is set out in **Figure 7.1** below.

Figure 7.1 - Responses to the question regarding how sex should be defined in the legislation



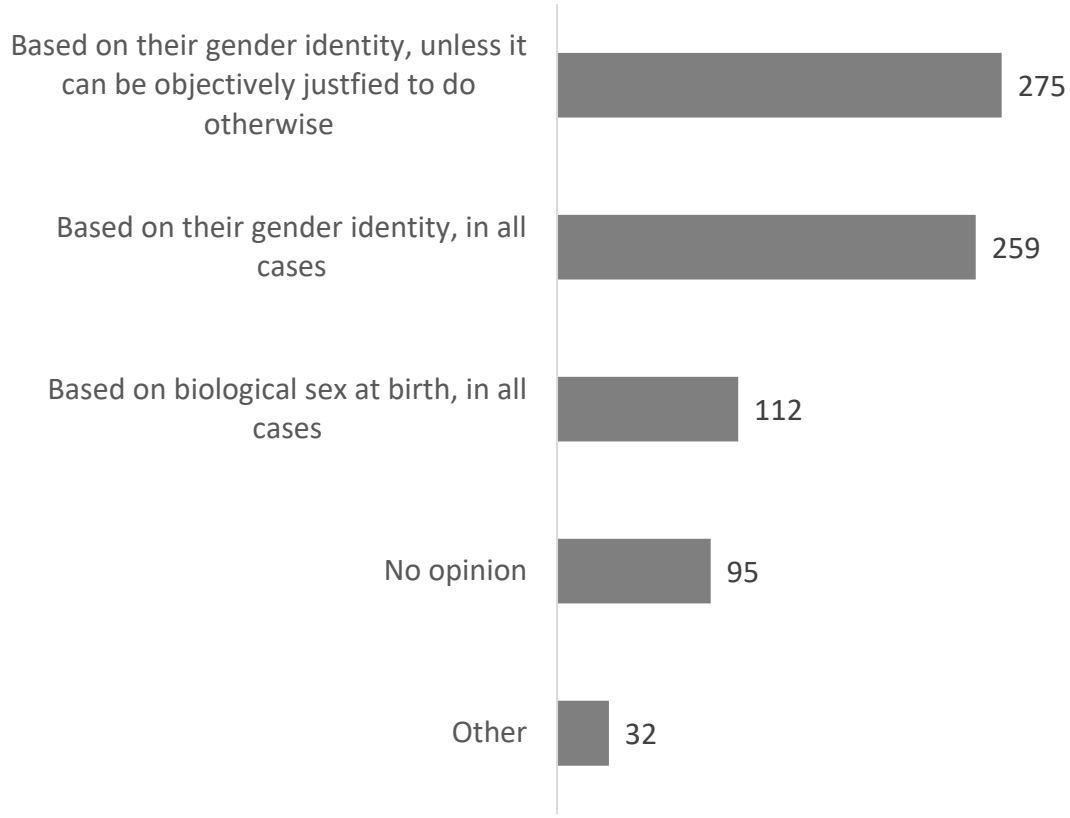
Part A asked **"On what basis do you think trans people should have access to single sex spaces and services?"**

773 respondents answered this question.

275 respondents (36%) were of the view that trans people should have access to single sex spaces and services based on their gender identity, unless it could be objectively justified to do otherwise. 259 respondents (34%) thought it should be based on their gender identity, in all cases. 112 respondents (14%) thought it should be based on biological sex at birth, in all cases. 95 respondents (12%) had no opinion and 32 respondents (4%) answered 'other'.

A full breakdown of the responses to this question is set out in **Figure 7.2** below.

Figure 7.2 - Responses to the question "On what basis do you think trans people should have access to single sex spaces and services?"



There were many strongly held and divergent views expressed in relation to the questions related to sex. Some comments concerned exceptions, which are detailed separately in Section 14 of this report.

Some respondents felt that non-binary and intersex people should be protected from discrimination and thought the Committee's proposals should go further in this regard.

Respondents who felt that the sex ground should be based on gender identity highlighted the potential impact on trans people's safety, wellbeing and ability to participate in society if different treatment based on biological sex were endorsed in legislation. They also argued that segregation based on biological sex was unenforceable; that most people would feel it would be inappropriate for trans men to be required to use women's spaces; that internationally there were calls for trans equality; that biological sex is not binary; that trans people should not be seen as potential threats; and that perpetration of assaults or other forms of violence should be managed through criminal not civil law. Concerns were also raised about the impact of this topic being debated on the wellbeing of trans people.

On the other hand, some respondents felt strongly that sex was biologically determined (they considered this a scientific fact) and a relevant characteristic when it came to discriminatory treatment. Those with this view often expressed concerns about the need to preserve (biologically defined) single sex spaces and the risk of sex-based violence.

Questions were raised about how a tribunal would determine whether someone was a man or a woman.

Comments included:

> "I am concerned to see no provision for non-binary people in the legislation. I have met increasing numbers of people who identify as non-binary in my personal and work life and they are not necessarily planning to change gender.
>
> "The States of Guernsey must NOT allow transphobic individuals to pretend men will dress as women to enter single sex spaces and assault women - this is ridiculous. Trans women face an awful lot of challenges as it is and to date there have not been any issues of this kind in Guernsey. It's also important to remember this is Civil Law and there is criminal law to prevent or punish such acts… You would also force Trans Men that are on testosterone and present as males into the female toilet as they were born female. Also this would be impossible to enforce..."
>
> "Please re-think your definitions of men and women - there can only be one way to define humans and that is by their biology. Any other way to define us places women in danger."
>
> "Please do not allow trans-exclusive women's groups to undermine equality or insist on exceptions which negatively affect trans women."
>
> "If a tribunal met to rule on what gender identity should be used, then I would presume that these would be specialists (as for other tribunals), but what criteria would they use? Some people socially transition, others medically transition, many do both but the timescales for accessing services are long (and indeed it takes over two years to even get a first appointment to be seen at a Gender Identity Clinic). Is it going to be based on chromosomes? Hormones? Secondary sexual characteristics? Genitals? Clothing? Names/documents?"
>
> "To a woman who has suffered rape, it may not be acceptable when the female doctor/nurse performing her smear is biologically male."

"The universally accepted definition of sex in science (specifically in the fields of biology and medicine), dictionaries, academia and elsewhere is that of a binary biological condition. The existence of intersex conditions does not in any way alter this fact as intersex people are still either male or female. Sex is biological and gender is socially constructed. We at X do not understand why the Committee would present such an incoherent definition of sex as their preferred option. It embeds sexist stereotypes, it is etymologically inaccurate, it conflates the sex ground (sex) with the trans ground (gender), and it passes the ensuing responsibility on to a Tribunal which, crucially, means that the law as written will give no confidence whatsoever to the citizen wishing to bring a case or to the service provider as to how it might be interpreted until the Tribunal is underway."

"We wish to continue to provide a service to everyone based on segregation by biological sex as we do now. We do not consider that biological males, whatever degree of transition they have undertaken, should share private spaces with biological females."

8. Compensatory awards – should there be a limit?

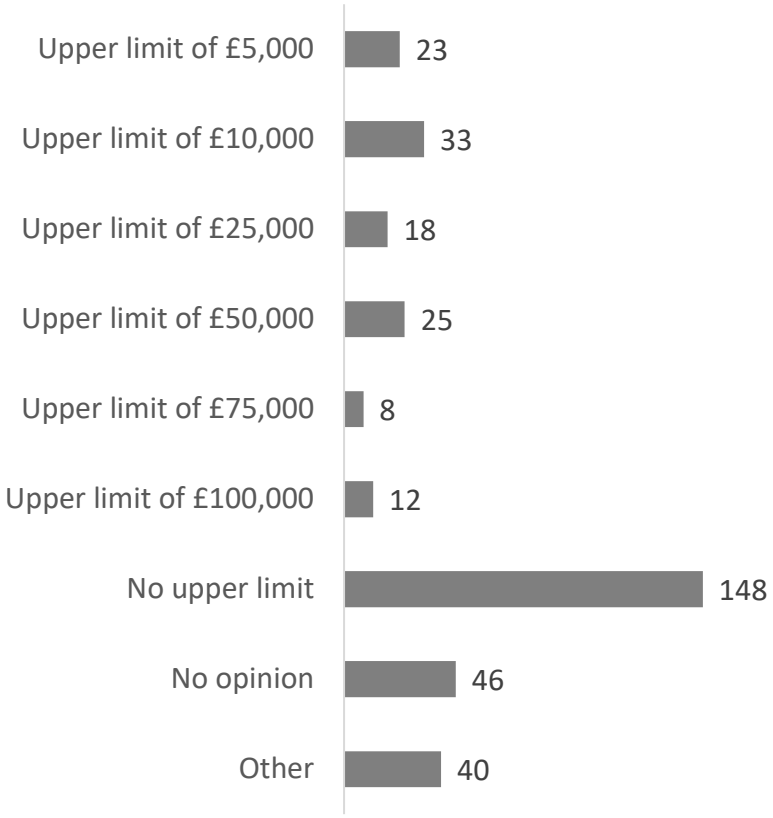
Part B asked **"Do you think there should be an upper limit to compensation for financial loss?"**

353 respondents answered this question.

148 respondents (42%) thought that there should be no limit. 119 respondents (34%) thought there should be an upper limit ranging from £5,000 to £100,000. Of those six different options for upper limits included in the questionnaire, an upper limit of £10,000 was the option selected by most respondents (33 respondents, 9%), followed by £50,000 (25 respondents, 7%). Very few respondents selected upper limits of £75,000 or £100,000. 46 respondents (13%) had no opinion. 40 respondents (11%) specified 'other'.

A full breakdown of the responses is set out in **Figure 8.1** below.

Figure 8.1 - Responses to the question "Do you think there should be an upper limit to compensation for financial loss?"



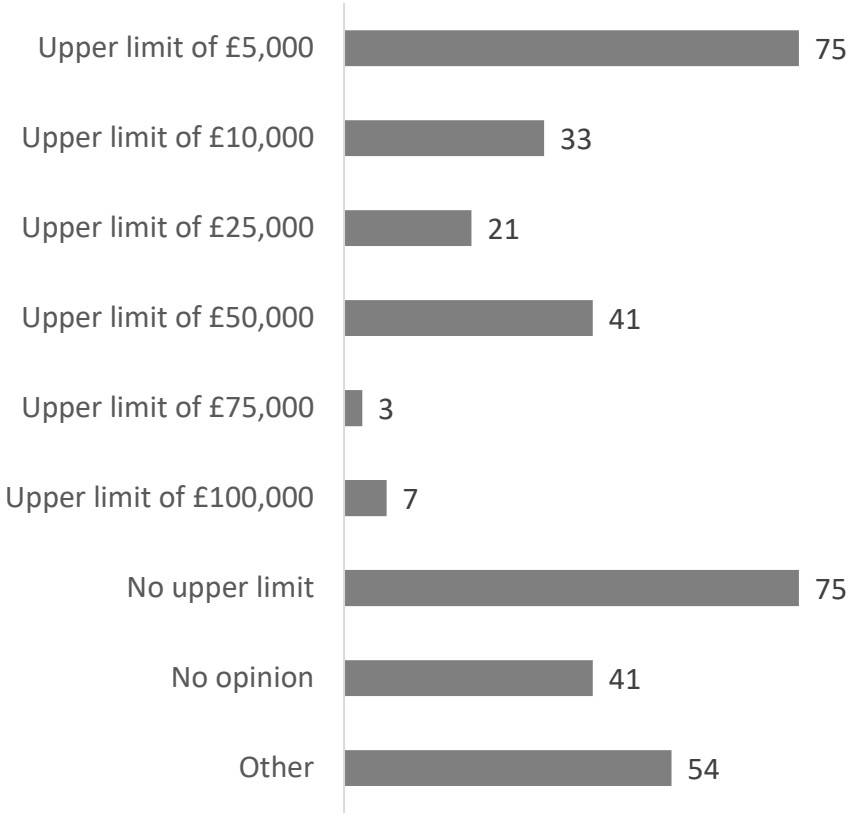
Part B asked **"Do you think there should be an upper limit to compensation for injury to feelings?"**

350 respondents answered this question.

The two most selected answers were polar opposites. 75 respondents (21%) selected the lowest upper limit of £5,000 and 75 respondents (21%) selected no upper limit. 170 respondents (49%) selected upper limit options of £50,000 or less. Very few respondents selected upper limits of £75,000 or £100,000. 41 respondents (12%) had no opinion and 54 respondents (15%) selected 'other.'

A full breakdown of the responses is set out in **Figure 8.2** below.

Figure 8.2 - Responses to the question "Do you think there should be an upper limit to compensation for injury to feelings?"



Generally, respondents thought that compensation for injury to feelings should be lower than for financial loss.

Many who answered "other" for injury to feelings felt it could not be quantified, was too subjective and/or should not be compensated for. Someone suggested an amount to cover six months' counselling for injury to feelings.

Respondents who said no upper limit for financial loss noted that the financial loss had to be proven so would only be high in cases where the proven financial loss was high. One respondent said compensation should be based on the ability of the "offender" to pay.

Some respondents commented that the proposed six month qualifying time period within which to make a claim after the last alleged incident of discrimination was too long and would create too much uncertainty for business.

Comments against the inclusion of upper limits included:

"I see no benefit to having upper limits except to protect the perpetrators of the most serious discrimination (which would be the cases that would require the highest compensation)."

"If there were to be an upper limit which is set too low, employers could deliberately discriminate and be prepared to take the hit, a bit like a supermarket having 'loss-leader' products."

"Financial loss would depend not only on what the person's earnings were, but also whether they had a pension, private health care, car allowance, etc. which could amount to much more than the proposed upper limit. By not having an upper limit would encourage employers to make sure they run a company that does not discriminate in any way. Injury to feelings - this is very difficult to quantify but there may be times where the employee is so badly affected by say, long-term bullying, that they require long-term medical/psychological treatment which comes at a cost which should not be borne by the employee."

Comments in favour of upper limits included:

"Injury to feelings is difficult to prove so keeping potential awards at a reasonable level makes the involvement of lawyers less likely."

"We reject entirely the suggestion that there should be uncapped damages - this has the potential to be crippling to Guernsey businesses financially, which is deeply unfair given the uncertainty created by the proposed regime and that will make it very difficult for employers to respond."

"I think that an upper limit set appropriately defines the risk to businesses and so acts as a deterrent and also avoids spurious claims. In terms of financial loss if the case is an employment case then 2yrs salary is a fair compensation level and accounts for businesses that have high financial turnover and might tend to 'pay employees off' to avoid litigation."

"Individuals are far more likely to make false or vexatious claims if there is not an upper limit placed upon the amount to be paid out."

"We feel that compensation should be capped but in the amount of £50,000. Clearly this does not mean that claimants will be able to recover £50,000 in every case but the higher threshold means that the Tribunal will have the ability to make such an

award where appropriate and there will be less need to update the legislation in the near future. £50,000 is also in line with the UK[6].”

Other comments included:

“If I lose money, monetary compensation seems appropriate. If my feelings are hurt, money is the wrong currency.”

“We believe that there is a culture in some employers of dismissing staff without any process being followed, then offering a compromise agreement with these limits as the settlement figure. Invariably… we advise them to accept as it is the maximum compensation they could recover, but even when they don’t the employer repeats the offer before any claim gets heard by a tribunal. Publicly it appears the employer is behaving appropriately as no cases are forthcoming, but the situation behind the scenes is quite different.”

A landlord noted “Even if no case is found we will have gone through the stress and trauma of it. Will we be able to claim compensation for damage to our feelings?”

9. Equality and Rights Organisation (ERO)

Part B asked **“From your perspective, what would be the five most important things to include in the mandate of an Equality and Rights Organisation?”**

321 respondents completed this question. Some respondents selected more than five options – **Table 9.1** below includes responses where individuals selected more than five options. It does not incorporate comments included only in free-text comments, which are discussed below.

[6] Note: In the UK there is no upper limit for compensation for financial loss; the current limit for injury to feelings is £44,000, with the most exceptional cases capable of exceeding £44,000.

Table 9.1 – Responses to the question "From your perspective, what would be the five most important things to include in the mandate of an Equality and Rights Organisation?"

	Answer choice	No. of responses
1	Providing advice and information to employers and service providers about equality	168
2	Promoting equality	167
3	Helping to resolve discrimination issues informally before a formal complaint is made, where possible	159
4	Providing advice and information to individuals with equality complaints	134
5	Promoting human rights	133
6	Issuing codes of practice on equality issues	115
7	Providing support for service providers thinking about accessibility for disabled people	85
8	Providing advice and information to individuals with human rights complaints	82
9	Providing legal or financial support for individuals bringing a case to a Court or Tribunal	71
10	Monitoring compliance with human rights standards	65
11	Bringing public interest discrimination complaints in its own right to a Court or Tribunal	52
12	Developing relationships with international organisations, such as the UN and networks of equality and rights bodies	51
13	Researching equality in Guernsey	46
14	Issuing compliance notices and/or issuing civil penalties when people do something discriminatory	44
15	Advising government about equality	44
16	Holding public inquiries on systemic equality issues and human rights violations	41
17	Investigating organisations and giving recommendations in relation to equality	40
18	Researching human rights in Guernsey	37
19	Advising government about human rights	32
	Other	35

A relatively popular viewpoint, shared by around a third of respondents who provided comments (in addition to selecting options in the above table), was that the ERO should focus on education, promotion, advice and informal resolution rather than on sanctions or

investigations. Respondents felt that this might nurture a culture in which rights were respected, support employers to understand their duties well and gain the support of the business community. It was suggested that a significant cause of discrimination was ignorance. Some respondents highlighted that they considered the legislation insufficient to achieve cultural change and that an ERO was required to achieve this.

One view expressed was that the ERO should not promote a litigious culture, which some considered a risk with the litigation functions suggested. Some respondents, however, felt that regulatory or litigation functions were necessary to prevent discrimination. Several respondents highlighted the fact that some groups in society (such as 'guest workers') might not wish to pursue a claim in a Court or Tribunal, and this could leave systemic discrimination unchallenged unless the ERO had litigation/regulatory powers.

Another suggested that some of the potential functions, such as the power to bring complaints in its own right and holding public inquiries, would deter employers from hiring employees with protected characteristics. A few respondents felt that the list of functions under consideration was weighted more towards the protection of individuals rather than supporting employers and service providers. There were concerns that employers would not seek advice from an ERO if they were worried about the possibility of the same organisation taking enforcement action or bringing a complaint against them.

More than ten respondents explicitly mentioned the importance of providing legal and financial support to individuals who sought to make complaints.

A small number of respondents commented that they did not support the establishment of an ERO at all. These respondents felt that that creating an ERO was unnecessary, overly bureaucratic and costly. Some suggested expanding the capacity of the Employment Relations Service as an alternative. Two respondents suggested that they felt an ERO might promote a culture of positive discrimination.

Some individuals said that they felt the ERO should focus on all human rights, while another thought a human rights remit would be too broad.

A few individuals felt that the accountability functions were the most important, with one person saying that this function was needed to address poor practice within the States of Guernsey.

Among those who chose 'other' functions, most of the comments were related to whether or not respondents felt there should be an ERO at all or that they found it hard to choose five categories. Other functions suggested included:

- Providing evidence
- The ability to bring class actions
- Compiling qualitative data and statistics
- Providing support for the Third Sector
- Dismissing trivial and vexatious complaints (subject to appeal to the Tribunal)
- Investigating, evaluating and requiring improvement in the substance and implementation of accessibility plans
- Pursuing interests and complaints in the public interest
- Making non-binding determinations
- Powers to investigate and alter discriminatory decisions of statutory functions

Comments received seeking wider powers for an ERO included:

> "It is vital that the ERO has sufficient powers to enforce legislation, including the ability to bring cases to the tribunal itself, rather than just issuing improvement notices… By stipulating that only people experiencing discrimination can bring a case, this is likely to mean many cases of discrimination will never be addressed, as people will have neither the means nor the ability to bring a case, especially as legal aid is not available for tribunal cases."

> "Arguably, passing the Human Rights Law without providing mechanisms to promote, protect and monitor those rights is a failure of the States of Guernsey's duties to promote and protect citizens' rights."

> "What is needed is cast iron States and Policy and Resources commitment for a budget of millions for staffing ERO, education, legal aid, advertising, grants and loans for access and reasonable/appropriate adjustment."

Comments received which were against the establishment of an ERO included:

> "In Jersey, an ERO was not considered proportionate or necessary; that argument is even more compelling for Guernsey. It might be different if there was a clear and substantial body of evidence that a significant number of people have been unable to exercise their rights such that the establishment of such a body was an essential part of change; no such evidence exists."

> "…the mandate of the ERO would be so broad that every individual on Guernsey would have to worry about its impact throughout their professional and private lives. We worry that it would, de facto and de jure, simply become a political and ideological police force (with a near-marxist, ultrawoke mandate - more suited to a totalitarian state than the historically free-thinking Bailiwick of Guernsey… We would therefore not create an Equality and Rights Organisation"

Comments received which highlighted the need for a greater focus on education than enforcement included:

> "We remain of the view that the educational and advisory responsibilities of the proposed Equality and Rights Organisation will be key to establishing the spirit of the Law. We are fully supportive of the emphasis on mediation and education ahead of litigation".

> "Legislation doesn't change things just by existing. Someone/something has to encourage and support our community to change attitudes. Legislation should be a backstop, a last resort for those who will not listen to reason. Hence the ERO is vital…"

> "It's always essential to create a balance of interests. It will be very important to inform smaller employers and clubs/associations in a practical way about compliance and of ways to mitigate costs, which are often ignored by politicians, who can fail to appreciate difficulties faced by these smaller organisations."

> "There needs to be proper engagement with business and training given by the ERO when this comes into force. The Committee have said multiple times that they aren't trying to catch anyone out and that this is trying to change mind sets and equality, not to introduce a claim culture… Larger employers already have access to training like this, but the small ones do not."

Part B asked **"If you were to experience discrimination, which of the following organisations would you be most comfortable seeking advice from?"**

324 respondents answered this question.

"An independent ERO" was by far the most popular choice, as **Figure 9.1** illustrates.

Out of those who said 'other' the following responses were given: ACAS; Citizens Advice; a States Member; an employment lawyer; the police; a trustee; a school.

Figure 9.1 – Responses to the question "If you were to experience discrimination, which of the following organisations would you be most comfortable seeking advice from?"

Part B asked **"If you were seeking advice about discrimination as an employer or service provider, which of the following organisations would you be most comfortable seeking advice from?"**

There were 315 responses to this question. "An independent ERO" was the most popular choice, as illustrated in **Figure 9.2**.

Respondents who selected 'other' said: Citizens Advice; HR professional; appointed external company lawyer; trustee; police; the internet; experts; and Start-up Guernsey.

Figure 9.2 – Responses to the question "If you were seeking advice about discrimination as an employer or service provider, which of the following organisations would you be most comfortable seeking advice from?"

In relation to these questions, issues of trust and independence were referenced more than any other factor, with many respondents emphasising the importance of independence. Several commented that advice should not come from the States of Guernsey and/or highlighted the potential conflict of interest that the States would have as the largest employer on the island.

A number of respondents highlighted the importance of the person giving the advice being competent to do so, with some believing that an ERO was likely to have the most expertise and be most up to date. A few respondents felt that only a lawyer could give advice of the level that they required.

Several respondents commented on the importance of inexpensive advice or noted concern over the cost of a lawyer.

Some respondents found Third Sector organisations more accessible and less intimidating.

Some respondents chose the Employment Relations Service as the preferred option because they did not want to see a new organisation being set up.

Some respondents expressed general concern about maintaining confidentiality on a small island.

Comments included:

> "The States should not be involved in the giving of individual advice as one of the biggest employers in Guernsey, it could lead to a conflict of interest on many occasions."

> "You need an independent body qualified to look at discrimination claims, but as an employer, you would normally engage a lawyer, that said, a smaller employer needs an independent body that can offer this service free of charge."

> "I think being able to go to a specialist organisation would be very useful. The idea of an Equality and Rights Organisation that is engaged in educating the public and seen to be supporting people who have been discriminated against would be a very attractive and probably an especially helpful first port of call."

> "The area of equality legislation is complicated and whilst bodies such as the ERO should be able to give straightforward advice, where employment issues arise that get to the point of actually needing advice they are often not straightforward. To even begin to grapple with these issues the staff within the ERO are going to need a lot of training and to work in the field for two or three years' before they become effective."

> "Whether ERO or revamped Employment Relations, the body must be impartial and advisory to both the complainant and the source of the perceived discrimination, and there should be no assumption that discrimination actually took place, advice should be balanced."

> "Any ERO worth their salt would be expert in discrimination issues, so they'd be the obvious body to turn to. Some of the other suggestions (e.g. HR rep/States of Guernsey staff) wouldn't be perceived as independent enough."

10. Other comments on enforcement, advice, conciliation and other services

The consultation generated a number of comments in relation to the mechanisms and processes for managing complaints. The questionnaire itself did not focus on the proposed enforcement structure overall, for instance how the existing Employment Relations Service and Employment & Discrimination Tribunal (the Tribunal) might relate to the ERO and the legislation. However, details on these were included in the technical draft proposals on which the Committee invited comment.

Some of the comments received on these issues were of a technical nature and included:

- The shifting of the burden of proof to the respondent, once a prima facie case of discrimination is established.
- The importance of legal aid – with some respondents stressing the importance of ensuring provision and others expressing concern about rising legal aid costs.
- It was suggested that employees should be legally required to notify an employer in writing before being able to register a complaint.
- Compulsory mediation was suggested.
- The ability of the Tribunal to make cost awards in order to deter frivolous, vexatious, trivial or misconceived claims was raised.
- The importance of claimants being able to rely on some points of common knowledge without having to provide evidence was highlighted.

Several respondents voiced concerns about the impact on business, in particular in relation to the possibility of vexatious and/or frivolous claims.

Significant concerns around the States' ability to adequately resource both the ERO and the Tribunal were raised, in relation to funding and finding qualified human resources. Some respondents made suggestions as to the composition of the Tribunal going forward, with several saying that the Tribunal should include legally qualified members.

Comments received relating to the Tribunal included:

> "…no other jurisdiction hears this type of claim before an all lay member panel; the norm is a specialist employment judge and two lay members. Our recent experience has highlighted the need for some formal rules of procedure to provide a clearer

framework for everyone operating in the Tribunal system. This would remove the potential for abuse, the uncertainty over how the Tribunal would treat an issue and the possibility of inconsistency between the approaches of different Tribunal Chairs. Any such review should include participation from community support organisations…as well as [lawyers]."

"Current Tribunal service do not have the expertise or resources to administer this new law and can't fall back on well-known and well tested case law. Tribunal needs to be chaired by a legally qualified person, ideally with experience in the field of employment."

11. Phasing implementation

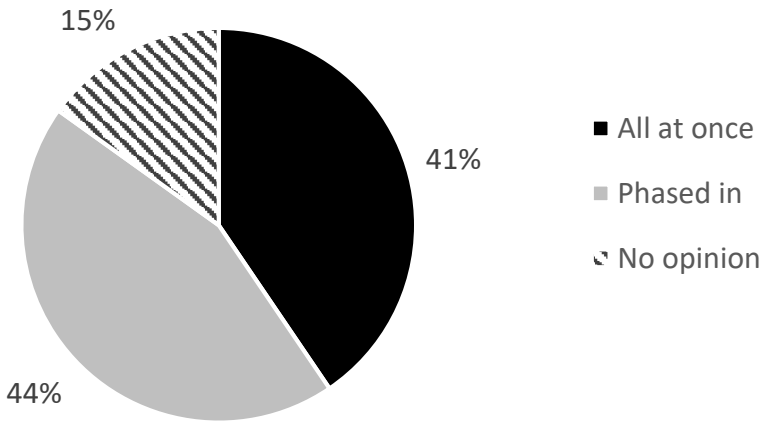
Part B asked **"Do you think that the legislation should come into force all at once or should it be phased in?"**

311 respondents answered this question.

Views on the question was fairly evenly split. 138 respondents (44%) thought the legislation should be phased in. 126 respondents (41%) were of the view that the legislation should come into force all at once. 47 respondents (15%) had no opinion.

The breakdown of responses is illustrated in **Figure 11.1** below.

Figure 11.1 - Responses to the question "Do you think that the legislation should come into force all at once or should it be phased in?"



Some respondents felt that there was little reason to delay the introduction of the legislation further and that the legislation had been planned for long enough that employers and service providers should be sufficiently prepared by the time it had been drafted. Some highlighted the need for delays on equal pay and accessibility provisions in particular (discussed in the next sections). Some felt the grounds of protection should be phased in, as was the case in Jersey, in order to give business more time to adapt and adjust. However, others argued that this would increase cost as employers may need to repeatedly review and revise HR policies each time a new phase of legislation is introduced. Other suggestions included introducing the legislation and evaluating and amending it once it was in force.

Comments received included:

> "Believe the legislation should come into force all at once. While the new legislation is likely to give extensive new rights, it seems fairly unlikely that there will be an immediate flood of claims."

> "Disability brought in first followed by other protected characteristics."

> "The feedback from Jersey was that this staged process helped businesses to deal with the disruption of amending/introducing new policies and procedures. We think a similar staged approach should be adopted here."

> "Given the research and preparation we are aware has gone in to the development of the proposals, we do not believe that further consultation and consideration is likely to result in any significant improvement to the legislation. Rather, we would see the most effective implementation route as being proceeding with the legislation, and then implementing a timetabled programme of monitoring and review, including the provision of feedback from the public and representative organisations, followed by any appropriate amendments to the then existing legislation. It is our view that the adoption and publishing of a timetabled review process would do much to reassure employers that any genuine difficulties can be exposed and resolved in a timely manner."

12. Equal pay for work of equal value

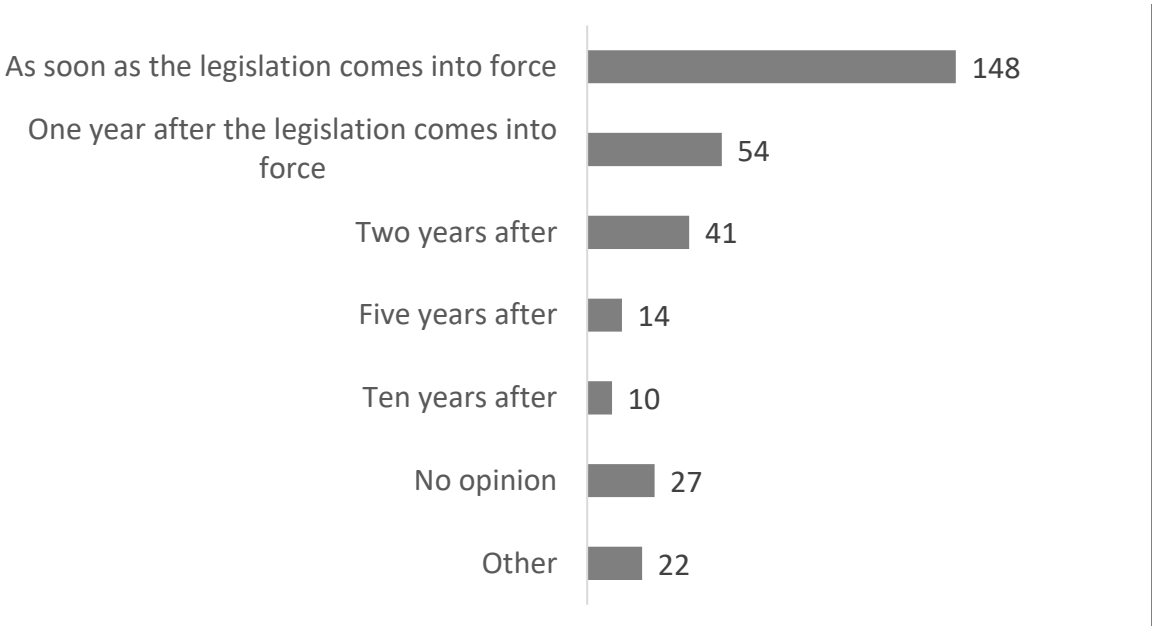
Part B asked **"When do you think someone should be able to register a complaint of equal pay for work of equal value?"**

316 respondents answered this question.

148 respondents (47%) thought that respondents should be able to register a complaint of equal pay for work of equal value as soon as the legislation comes into force. 54 respondents (17%) thought that this aspect of the legislation should come into force one year after the legislation comes into force and 41 respondents (13%) thought there should be a two year delay. Very few respondents selected the five and ten year options.

A full breakdown of the responses is set out in **Figure 12.1** below.

Figure 12.1 - Responses to the question "When do you think someone should be able to register a complaint of equal pay for work of equal value?"



A number of comments were received relating to whether respondents supported the introduction of equal pay and the specifics of the proposals, rather than the time frame per se. Those that welcomed the legislation highlighted its importance for gender equality and the extension of the UN Convention on the Elimination of all forms of Discrimination Against Women. Concerns raised included the cost to the public sector, the potential for employees to compare themselves to employees in other jurisdictions and the fact that the equal pay provision in the draft proposals extended to other characteristics, not only to sex.

Comments received which welcomed the introduction of equal pay provisions included:

> "The States of Guernsey must ensure all of their staff receive equal pay for work of equal value. This should be backdated by at least 5 years if a claim is proved."

> "Pleased to see the proposal to use the legislation to advance CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) in Guernsey. The consultation document recognises that the introduction of equal pay rights may be important for those with "carer status" who are working part time, if part time employees are paid pro rata less than their full time colleagues."

> "We broadly agree with the proposals in this area, like to see the legislation requiring employers to undertake mandatory pay audits. These should provide a breakdown of the workforce by grade or job with reference to protected grounds and salary."

Comments which sought to limit the provisions on equal pay included:

> "Should limit comparators for equal pay/equal value claims to employees in Guernsey."

> "Additional costs for the States will be substantial and needs a delay to allow the States to change working practices and employee contracts so costs can be managed over a number of years."

> "We are concerned that the adoption of equal pay/equal treatment rights of action across all of the protected grounds has been taken forward without any or any apparent consideration as to whether this is necessary for Guernsey. In the UK, where the vast majority of equal pay litigation has taken place, this right is limited to sex. It is unclear why it is considered necessary for Guernsey to innovate in this area."

13. Appropriate adjustments and the anticipatory accessibility duty

It is intended that the discrimination legislation will drive improvements in accessibility. Changes to physical features could arise as a result of a person's request for an appropriate adjustment – this is a reactive duty responding to a particular individual's needs. The

proposed anticipatory accessibility duty is a proactive duty intended to negate the need for individuals to have to ask for adjustments. The aim is that accessibility should be built in to the design and planning of services and buildings accessible to the general public. In developing these aspects of the proposals the Committee recognised that changes to physical features need to be planned ahead due to the potential cost implications of such changes. In the questionnaire, the Committee asked a series of questions relating to the potential lead-in period that would be necessary in three different respects.

Part B asked **"How much time after the commencement of the legislation do you think education providers and providers of goods and services should be given to carry out an access audit, and develop an Accessibility Action Plan that prioritises what they will do to improve accessibility?"**

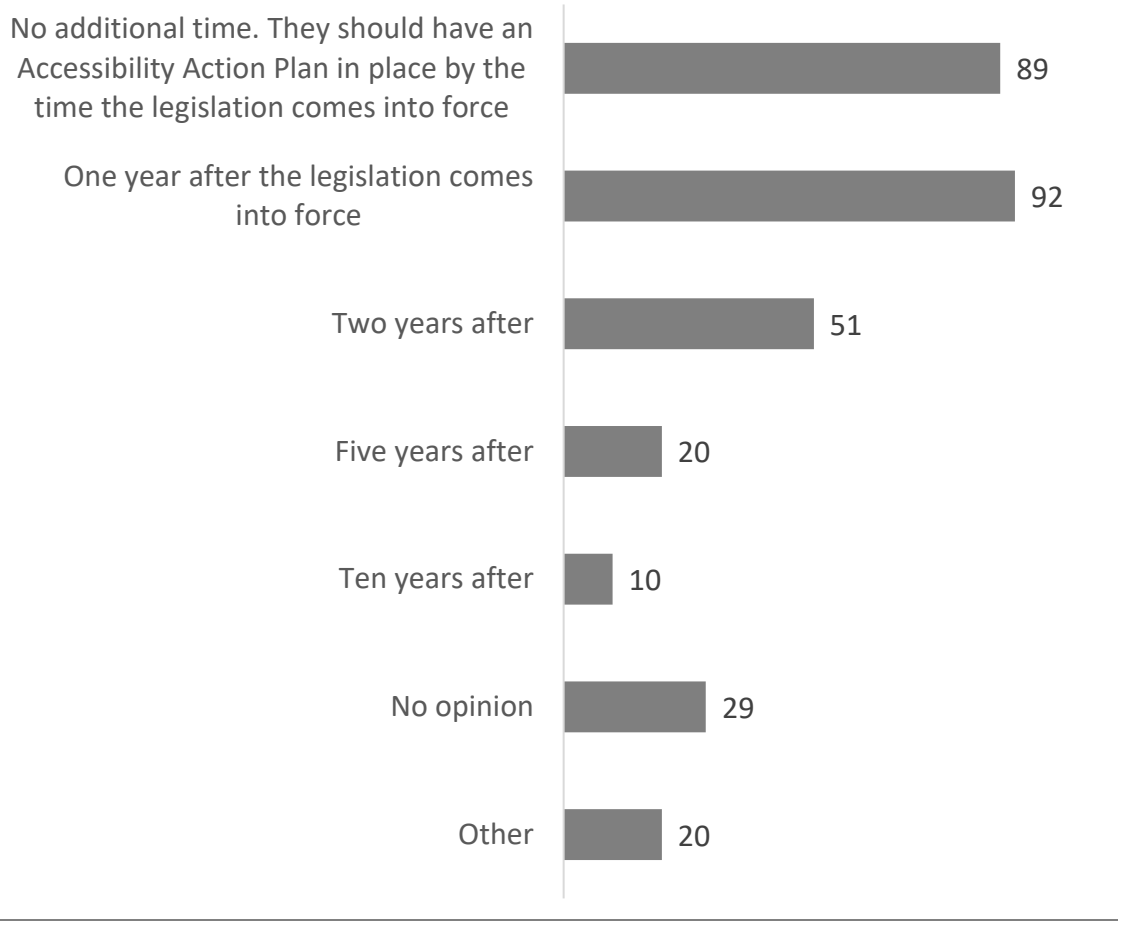
311 respondents answered this question.

89 respondents (29%) thought that education providers and providers of goods or services should have an Accessibility Action Plan in place by the time the legislation enters into force.

173 respondents (56%) thought there should be a lead-in period of some description to provide time for duty-bearers to carry out an access audit and develop an Accessibility Action Plan. Of these 173 respondents, 92 respondents (30% of respondents to this question) thought the lead-in period should be 1 year, 51 respondents (16%) thought it should be 2 years, 20 respondents (6%) thought it should be 5 years and 10 respondents (3%) thought it should be 10 years. 29 respondents had no opinion.

A full breakdown of the responses is set out in **Figure 13.1** below.

Figure 13.1 - Responses to the question "How much time after the commencement of the legislation do you think education providers and providers of goods and services should be given to carry out an access audit, and develop an Accessibility Action Plan that prioritises what they will do to improve accessibility?"



Part B asked **"How much time after the commencement of the legislation do you think education providers and providers of goods and services should be given before beginning to implement physical changes to buildings as part of an Accessibility Action Plan?"**

311 respondents answered this question.

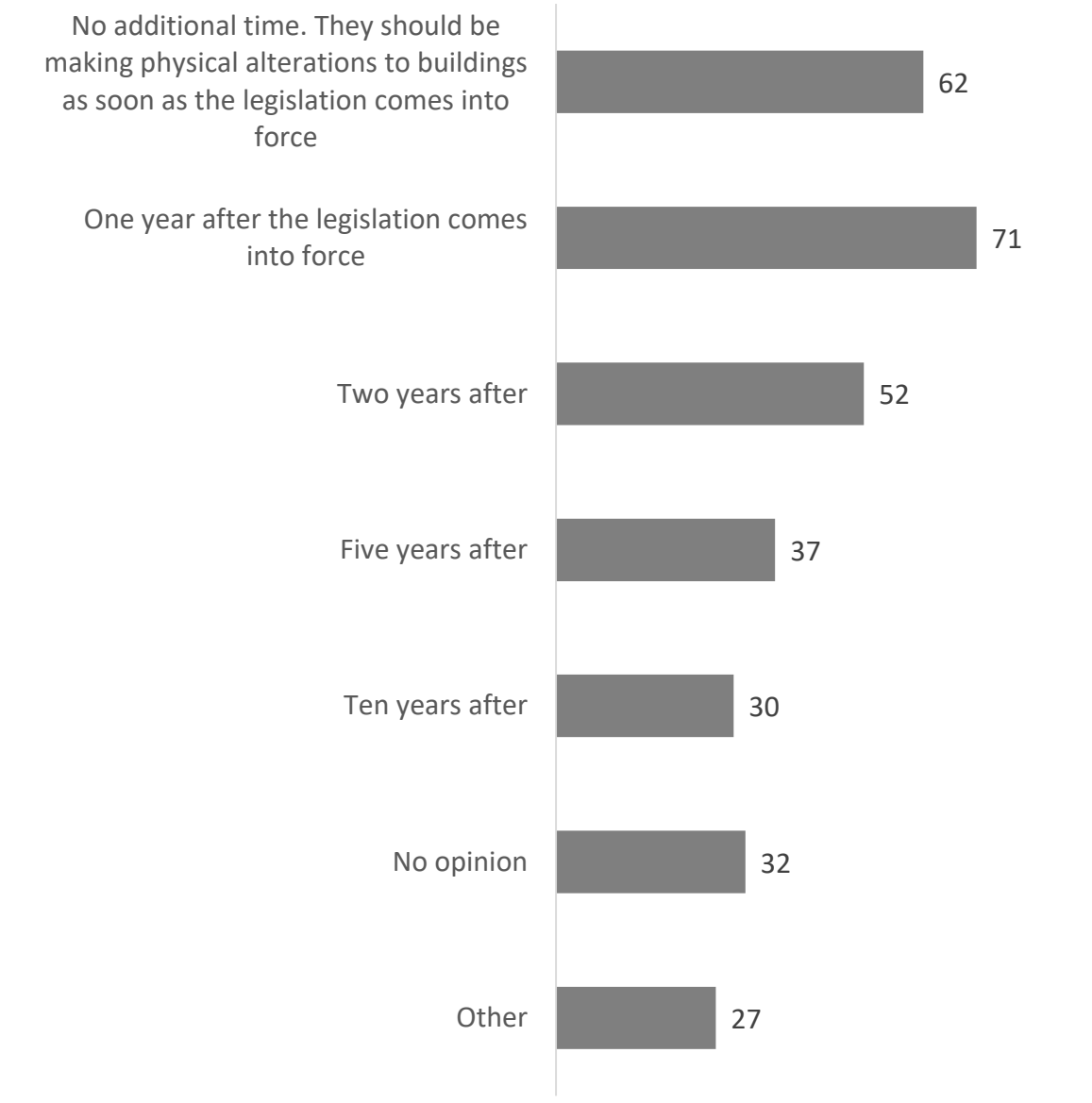
62 respondents (20%) thought that education providers and providers of goods or services should begin making physical changes to buildings as part of an Accessibility Action Plan as soon as the legislation comes into force.

190 respondents (61%) thought there should be a lead-in period of some description. Of these 190 respondents, 71 respondents (23% of respondents to this question) thought that duty bearers should be given 1 year before beginning to implement physical changes, 52

respondents (17%) thought they should be given 2 years, 37 respondents (12%) thought they should be given 5 years and 30 respondents (10%) thought they should be given 10 years. 32 respondents (10%) had no opinion.

A full breakdown of the responses is set out in **Figure 13.2** below.

Figure 13.2 - Responses to the question "How much time after the commencement of the legislation do you think education providers and providers of goods and services should be given before beginning to implement physical changes to buildings as part of an Accessibility Action Plan?"



Part B asked **"When do you think the duty for employers or service providers to respond to requests for appropriate adjustment that require a physical alteration to a building (that is not a disproportionate burden for the employer or service provider to provide) should commence?"**

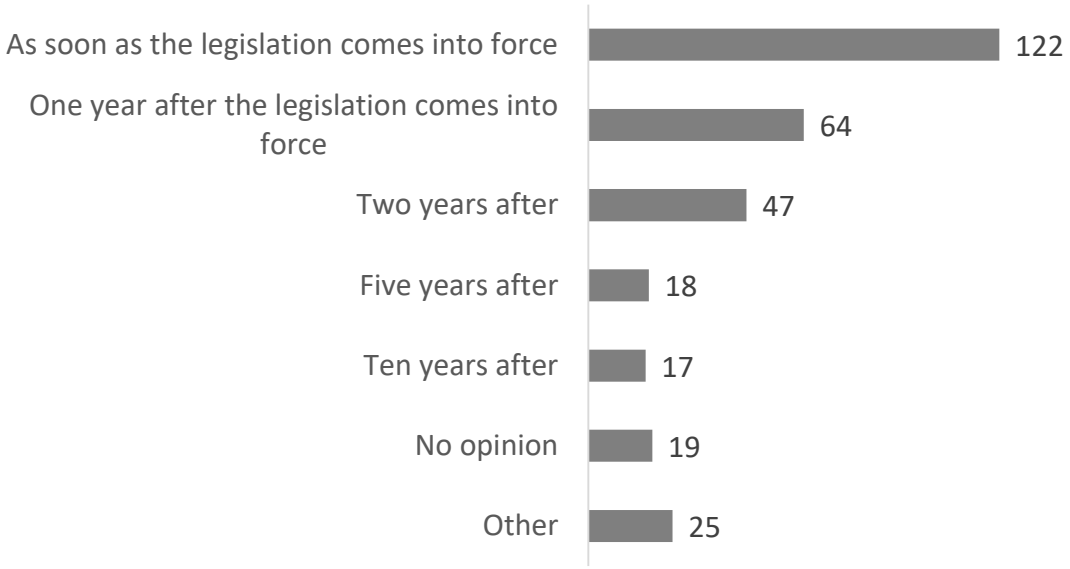
312 respondents answered this question.

122 respondents (39%) thought that the duty for employers and service providers to respond to requests for appropriate adjustments that require a physical alteration to a building should commence as soon as the legislation comes into force.

146 respondents (47%) thought there should be a lead-in period of some description. Of these 146 respondents, 64 respondents (21% of respondents to this question) thought that the duty to respond to requests for appropriate adjustments that require physical alteration to a building should commence one year after the legislation enters into force and 47 respondents (15%) thought there should be a two year lead-in period. The longer-term options were selected by fewer respondents - 18 respondents (6%) thought there should be a 5 year lead-in period and 17 respondents (5%) thought there should be a 10 year lead-in period. 19 respondents (6%) had no opinion.

A full breakdown of the responses is set out in **Figure 13.3** below.

Figure 13.3 - Responses to the question "When do you think the duty for employers or service providers to respond to requests for appropriate adjustment that require a physical alteration to a building (that is not a disproportionate burden for the employer or service provider to provide) should commence?"



Some of the comments received were explicitly about the timeframes. In particular, concerns were raised about the fact that reasonable accommodation was a right (in the UN Convention on the Rights of Persons with Disabilities) that should be immediately effective. For example:

> "The duty for employers or service providers to respond to requests for appropriate adjustments that require a physical alteration to a building (that is not a disproportionate burden for the employer or service provider to provide) should commence as soon as the legislation comes into force. This is because the duty to provide reasonable accommodation is an individualized reactive duty that should be applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability, which includes a discussion about projected timescales."

Reasons for suggesting a delay to the duties often included the time it was anticipated was needed to properly assess properties and the expense of making changes (particularly for larger estates that included older buildings or where service delivery was dependent on significant infrastructure). However, there were also concerns that: "If people think they have plenty of time to look at this, it will just be delayed and delayed and nothing will happen."

Wider comments were also received on appropriate adjustments and accessibility.

Appropriate adjustments

On appropriate adjustment, some respondents felt there should be further clarification about what was 'appropriate' and what would be a 'disproportionate burden' for an employer or service provider. **T**wo respondents thought there was a need to clarify the meaning of 'less favourable' in this context. They both supported the UK guidance that the 'less favourable treatment' should be substantial, meaning anything 'more than minor or trivial';

Some respondents felt that the term 'reasonable adjustment' used in the UK was preferable to 'appropriate adjustment'. The importance of communicating that the scope of this duty extended to non-physical issues (e.g. a disabled person's need for flexible working) was also highlighted. The value to a person's life of small and low-cost changes was emphasised.

> "The little things matter just as much as the BIG things. For example, non-slip mats. A coat hook on the back of a toilet door. A chair in a shop. A handrail. A ramp. Painted edges on steps for the partially sighted. Paper copies of documents for people who struggle to read text on a screen (in other words they have a 'hidden

> disability'). None of the above would cost a great deal to introduce yet would mean so much to those who need them."

Some respondents felt that the duty to provide reasonable adjustments should also apply in respect if carers: "Extending the duty to cover the carer ground is likely to indirectly and positively benefit persons with disabilities."

Others suggested that there should be government funding to assist with the costs associated with adjustments, particularly for small businesses:

> "I haven't seen any mention of any fund/s being made available to help support e.g. small businesses, including landlords, to make changes to comply with the law. Am I right to assume this has not even been considered? I think it should be."

> "At present, we understand that a small fund may be made available to small businesses to facilitate reasonable adjustments which involve a financial cost (although this has not been confirmed for definite). Other than that assistance (uncertain in its existence and extent), the current proposals do not appear to have taken on board or paid any regard to the financial impact of the proposals on small businesses".

Accessibility

A number of comments were made more generally on the proposed anticipatory accessibility duty. Some concerns were raised about the impact, particularly on small businesses, of needing to comply with the duty – though a lead-in period was felt to be useful. Other respondents felt that the duty did not go far enough and should apply more widely (e.g. to accommodation providers and employers), come into force more quickly or that published standards of accessibility would also be required.

One respondent suggested establishing a voluntary registration scheme where organisations would submit their accessibility plans to a States body and, in return, receive a certificate and window sticker confirming that the organisation had registered its plan. Some respondents raised concerns about how to make 'historical old buildings in town' accessible.

> "Strongly disagree with exemptions for employers, accommodation providers and services restricted to club/association membership. All persons responsible for non-domestic premises should ensure reasonable access for disabled persons. Timescales for action plans and physical alterations are also excessively long."

"…further consideration is needed as to the time allowed to begin implementation of physical adjustments to buildings as the proposal of ten years is viewed as grossly excessive (except possibly where there is a plan to set aside funds in order to achieve a standard of accessibility, in time, that would otherwise currently place a disproportionate burden on the organization)…"

"There is a concern over the loose definitions in this duty and in particular the risk that entire premises will be captured by the definition rather than just the main public areas, as appears is the intention. For smaller businesses in particular it is felt that the burden in complying with this duty will be disproportionate. However, the period of time for compliance will help to lessen this burden. This is reflected in our feedback from businesses, of which only 55% anticipate that the anticipatory accessibility duty will impose a significant burden on their business."

"The proposals do not fully address concerns about systemic discrimination which is denying access to certain publicly available services (transport, etc.). Individual complaint will not resolve such issues and certainly not in a planned and controlled manner… as a minimum, the proposals should either impose a duty, or grant authority, with regard to establishing standards of accessibility to, for example, transport systems, design of roads and footpaths, communication and information systems and standards of service, etc."

14. Exceptions to the legislation

If the proposals set out in the technical consultation document were approved by the States and were legislated, then, as a general rule, any different treatment on the basis of the protected characteristics covered (e.g. disability, race) would be unlawful.

However, the proposals included exceptions to that rule where different treatment would not be considered unlawful discrimination for the purposes of the proposed legislation. These cover situations where it seems fair, reasonable, necessary, or justified to treat people differently. For example, one of the exceptions says that services that want to offer discounted tickets to families can continue to do so. The full list of proposed exceptions is available at: www.gov.gg/discriminationconsultation.

There were a number of comments on the proposed exceptions to the legislation (as invited in Part C of the questionnaire) and suggested changes to the exceptions list, which are summarised in this section.

General comments

One respondent suggested that small businesses "of say 10 employees" should be exempt entirely from the legislation.

Someone commented that Guernsey "wouldn't need a list of exceptions if free market and common decency prevail."

One respondent said:

> "Reading the exceptions it does give the impression that the SOG have a bit of a "free for all" in terms of being able to discriminate if it meets policy guidelines (particularly in the area of Population Management) but I also appreciate that it's a complex issue to administer other areas of legislation and public functions alongside this."

One respondent supported the current exceptions in the consultation document but said it should be clear whether the legislation would apply retrospectively (their view was preferably not) and that a grace period of time to change should be allowed, akin to the grace period given under the sex discrimination ordinance.

One point that was raised by several respondents was that there should be a mechanism to allow for exceptions to be added to the legislation quickly if needed.

The following pages detail comments that were made in relation to individual exceptions.

Requirements of the law (no. 1)

> "…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…"

A request was made to clarify whether exception 1 would cover contracts/leases.

One person commented that they were concerned that courts/judges could not be subject to a discrimination case.

A respondent noted that consideration should also be given to the indemnities written into various laws, and asked whether the penalties or compensation imposed by the proposed discrimination legislation would override those indemnities.

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."

There was one objection to this specific exception and several comments about how transgender people should have access to single sex spaces (see comments on exception 57).

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."

One comment asked for more detail in relation to this exception, and asked when it would apply.

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… steps taken to protect the health and safety of a pregnant person should not result in them being treated unfavourably… 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."

Two comments were made about exception no. 6 and what was meant by 'reasonable belief'. Another wanted both breastfeeding and pregnancy specifically mentioned in the no detriment sentence of this exception.

National security (no.7)

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

There was a query over this exception and one person said that it was not specific enough.

Immigration (no. 8)

"…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."

There was feedback that this exception was not specific enough. The following change was suggested to the wording of this exception: "We propose that Immigration Officers and Police Officers would not be discriminating where they are acting in a way required to give effect to relevant UK immigration law or policy as extended to and in force in the Bailiwick of Guernsey."

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, 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."

There were four queries over whether this exception should be allowed.

One respondent was concerned about the States being able to make determinations based on nationality or ethnic origin and said this could lead to racist determinations being made. The respondent commented that the States must ensure that sufficient safeguards were in place to prevent such abuse.

Comments on population management included "serious concerns regarding population management" and disagreement "with the concept that the government should have the ability to discriminate on protected grounds over the issue of immigration wholly or partially, which appears to be the proposal."

Another response said the population management law needed to be reconsidered so that not all permit holders had to work full-time: "As an employer we want to give all our employees the same flexible working opportunities".

Household composition for grants, loans, or benefits (no. 10)

"…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."

There was one objection to this exception and feedback that it was not specific enough.

Minimum wage (no. 13)

"…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…"

Three respondents disagreed with the exception around the minimum wage for young people and apprentices. These respondents felt that the minimum wage did not reflect the very high cost of living in Guernsey, which was no less high for apprentices and young people. They argued that the principle of equal pay for work of equal value should apply to all employees, regardless of age.

One respondent believed that it was wrong to allow for discrimination of young people in pay structures and commented that they had been advocating for "the rate for the job" for all.

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."

There was one objection to this exception.

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…"

Two comments were made on this exception: "Age related pay exception should be removed" and "Why is length of service ok?".

Occupational benefits and pension schemes (no. 16)

"…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 equalize the resultant benefit for comparable members).

We propose that occupational pension schemes can use gender (sex) specific actuarial factors if there is actuarial data to justify the difference, even though insurers are required to use gender-neutral factors in relation to annuity purchases."

There were a number of comments made with respect to this exception and also exception no. 31 regarding risk.

There was a query about whether it would also be appropriate to restrict access to occupational benefits based purely on age.

One respondent said it should be made clear that all occupational benefits, pension schemes, and employers or providers of such schemes would be covered by this exception. The respondent said that it should apply to occupational pension schemes as well as to personal pensions and employment benefit schemes such as retirement annuity contracts and retirement annuity trust schemes (and should also apply to trustees and administrators of schemes). They also said that an exception needed to permit a defined benefit that was designed to vary in amount with age (based on actuarial assumptions when the benefit was designed).

Another respondent said that exception nos. 16 and 31 should extend to cover family situations. They added that exception 16 should include disability so that a pension scheme could provide ill health benefits at any age.

Clarity was requested on a normal retirement age (50-75 under income tax law) and whether benefit accrual could terminate on reaching this age, and whether this included an employers' contribution to Retirement Annuity Trust Schemes.

One respondent said that traditionally defined benefit pension schemes had provided a contingent spouse's pension to a married member. Some schemes also gave the trustees discretion to provide a similar "dependent" type benefit where a scheme member died having been in a long standing partnership with another person.

> "Clarification around how this type of discretionary benefit would be treated under the proposed legislation is required. Our preference would be for an exemption where trustees exercise discretion in a reasonable manner. This is because measures, such as the length of the partnership or financial interdependency, can be difficult to establish and open to challenge."

Another respondent said "Pension schemes often provide a short term pension to a child of a deceased member up to a certain age; typically this is age 18 or a higher specified age for as long as the child remains in full-time education or training. This practice should be covered by an exemption."

Other comments on this exception included:

> "Death in service and ill health benefits are often linked to age – can these stop at normal retirement age?"

> "Restrict where benefits cannot be insured on health grounds or when only at disproportionate cost to allow pension provider of the scheme or employer to vary the benefit provided to the member."

Immigration and population management (no. 17)

"employers must continue to appropriately take into account immigration status and the requirements of Population Management"

See earlier comments on Population Management (no. 9).

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."

One response said that providing accommodation appropriate to family size should apply to key worker housing.

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…, provide benefits in relation to care responsibilities… without this being a disadvantage to employees that do not have those responsibilities…, provide a benefit to an employee in relation to a family situation, for example, additional paid leave during a period of family illness…, provide benefits in relation to an employee's family members."

Two respondents said the Committee should give careful consideration to not discriminating against people who do not have families. For instance:

> "Employers should not be permitted to offer flexible working to those with caring responsibilities unless they also offer flexible working to those without caring

responsibilities. Employers should only be permitted to offer benefits to an employee's family members if all employees have the right to receive those benefits through identifying someone to receive them."

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."

One respondent noted:

> "In relation to "qualifications" in employment, the proposal is too wide. There must be a genuine objective justification based on the actual requirements of the job to defend a claim of direct and indirect discrimination based on requirements for particular qualifications."

Genuine and Determining Occupational Requirements and Employment Services (no. 23)

"…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."

One person said employers in healthcare should be able to specify a gender specific role in advertisements. Note: This is already possible under the Committee's proposals as a healthcare organisation could specify a Genuine Occupational Requirement under the legislation if they could objectively justify this. For example, the only female GP at a medical practice is leaving and the practice has evidence that some of its clients request a female GP. In these circumstances the practice could specify in the job advertisement that applications were being sought from female GPs.

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…"

One respondent questioned whether it was right for marital status, sex or sexual orientation and trans status to be taken into account when recruiting for an organised religion and another objected to this exception.

Another said:

> "We accept that there is a genuine need by religious organisations to recruit ministers who share the denomination or religion of the religious organisation, and that due to the nature of some religious beliefs candidates might be required to have or not have certain characteristics that are otherwise protected, such as not to be a woman, in a same-sex marriage, or identify as transgender. However, the wording of the proposed exception needs to be precise about when such restrictions can be applied. Firstly, the legislation needs to be specific on what grounds a restriction on the basis of religion in employment can be made. This should be on the basis of a genuine, legitimate, and determining occupational requirement (GOR) – as is the case in the UK and indeed across the European Union. To meet the threshold of a GOR, the employer must show that there is a substantial organisational need for the post to be restricted to a candidate of a certain religious group, that being of that religious group is a crucial requirement for fulfilling the role (not just one of many factors), and that restricting the role is a proportionate means of meeting that need. We would like guidance accompanying the legislation to make clear that pastoral support roles are not by definition covered by this exception and that a GOR would have to be fulfilled for each role before a restriction could be applied."

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."

One respondent queried what was meant by "other reliable information."

One person commented that safeguarding restrictions should not be limited to sexual behaviour concerns and that violent, abusive, controlling, threatening or manipulative behaviour concerns were also reasons for not recruiting on safeguarding grounds. Similarly, another asked whether the wording should be broader than sexual behaviour, to include risk if there was abuse or neglect: "Should other offences such as significant violence (including domestic abuse) be included under the same caveat where there are safeguarding concerns?"

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."

There was one objection to this exception.

Different treatment based on assessed needs (no. 27)

"…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."

A comment of support was made in respect of this exception.

Admissions policies (no. 28)

"…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, whilst taking mixed sex day pupils."

There was a query as to why a boarding school could only accept boarders of one sex but day pupils of both sexes.

Another two respondents raised objections to this proposed exception and one said "We believe that the proposal to allow religious schools to take religion into account in their admissions policies should be dropped."

Curriculum (no. 29)

"…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…"

One respondent stated that they did not think that religious schools should be able to change the curriculum.

Another said: "We believe that the exception to the law that permits religious schools to only offer religious education in line with the beliefs of their own faith and/or enables them to provide only a chaplain of one religion should be dropped."

A respondent commented that it regarded discrimination by religious organisations as undesirable and recommended that the Committee should take this opportunity to ensure that where exemptions existed - for example, for schools with a religious ethos to discriminate on grounds of sexual orientation or religion or belief - these exemptions should be as narrowly drawn as possible: "Any exemption to the discrimination legislation for these schools is likely to lead to an unacceptable division between the equalities standards applied within the education service."

> "Schools, even religious schools, should be required to teach students about the existence of, respect for and equality of people who do not conform to their religious beliefs, i.e. catholic schools should still teach pupils about the characteristics of other faiths and should not be allowed to exclude factual education about LGBTQ people, even if they do not believe in "promoting" these lifestyles. They should also provide non-judgemental school counsellors for pupils who struggle with LGBTQ issues that are deemed 'forbidden' by the school's religion in order that pupils feel able to express their feelings without fear of discrimination."

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 some of the protected grounds *[age and disability were proposed]* 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…"

Clarification was requested regarding exception nos. 16 and 31.

A comment was made that the law should require non-discrimination for future actuarial benefits, but not for benefits acquired prior to the introduction of the legislation.

One respondent asked "In the case of gender-dependent actuarial factors, which gender should be used for trans cases?" Another said that exception no. 31 should include sex and marital status. One respondent said: "Any such discrimination should be actuarially justifiable."

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…and different treatment is required for public health reasons."

A respondent noted that:

> "With regard to infectious diseases, whilst X appreciates that in some circumstances people may need to be treated differently where there is a clear and substantial risk of transmission, X believes that the exception, as written, could be used to justify inappropriate treatment of people with certain conditions where there is little or no risk of onward transmission, such as those with HIV."

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…"

Comments were received from the Committee *for* Health & Social Care (see appendix 3) and an individual, who felt that the wording of the exception was not specific enough. The Committee *for* Health & Social Care was of the view that it should explicitly allow for prioritisation of treatment for some individuals where this was clinically relevant.

The Committee *for* Health & Social Care sought clarity about whether, under the proposed legislation, it would be permissible to deny funding for services based on a ground of protection where the medical evidence was such that there was expected to be highly limited success of treatment. This point was considered to extend further than exercising clinical judgement at an individual level, as it related to the application of a broader policy principle for targeting services where there was medical evidence to support this practice.

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."

A comment was made that in addition to considering age in relation to the suitability of prospective adoptive parents, it should also be possible to deny an application based on physical and mental health.

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 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."

One respondent said "It is not clear from the documentation as to why this exception is needed or indeed desirable" and expressed concern "that this exception could be used to deny people services based purely on prejudice."

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

"… 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."

A comment was made that this exception should not permit exclusions based on sexual orientation or gender.

Another respondent was concerned that the stipulation that there should be no segregation based on colour may mean that it would not be possible to target screening for sickle cell anaemia.

Web information services (no. 44)

"…We intend that ISSPs [Information Society Services Providers] 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."

One respondent felt that the legislation should require the removal of the discriminatory material within a specified time period of the ISSP becoming aware. This would include where inappropriate material was reported to the ISSP.

Religious events and services (no. 45)

"…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…However, this exception is not intended to exempt religious organisations from any requirement to comply with the legislation. 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."

One respondent was concerned that the proposed exception allowed religious organisations to discriminate on grounds of trans status, even if only within narrow confines: "The existence of any exception for religious organisations creates a false perception that they are able to discriminate with impunity."

Another respondent said:

> "We suggest that a test be placed on this exception, that persons should only be treated differently at religious events or in receipt of services if to not do so would run counter to the purpose of the religion or belief organisation, and because the nature or context of the service would cause conflict with a significant number of the religion's followers' strongly held religious convictions."

Clubs and associations – restricted membership (no. 47)

"… 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."

One respondent did not think it was right for a club or association to be able to restrict membership on the basis of a person's sex.

Another respondent said:

> "…we believe that this proposal needs to be carefully reworded to give clarity against what grounds a restriction on offering membership to a religious organisation can be made. At the moment the proposal suggests that 'religious organisations may restrict their membership based on religious belief and practice' (although not on the grounds of race). We would not want to see restrictions placed against other protected characteristics, such as age, disability, or carer status. It is possible that some religious organisations may wish to discriminate on the basis of sex, sexual orientation, and/or trans status. If such restrictions are accepted, the religious organisation needs to demonstrate that there is a genuine need within the organisation to do so, and not merely a preference, and that it is carried out in a proportionate way."

Religious buildings (no. 51)

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

One comment was made on this exception:

> "Exception 51 needs to be carefully reworded to give clarity against what grounds a restriction on hiring or letting a place of worship for other purposes can be made. We suggest this exception be limited only to the grounds of religion or belief and sexual orientation. Further, this exception should only apply if hiring the place of worship would run counter to the purpose of the religion or belief organisation, and because of the nature or context of activity to be held in the building would cause conflict with a significant number of the religion's followers' strongly held religious convictions."

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 the following grounds only: age, carer status, disability, and residency status (in so far as this is associated with the race ground)."

One respondent asked: "Why doesn't Exception 52 apply to private landlords?"

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."

One respondent wanted to remove the word 'only' from the first sentence of exception 55 to avoid any misunderstanding or misinterpretation.

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

*"…*If the Committee's preferred position was adopted[7] 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…
- 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."

The below commentary should be read in conjunction with Section 7 of this document which summarises the feedback received in relation to the sex and trans grounds of protection.

This proposed exception generated a great deal of feedback from polar opposite positions.

Some respondents were of the view that trans women should be treated as women and trans men should be treated as men in all circumstances:

> "Trans women should be treated as women and trans men should be treated as men."

> "Don't insist on exceptions which negatively affect trans women."

[7] The technical draft proposals said that the majority of the Committee's preferred option with respect to access to single sex roles, spaces or services for trans people was that they should be included as the gender that they present as, but an employer or service-provider may exclude a trans person from a single-sex role, space or service in some circumstances if they can objectively justify doing so.

> "With regard to the use of single-sex spaces and services by trans people, people should be able to self-determine their gender and access goods and services based on this determination. The same should apply to intersex and non-binary people."

Others were seriously concerned about the implications of this approach and felt that single sex exceptions were vital in order for it to be permissible to exclude trans women from women only spaces in certain circumstances:

> "We agree with the Committee that single sex exceptions are vital in order for it to be legal to discriminate on the basis of sex in certain circumstances, such as an organisation being permitted to continue to provide separate changing facilities for women and men. We agree with all the exceptions that are detailed in the List of Proposed Exceptions and would add the following ones:
>
> • the right to request a medical practitioner of a given sex (not gender);
> • the right for employees (security, police etc.) who are required to conduct personal security or body searches to only be obliged to search persons of the same sex as themselves;
> • prison, shelters, refuges, toilets and changing rooms and areas should be clearly stated as included under the communal accommodation exemption or included under a separate heading."

> "The most crucial point in respect of the exceptions, and we cannot stress this enough, is that they become largely meaningless if sex is defined to include social factors, and completely meaningless if it is self-defined. On p.176 of the Technical Draft Proposals (TDP), the Committee again conflates sex and gender. People who identify as trans do not change their sex. It is indisputably not possible to change sex and there is no scientific evidence to state otherwise (hence why the term is gender reassignment). To suggest that some people should access single sex spaces on the basis of gender while the vast majority of the population access them on the basis of sex is not a workable solution and is not equitable. It also results in active discrimination against those who have good grounds for wanting or needing single sex spaces. We believe that, despite some brief references to the lack of a requirement for surgery or hormones in the consultation paperwork, the vast majority of the public will be under the impression that a person who identifies as transgender is someone who has undergone genital surgery. While [we] would never advocate for any law that compels people to undergo a medical process, the Committee should not be blind to the inevitable public backlash that would follow the introduction of a law that allows men who identify as women to access women's private spaces, once the public realise that around 80% of men who identify as women have no surgical procedures whatsoever and nearly all of them retain their

> penis. Yet again we question the equity in the proposal that says that a small subsection of the population should be given the option of participating on the basis of their self-held feeling of gender whilst everyone else participates on the basis of their actual sex. We note that only women stand to lose out. Men's sports will be unaffected as female-born people are not a threat to their superior biological performance levels. This is discriminatory in itself."

Some felt 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 had transitioned:

> "Exception on access to single sex spaces – biological sex in all cases."

> "Women's sports and competitions should only be for biological women with XX chromosomes."

Children in rental properties (no. 58)

See section 6 of this report for the limited range of circumstances proposed by the Committee when landlords would be permitted take age, family composition (i.e. carer status), or pregnancy of a tenant or prospective tenant into account when letting a property.

One respondent said they supported exception 58 but suggested adding the following to the list of circumstances when landlords would be permitted to take age, family composition (i.e. carer status), or pregnancy of a tenant or prospective tenant into account when letting a property: when "the family/pregnancy circumstances of the tenant/prospective tenant will not constitute a reduction in the enjoyment of those living in surrounding properties."

Additional exceptions that respondents asked the Committee to consider

1) There was a request for consideration to be given to ensuring that any future States funded and authorised wage subsidy scheme(s) for persons with restricted capacity for work would not constitute discrimination under the proposed legislation. A second response supported this and said:

> "It is important that disabled people are entitled to the same pay and benefits as their non-disabled colleagues otherwise it would be discriminatory. However we acknowledge there is a group of people, primarily with learning disabilities, who may benefit from such a provision in the new law allowing them to work for below Minimum Wage and a failure to do so could be discrimination in itself as the

opportunity for work is removed. Careful monitoring and systems would need to be put in place to protect individuals from discrimination and unfair treatment."

2) An exception for friendly/mutual organisations that should have the ability to continue to provide the benefits as have historically existed on the basis that members have contributed on a personal basis for the membership benefits. It was also queried whether it would be advisable to have an exception to allow mutual businesses to be based around a protected characteristic.

3) There was a request to review assessment of risk and safeguarding in contexts beyond employment.

4) Some concerns were raised about the possible need for grandfather rights for employees if benefits were discontinued in accordance with equal pay provisions.

5) An exception was suggested relating to the prioritisation of treatment for some individuals where this is clinically relevant.

6) One respondent suggested that:
"Succession planning should be an exception to age discrimination so that younger staff can be developed internally. An employer should have the freedom to develop younger staff and not necessarily retire older employees but move them into an alternative role to develop the team beneath."

15. Misconceptions and clarifications

Among the general comments received were some that contained misconceptions which the Committee would like to correct.

Misconception:	Some saw the discrimination legislation as a tool for bringing about policy change, particularly in the field of education (e.g. with regard to religious schools, selection by ability or assessment of higher education students independently of their parents for grant purposes).
Clarification:	It would not be appropriate for the Committee *for* Employment & Social Security, through these proposals, to change policy that clearly falls under the mandate of other States Committees.

Misconception: "There seems to be a gap in the proposed legislation in relation to the rights of residents of the Bailiwick in dealing with some government departments. It may be that it is not a good or service that is being sought and I'm not sure how then those other departments will be caught. (Is intention that all public service would be covered by the legislation except where there is a specific exception?)"

Clarification: All States service areas that provide goods or services, education or accommodation to the public (or part of the public) would be covered by the proposed discrimination legislation unless there is a specific exception that applies. Section 5.2.1 of the Committee's technical draft proposals describes 'who is a provider of goods or services' – it is noted that this includes 'the provision of services by government'.

Misconception: "At the moment the proposed law would seem to suggest that the employer, service provider or landlord are the only people who are likely to discriminate."

Clarification: The aim of non-discrimination law is to allow all individuals an equal and fair prospect to access opportunities available in a society. Non-discrimination law applies where people are exercising functions that place them in a position of authority or allow them to take decisions that may have a direct impact on others' lives. It does not interfere in personal contexts (i.e. interactions between family members, friends or acquaintances). The proposed legislation would apply to employers, providers of goods or services, education providers, accommodation providers (including landlords, estate agents and property management companies) and clubs and associations.

Misconception: "A landlord would hope to have several people wanting to rent a property and will have to choose one of them. What is to stop any of the others from suing for discrimination? If three tenants, e.g. a family, a retired couple and a professional couple, show an interest in renting some accommodation, and they all look good and equal on paper, but two have different protected grounds and the third does not, it is not clear to us if this law will force us to take one of the tenants with a protected ground. If we select the professional couple

can both the other possible tenants have a discrimination complaint upheld against us?"

Clarification: The proposed legislation does not require a landlord to select a tenant because they have a protected ground - it would require them to not reject a prospective tenant because they have a protected ground (e.g. to reject a prospective tenant because of their race or sexuality). It is perfectly acceptable to select a tenant (whether they have a protected ground or not) based on references, evidenced ability to pay the rent, being at the top of the waiting list, etc. If, in the scenario set out in the misconception above, a person made a discrimination complaint against the landlord, the complainant would need to provide evidence to support their complaint or at least be able to demonstrate that the circumstances appear to be discriminatory – that you can draw an inference of discrimination from them. The burden of proof would then switch to the landlord to demonstrate that they had a non-discriminatory reason(s) for the decision they took in respect of the tenancy.

Misconception: "This legislation needs to acknowledge that, in the same way as orders of court, other laws etc., the tenancy agreement/lease is a legal document and must be adhered to, potentially overriding certain aspects of this new law. e.g. It will name the persons who can live at the property. It may say there must not be disruption to neighbours, changes must not be made to the property etc."

Clarification: The discrimination legislation will apply to tenancy agreements and leases. The Committee will consider what to recommend in respect of discriminatory terms in pre-existing agreements and leases.

Misconception: "Why is selling of accommodation included in these proposals? When you buy/sell a property it is sold as seen (subject to negotiation after surveys etc.) and if someone buys it surely it is up to them to adapt it to their needs at their own cost. We can't see why the person selling it should be controlled by this law."

Clarification: As explained above, non-discrimination law applies where people are exercising functions that place them in a position of authority or allow

them to take decisions that may have a direct impact on others' lives. Sale of accommodation falls into this category which is why it is included in the proposals for the new discrimination legislation. That said, the Committee's technical draft proposals do not include a requirement for a person selling a property to adapt it to meet a disabled person's needs – this is a misconception. What the draft proposals say is that accommodation providers[8] must not discriminate on any of the protected grounds in the decisions they make about who the property (or land) is provided to (including by sale, rent, lease or other agreement). So, for example, it would be unlawful under the draft policy proposals for an estate agent to refuse to sell a property to a prospective purchaser because they are gay, Asian, Muslim, etc. However, it would be fine to refuse to accept an offer from that prospective purchaser if their offer is considered too low or because they are not a cash buyer, etc.

Misconception: "It doesn't feel right that the effect this law would have is to treat a family or a disabled person more favourably than a non-family or non-disabled person. Surely it is trying to make them equal. The landlord has very likely had valid reasons for taking the other tenant, nothing to do with any grounds under the legislation.

Clarification: The proposed legislation does not require a landlord to select a tenant because they have a protected ground. This would be positive discrimination and this is not permitted under the Committee's proposals. If the landlord has valid (non-discriminatory) reasons for leasing the property to a particular person that would be fine.

Misconception: "E.g. 1) a stair lift must be fitted. It is then removed because the next tenant does not need it. Then a new one is needed for a new tenant. My wall has already been compromised by fitting the first stair lift. E.g 2) my existing tenant becomes disabled and requests a stair lift. It is

[8] Meaning of 'Accommodation providers' as set out in section 5.4.1 of the Committee's technical draft proposals – "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."

costly to install or rent. He can't afford to pay for it. Neither can I. At present he would seek alternative accommodation. What would happen under these proposals? Could I be found guilty of a complaint from him, and have to pay compensation and/or be forced to install and pay for a stair lift (even though I can't afford it without increasing the rent) under the proposals?"

Clarification: Under the technical draft proposals on which the Committee consulted, providers of both residential and commercial property would 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 to fittings like door handles where required by the tenant, provided it is not a disproportionate burden on them to provide such adjustments. If a physical alteration to a fixed feature of a property is required to make it accessible to a disabled tenant (e.g. the installation of a stair lift), the landlord would not be expected to pay for it. The Committee proposed that accommodation providers should 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 the alteration should be at the tenant's 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.

Misconception: No clubs can be aimed at particular races.

Clarification: It is just segregation on the basis of colour that is proposed not to be allowed.

Misconception: "If a white middle class man is the perfect candidate for a job why should there be any reason not to hire them?"

Clarification: If he is the best candidate for the job there is no reason not to hire him. The Committee's proposals do not require employers to positively discriminate in favour of a person with a protected characteristic – in fact, the technical draft proposals state that positive discrimination would not be permissible. Employers should

be mindful, however, that they may be asked by unsuccessful candidates why they were not successful so hiring decisions should be made on an objective basis and reasons should be recorded – this is already the case.

Misconception: "These proposals seem to advise employers that they cannot ask questions on someone's disability and suggest that they should not be monitoring attendance. This seems extraordinary and disregards the business need."

Clarification: Employers can monitor employee attendance and ensure that employees are carrying out the essential functions of the job.

16. Other comments

This section is intended to identify some themes, key points and the range of other comments received but does not comprehensively cover all feedback given.

16.1 Comments on the technical draft proposals

The following comments suggested amendments to the content of the technical draft proposals:

- Comments related to **Section 3 - Discrimination**:
    - **Indirect discrimination/intention** – clarification was asked for regarding how an intention to indirectly discriminate, and therefore how prior knowledge (or lack of knowledge) of the potential disadvantage, caused by a generally applied provision, might affect the defence of indirect discrimination.
    - **Objective justification** – two separate points were made. Firstly that the use of 'appropriate' in relation to objective justification was confusing given it was also used for 'appropriate adjustment'. The use of the word 'proportionate' was suggested instead. Secondly, it was suggested that a third stage be added to objective justification to examine whether appropriate adjustments had been taken into account.
    - **Disproportionate burden** – some comments were made in relation to the defence for not providing an appropriate adjustment for a disabled person – that it was a disproportionate burden on the employer or service provider to

provide. Respondents emphasised that clear and comprehensive guidance was required on what was disproportionate. One respondent suggested that any adjustment should be considered disproportionate for employers with less than ten employees unless the person requesting the adjustment could prove otherwise.

- **Multiple and intersectional discrimination** – a comment was received in support of this being included in the proposals.
- **Positive action/quotas** – it was suggested that the legislation should be drafted in such a way that the use of quotas could be made permissible at a later date, if a future Committee wanted to change this policy.
- **Harassment** – some respondents felt that provisions to prohibit harassment were overdue. A few respondents felt the provisions did not go far enough with suggestions that the use of the 'reasonable person test' to determine whether harassment had taken place was inappropriate, and that there should be a more proactive, preventative duty on employers. A few respondents felt the proposed provision went too far. In particular, concerns were raised about the inclusion of third-party harassment - with respondents feeling that employers and service providers should not be responsible for the actions of third parties.
- **Victimisation** – it was highlighted by one respondent that protection from victimisation should apply from the earliest stage possible.

- Comments related to **Section 4 - Employment**:
  - **Voluntary workers** – it was suggested that the legislation should also protect voluntary workers.
  - **Definition of employment** – several respondents felt that the definition of employment should be wider to ensure that part-time, casual workers and others would also be protected – this would be more similar to the UK position.
  - **Essential functions of a role** – it was commented that the essential functions of a role could change over time and that employees should be required to continue to meet those essential functions as the role changed – considering not only the original job description but the "practical reality of the role".
  - **Equality monitoring** – a couple of respondents felt there should be requirements on employers to monitor equality.

- Comments related to **Section 5 - Goods, services, education, accommodation, clubs and associations:**
    - **Clubs and associations** – a comment was made that clubs and associations with 24 or fewer members should also be covered by the law.
    - **Impact on accommodation providers** – concerns were raised about the effect of the law on accommodation providers' ability to use their judgement with regards to who they accepted as tenants. Some thought that such a restriction would reduce the number of rental properties available on the market. Some respondents were of the view that the legislation should not apply to private residential landlords.

- Other comments:
    - **Public sector equality duty** – this was raised by one respondent as preferred to enable a forum for discussing relevant equality issues.

16.2 Comments on the consultation process

The following comments were made on the consultation itself:

- **Length and timing of the consultation period** – some respondents felt the consultation period was too short, particularly given that it took place over the summer period, and others requested a second consultation once proposals were revised.
- **Variety of consultation documents** – some positive feedback was received on the range of documents made available to allow respondents to access information at the appropriate level.

16.3 Areas of concern raised

Other general areas of concern raised included:

- the ability of discrimination legislation to influence "entrenched patterns of privilege".
- that people should not be required to provide services against their own conscience or religious belief.
- some respondents explicitly raised concerns about the equality implications of the way that income tax returns were managed for married persons.

16.4 Comments questioning the need for discrimination legislation

A number of comments were raised questioning the need for discrimination legislation at all. Several of these respondents did not consider discrimination legislation was justified unless there was relevant statistical information showing that there was a significant issue on the island.

16.5 General comments in favour of or opposed to the proposals

Many respondents did not comment on their general support for, or opposition to, the proposals. Where general comments were made about support for, or opposition to, the proposals these tended to be divided between those who strongly supported the proposals and those who were firmly against them. The official responses of the business community's representative organisations in particular expressed concerns and views against the proposals.

Comments in favour of the proposals included:

> "I am fully supportive of this legislation, which is sorely needed in Guernsey. We cannot call ourselves a truly developed, democratic society without a proper anti-discrimination law, and the excellent efforts of the committee should not be undone at this stage. Nor should the voices of a few very wealthy people locally or some in the business community, who command lots of resources and enjoy large platforms, count for more than the people that this legislation is intended to protect, who are often voiceless."

> "Discrimination legislation is needed… Would help LGBT+ individuals feel safe."

> "Comprehensive, proportionate and well considered proposals. Congratulate ESS on the inclusive and consultative approach used to get this far."

> "I am glad this is finally coming. Thank you to all that have worked so hard on this. Please don't allow this to be diluted or delayed further."

> "I think it is a really well constructed draft, it's obviously a hugely complicated area to legislate for but I am very impressed at the effort to make it as straightforward and as reasonable as possible. Thank you."

> "I think these proposals have the potential to be of huge benefit to our reputation, to individual members of the population and to the community as a whole. They are long overdue and in my opinion should be warmly welcomed, embraced and

implemented without delay. I would like to thank the members of the community, the civil services and States members who have put together legislative proposals that we can all be proud of. This is not us simply paying lip service to a cheap and simple solution but fully considering the options and creating plans that show almost uniquely that Guernsey can lead something at an international level. Coming from a business leadership background it is my considered position that there is absolutely nothing in here to be afraid of. Yes there are costs and changes in process, thinking and approach but also opportunities to grow revenues and profits and create a better workplace. The benefits of attracting new customers, creating new services and products, improving employee retention, creating more productive teams, and changing company cultures all need to be positively considered by the Island's employers."

"We have been waiting decades for changes like these to come about. I cannot stress how strongly I support the implementation of discrimination legislation on all ten of the proposed grounds."

The following comments sum up the core of the response from the business sector:

"…we are extremely concerned that the proposed legislation is both disproportionate and unfamiliar and will lead to some firms withdrawing from the island, some firms scaling back current or future expansion plans and a risk averse employment culture where firms become more conservative about hiring and more conservative on recognizing and rewarding differentiated performance. In short, we believe the proposed legislation will have the direct effect it is trying to mitigate."

"We believe that Guernsey should uphold strong moral values which include the fundamental right not to be discriminated against. A key aspect of Guernsey's role as a leading finance centre is that it does commit to and meet international standards and values. We therefore support the introduction of an equality regime that helps Guernsey meet international standards and ensure that Guernsey is a thriving and responsible jurisdiction. However, we do not support the discrimination law regime that has been proposed in the current form."

"…as a Company we are not in any way stating that there should not be discrimination legislation put in place in Guernsey, as we are completely supportive of a form of the legislation being implemented. However, we have genuine, deep concerns over the wording and content of the proposed legislation, which we feel needs to be considered in more detail before being implemented, as it quite clearly

currently does not fairly balance the competing interests or the employer and employee, as all elements are skewed in favour of the employee."

"Generally, the proposals are more than we need for a small community and we could easily adopt legislation similar to Jersey or the UK, which is perfectly adequate."

Other responses against the proposals, many of which labelled them as 'disproportionate,' included the following:

"Don't try and be too clever or complicated. Much can be achieved through better voluntary support and an appeal to good moral sense and fairness."

"I feel that the need is there for more legislation, especially in the area of disabilities, but that the instances of other discrimination is Guernsey is vanishingly thin as to justify such a substantive legislative change. It does feel too much like a hammer to crack a nut, effectively using the good will that exists on the island to see discrimination legislation pertaining to disabilities as the excuse to expand on certain deputies' personal ideologies."

"I think this is a minefield which could bring many types of benefits to those who may not wish to work or live under conditions which do not please them, but which could put enormous pressure, worry and expense on the employer or landlords."

"Scrap the whole thing -- we don't need it and we can't afford it."

"These proposals will hinder growth in Guernsey business, accommodation and will be detrimental to our community. The proposals are biased, will be costly to implement (what is the cost of preparation to date?) and be a cause of great strife and antagonism in our society. They will not help and will be open to abuse."

"Key words are proportionate and pragmatic."

"No costings, business case or evidence"

"Disproportionate, difficult to administer, expensive, uncompetitive."

"Extremely supportive of discrimination legislation but concerned whether approach is proportionate and could be overly cumbersome for businesses. If implemented in

current form could be damaging for the disabled community and have the opposite effect of what it is aiming to achieve."

"We have a genuine concern that the proposed legislation has not had any form of impact assessment in any way to determine what the potential actual cost to business would be, the effect on the Guernsey market, the impact this will have on new business coming to the island or the impact this will have on existing business remaining on the island."

Appendix 1: Events and meetings held

Pre-launch briefings

- Presentation to States members - 8 July 2019
- Presentation to the media - 8 July 2019

Launch events

- Business breakfast - 9 July 2019
- Other stakeholders - 9 July 2019
- Public meeting - 15 July 2019

Other events/meetings held during the consultation period

- Youth Forum workshop, facilitated by the Youth Commission - 14 July 2019
- Committee *for* Education, Sport & Culture meeting - 16 July 2019
- Committee *for* Economic Development meeting - 18 July 2019
- States of Alderney's Policy & Finance Committee meeting - 22 July 2019
- Committee *for* Health & Social Care meeting - 24 July 2019
- Committee *for* Home Affairs meeting - 5 August 2019
- Committee *for* Environment & Infrastructure meeting - 8 August 2019
- Chamber of Commerce lunch event - 19 August 2019
- Policy & Resources Committee meeting - 29 August & 10 September 2019
- Meeting with representatives of Liberate - 3 September 2019
- Guernsey Private Residential Landlords Association open meeting - 5 September 2019
- Guernsey Disability Alliance Member Charities' meeting - 6 September 2019
- Chamber of Commerce 'Lunch and Learn' event – 10 September 2019
- Joint Institute of Directors and Chartered Institute of Personnel and Development event - 12 September 2019
- Development & Planning Authority meeting - 13 September 2019
- Guernsey Disability Alliance Members' meeting - 17 September 2019
- Focus group for small businesses - representatives of ten small business attended - 18 September 2019
- Met individually with seven small business owners to discuss the draft policy proposals.

Appendix 2: List of organisations that responded by letter or email

[Note: This list does not include those organisations who responded through the consultation questionnaire (that identified themselves) as it was not known, in all cases, if respondents were answering on behalf of their organisation.]

Association of Guernsey Charities
Autism Guernsey
BWCI
Carers Guernsey
Carey Olsen
CI Toys
CIPD (Guernsey Branch)
Committee *for* Economic Development
Committee *for* Education, Sport and Culture
Committee *for* Environment and Infrastructure
Committee *for* Health and Social Care
Committee *for* Home Affairs
Deloitte
Development and Planning Authority
Employment & Discrimination Tribunal
Equality Working Group
Guernsey Association of Pension Providers
Guernsey Disability Alliance Executive Committee
Guernsey Electricity
Guernsey Employment Trust
Guernsey Financial Services Commission
Guernsey Society for Physically Disabled People
Guernsey Women's Alliance
HSBC
Channel Islands Humanists (a section of Humanists UK)
IOD, CIPD, CGI, GIBA and Chamber of Commerce (jointly)
NASUWT
Ogier
OSA
Policy & Resources Committee
Prospect
Ron Short Centre Service Users

Safer LBG
States Trading and Supervisory Board
Unite
Youth Forum

Appendix 3: Responses from States' Committees, Boards and Authorities

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02 October 2019

Dear Deputy Le Clerc Nick,

Technical Draft Proposals: Equality and Discrimination Legislation

Thank you for your letter of 5th July 2019 inviting the Policy & Resources Committee (P&RC) to engage in the public consultation on technical draft proposals for equality and discrimination legislation.

The undoubted hard work by both Members and officers that has been undertaken in developing policy proposals and preparing the comprehensive documentation for the consultation is recognised and appreciated. Furthermore, in considering the proposals we have acknowledged that the States' Assembly unanimously recognises that equality and discrimination legislation is highly desirable, not only to protect employees and service users but also to raise the reputation of Guernsey in this important area. I want to make it clear that the fundamental principles of introducing disability and discrimination legislation are supported by P&RC.

Notwithstanding the detailed analysis work undertaken, the Committee does have a number of concerns and constructive comments which it hopes that the Committee *for* Employment & Social Security will consider. We would welcome an early opportunity to discuss these further and have asked officers to investigate dates for later this month. In this initial submission, the aim has been to summarise key topics or issues that we would be keen to discuss with you further. Information, evidence and advice that has substantiated our position, will, of course, be shared in due course.

1. Period of Consultation

I would firstly caution that our response remains incomplete as the length of the document when coupled with the specialist knowledge required to interpret the proposals and

understand their potential ramifications, requires a greater timeframe than has currently been allowed.

In such circumstances, the Committee would have strongly supported an extension to the consultation period until 31 December 2019. Indeed the Committee would suggest that consideration be given to a second round of consultation once you have received and considered the initial feedback from the community and may have incorporated some of these findings into revised proposals.

2. Proportionality for Guernsey

P&RC is concerned that the proposals are, in a number of areas, or can be perceived to be, disproportionate for the size of the Island and:-

I. will be difficult to administer;
II. expensive to fund and resource;
III. potentially drive current employers to other jurisdictions (such as Jersey); and
IV. ultimately have the unintended consequence of discouraging employers from taking on employees with existing protected characteristics.

By way of background it is to be remembered that the States 2013 policy letter which resulted in the States voting in favour of introducing disability legislation identified that legislation should be cost effective and proportionate. The Committee feels that any proposals brought to the States, to be successful, will need to evidence the need for the solution presented and demonstrate that the solution is both cost effective and proportionate for the Island's needs.

3. Administration and Resources

Whilst it is understood that the concept of Equal Value/ Equal Work is one of the key elements of an equality and discrimination regime, it is also acknowledged that the additional costs will, for the States as the Island's largest employer, be substantial and a delay needs to be made to allow the States to change working practices and Employee Contracts so that these costs can be managed over a number of years.

Equally important, the current administration and resources available to the States and the Employment and Discrimination Panel is not adequate to be able to implement and administer the current proposals. Once again delay will be required for the Tribunal Service to be trained and resourced adequately to be able to administer expansion of the grounds and scope of the current legislation.

There will be a competing need for highly qualified staffing for both the Tribunal Service and the 'Equality and Rights Organisation' entity, whatever scale and operational solution is recommended and there may be difficulties in recruiting suitable staff. Alternative solutions,

such as working more closely with Jersey, especially with regards to the resourcing of Tribunals, should be explored more thoroughly before the Assembly is presented with preferred legislative proposals including enforcement recommendations.

4. Specialist Counsel Advice

Given the highly technical and specialist nature of the proposals, my Committee sought specialist Counsel advice, primarily from the perspective of employer, to enable it to understand and identify areas of concern and enable it to make a more comprehensive response. Alternative options (to those offered by the proposals) that potentially identify more suitable legislative routes have resulted from this research which we are keen to share with you. This legal advice remains the property of my Committee as employer and currently has legal privilege. We therefore need to agree the best way to share this largely technical expert advice, acknowledging that you have legal advice reviewing options from the start of your work that may also be valuable to share.

Upon receiving the advice, it became obvious that this is a highly complex area of law and not one in which general employers can comment to any real degree without taking their own legal advice, especially in the consultation timeframe afforded.

It is also worth noting that the technical draft proposals only offer limited options when in reality there will be a whole range of alternative options available, many of which may be more suitable and proportionate for a small Island. My Committee appreciates that the Committee *for* Employment & Social Security has already considered these policy areas in detail but cautions that as a consequence it is farther ahead in its thinking and the community also needs to evaluate some of those other options and the reasons that they have been discounted in the technical draft proposals.

In the above circumstances my Committee provides the following selection of Counsel's comments regarding the proposals with which my Committee concurs although this letter is not the correct framework for more detailed comments:-

A) Definition of Disability

We are advised that the definition of 'disability' is very wide and should be substituted for a definition similar to that used in the UK Equality Act 2010 which has a requirement for a minimum duration of a disability to exist and a requirement that the disability must be serious. The present definition of disability has neither of these elements and may prove unworkable.

B) Tribunal Process and Awards

I. The six-month period in which to bring a claim is too long and the three-month period as currently used in both Guernsey and the UK is more suitable. Using a longer period would not only increase employer uncertainty

but also stagger the timings for hearing both unfair dismissal and discrimination claims which would result in many aspects of the same claim being heard by different panels which is undesirable.

II. The suggested use of penalty awards for serious instances of discrimination is not currently a civil law concept in Guernsey. Only compensatory awards should be considered.

III. The proposed levels of awards are excessive and a much lower level of awards should be set within fixed limits.

IV. It should be recognised that the unfair dismissal element of any form of award is entirely separate from discrimination legislation and that there is no requirement to change the unfair dismissal regime.

C) Equality Rights Organisation

There is concern that the implementation of this body may not prove cost-effective or proportionate to justify the ERO being set up immediately in the manner envisaged under the Paris Protocols. Other options should potentially be explored such as setting up a specialist branch of the Employment Relations Service to initially provide the core, essential services such as advice, draft statutory codes and offer training. The ERO could be set up later once the legislation is bedded in, if required. It is easier to grow the scope and authority of any ERO entity than to rein it in, if initially it is over-specified. Given the requirement for progressive adherence to UN conventions, following the suggested ERS expansion route would accord with the progressive intent of the UN Conventions on which much of the rationale for the proposals are based. Additionally it would still meet the intention of the 2013 Resolutions.

D) Current pieces of legislation which are potentially discriminatory

The Committee *for* Employment & Social Security has also identified a number of pieces of legislation which it considers are discriminatory and also some legislative gaps. Although exempt from the discrimination legislation under exception 1, some of the legislation is likely outdated and could be addressed as and when resources allow.

The impact of the technical draft proposals on current legislation and indeed the gaps it potentially exposes will challenge the States which has an extensive list of legislative drafting already pending; Brexit commitments to meet; and other work steams also generating drafting requirements for some quite significant policies. This list may not be comprehensive; indeed recent work to repeal and replace the Matrimonial Causes Law has

demonstrated a need for pension legislation and separately, co-habiting couples legislation, which have also recently been recurring themes in other areas of social policy.

With its responsibilities to co-ordinate policy development work, prioritise legislative drafting, and to assume responsibility for those areas outside the remit of other Committees, it will fall to my Committee to recommend a course of action to the Assembly and it thanks the Committee *for* Employment & Social Security for specifically raising these issues.

St James' Chambers will arrange to repeal legislation as appropriate when drafting the discrimination law and will secure powers through that Ordinance to manage other areas of legislation that may need amendment. The perceived legislative gaps will require policy Resolutions of the States. Current work streams will provide some avenues for this analysis, such as the Future Model for Health and Care; the Review of the Education Law; the Review of the Children's Law; and the Justice Framework. Others are additional work streams. The Committee may well decide to bring forward these areas in future reviews of the Policy & Resource Plan or other pertinent policy letters. For example, there is already a Resolution from the 2018 Budget to introduce independent taxation for which the relevant legislation is to be drafted. (This would not, however, change the scenarios in which couples are able to transfer allowances and so would continue for married couples, those in civil partnerships and cohabiting couples with children, therefore statutory exemption would need to remain).

However, at this stage, the veracity of the case for these pieces of legislation is untested and therefore careful consideration between Committees and St James' Chambers in the presentation of this information is required.

Summary

By way of summary, both Committees recognise that it is desirable for the early introduction of an effective and proportionate Equality and Discrimination Legislation. Even so there is a very real concern voiced by my Committee, other business stakeholder groups and employer organisations that the technical draft proposals may go (or be perceived to go) much further than what is required or desirable for Guernsey.

My Committee has a large number of detailed comments which need to be raised in addition to the ones listed above. This letter is not the correct framework in which to fully outline its suggestions and comments. It would be sensible to meet ahead of the next scheduled full joint Committee meeting in late November and officers have tentatively agreed 22nd October to work with you on this important topic.

A further series of meetings at both political and officer level may also be valuable over the next few months, or an extension to our scheduled oversight meetings, so that the

Committee *for* Employment & Social Security is able to understand and challenge the areas of concern held by this Committee prior to refining its proposals.

My Committee looks forward to meeting with the Committee *for* Employment & Social Security to discuss this priority work in the near future.

Yours sincerely

Deputy G A St Pier
President
Policy & Resources Committee

Policy & Resources Committee

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8 January 2020

Dear Deputy Le Clerc

Supporting Letter: Technical Draft Proposals - Equality and Discrimination Legislation

I write further to our letter dated 2 October 2019 which we understand will form part of a published pack of States' Committee responses to the Technical Draft Proposals for equality and discrimination legislation appended to a summary of the public consultation.

The purpose of this additional letter is to simply re-iterate that the legal advice to which the Policy & Resources Committee refers in its letter, and which was shared on a confidential basis with the Committee *for* Employment & Social Security, remains entirely the property of the Policy & Resources Committee and that there has been no express or implied waiver of privilege over any such legal advice.

The Policy & Resources Committee shall of course reciprocate all assurances of confidentiality and honour privilege in respect of any confidential correspondence and/or legal advice which the Committee *for* Employment & Social Security has itself shared.

We suggest that this letter is attached to the Policy & Resources Committee's original letter dated 2 October 2019, within your published pack, to ensure that there can be no ambiguity as to the privileged and confidential status of the legal advice in the event that a subsequent accidental disclosure occurs.

Yours sincerely

Deputy G A St Pier
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By E-mail

18 October 2019

Dear Deputy Le Clerc,

Discrimination Legislation – Consultation on technical draft proposals

Thank you for your letter of 5th July 2019 inviting the views of the Committee *for* Economic Development ("the Committee") on the draft discrimination legislation proposals. We are grateful to be able to feed into the consultation.

All members of the Committee are supportive of the principle of introducing proportionate equality and discrimination legislation in Guernsey, and acknowledge that an inclusive community and workforce is good for the economy. However, a majority of the Members of the Committee[1] do not believe that the proposals in their current form are a balanced proposition for Guernsey and are extremely concerned that the proposals would impose greater burden and unnecessary cost on Guernsey businesses.

In considering its response, the Committee has reviewed feedback from Guernsey's business representative groups. The responses from these business groups include very concerning feedback on the anticipated impact of the proposals on the local economy and on our competitiveness. It should be recognised that Guernsey's businesses compete on a global stage and that businesses can and do locate to jurisdictions where the ease of doing business has least impact on them. Many of the major employers in our island are multi-jurisdictional. This means they already comply with a wide range of anti-discrimination and inclusion standards. The point that in Guernsey they will now be asked to go further than almost anywhere else where they operate is a significant concern. In addition, the view that Guernsey's proposed legislation does not align with the legislation in Jersey or the UK, where many of our employers also have operations, is a particular frustration to business. The threat of businesses moving some parts of their operations from Guernsey is, in the majority of the Committee Members' opinion, a potential danger that should not be ignored, and one that if it came to pass would be detrimental to working families and individuals across the island.

The Committee – by majority - is also concerned about the impact that the legislation could have on small businesses, in particular the additional time and cost requirements that will

[1] Note that the response in this letter should be regarded as the view of a majority of the Members of the Committee *for* Economic Development, rather than the unanimous view of all Committee Members.

be placed on these businesses in order to comply with the legislation. The Committee is currently undertaking a review of red tape to remove overly and unnecessarily burdensome regulation and legislation, and the overall concern is that the proposals will add significant red tape to small businesses.

The Committee was grateful for the opportunity for the Committee's officers to work alongside officers from the Committee *for* Employment & Social Security in consultation with a selection of representative small businesses. In summary, concerns from this engagement included the broad definition of disability and the need for an upper limit on compensation awards. There were however some further concerns that were specific to small businesses which the Committee asks that you take into consideration. In this respect the Committee believes that further clarity is required on the functions of the Equality and Rights Organisation (ERO) as it is evident from employer feedback that there are differences in understanding regarding the functions of this organisation.

It should also be noted that the combined response from the Guernsey Institute of Directors, the Guernsey Chamber of Commerce, the Confederation of Guernsey Industry, the Guernsey International Business Association and the Guernsey branch of the Chartered Institute of Personnel and Development represents the views and interests of a majority of businesses across Guernsey, both large and small. They are speaking with a united voice that the proposed legislation would have a negative impact on business confidence and on our longer-term competitiveness.

Given the feedback from business, the Committee – by majority - requests that further work is undertaken to reconsider the legislation proposals to ensure that these are proportionate for Guernsey and do not undermine Guernsey's competitiveness.

The Committee was disappointed with the decision not to extend the consultation period following extensive calls from industry to do so. To ensure that we can introduce legislation that is proportionate and suitable for Guernsey, it is the view of the majority of Members of the Committee that further engagement with employers is essential to understand the true impact the legislation proposals will have on business operations. To support businesses in this area, the Committee supports the publication of the impact assessments undertaken as part of this work.

In conclusion, it is the view of the majority of the Members of the Committee that the legislation proposals in their current form are disproportionate for Guernsey, would have a negative impact on Guernsey's economy and Members suggest that work should be undertaken to address these concerns, including further engagement with the business community.

Yours sincerely,

Deputy Andrea Dudley-Owen
Vice-President
Committee *for* Economic Development

Copy:

- Members of the Committee *for* Economic Development
- Strategic Lead for Place Policy
- Strategic Lead for People Policy
- Chief Secretary, Committee *for* Employment and Social Security

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3 October 2019

Dear Deputy Le Clerc

Consultation: Discrimination Legislation Draft Proposals

The Committee *for* Education, Sport & Culture is grateful for the opportunity to respond to the draft proposals for discrimination legislation as part of the consultation process. Following the presentation and supporting information provided at our meeting in July (16th) and subsequent discussions by the Committee and its officers, we have considered the intent and impact of the proposals. The Committee is supportive of the proposals which intend to provide protection and to increase equality of opportunity and inclusion. There are a few areas where it wishes to make additional comments as set out below:

1. Definition

The proposed definition is broad and once in place can be used for other work on inclusion including the review of SEND (Special Educational Needs and Disabilities) provision and the Education Law. Due to this it would be appreciated if officers could be made aware of any changes to the definition resulting from this consultation. The provision of services will be shaped by this definition including the way our education support services are provided to parents/carers of children with additional learning needs and/or disabilities.

2. Age

The consultation proposes that the school leaving age determines if young people are protected in employment, however the Committee acknowledges that a number of learners (under 16) may be in part-time or casual employment and would benefit from being protected. This may also be impacted by any future changes to compulsory school age which if raised may mean that young people, for example apprentices, would not be able to register age discrimination. The remaining age based proposals are reasonable and allow for provision to be differentiated, when appropriate and necessary, based on age.

3. Employment

It is recognised that this may result in additional responsibilities on employers to ensure they are not discriminatory. The full cost and impact of this is not known and difficult to estimate. It is important that these changes can be introduced so as not to limit the availability or affordability of services to all.

4. Goods, services, education, accommodation, clubs and associations.

Whilst inclusion is already key to the design of services within our mandate, we recognise that areas may require a significant level of review and concern is raised about the resources needed to comprehensively undertake this within the implementation timeline proposed.

5. Appropriate adjustments and anticipatory accessibility duty

The duty to provide appropriate adjustments has implications for the large number of premises used by services within the Education, Sport & Culture mandate including States and voluntary schools, heritage sites and leisure facilities. It will also apply to the grant-aided colleges, and other sites used by States of Guernsey services but not owned by the States. Where funding is required to improve access to these sites consideration would need to be given to how this is to be provided and prioritised. The proposals suggest that an education or service provider could treat people differently based on protected grounds where the appropriate adjustment would be a disproportionate burden. Although there are examples in the consultation which suggests what may be reasonable for a small or medium sized organisation it is not clear what would be viewed as disproportionate for one the size of the States of Guernsey (considered as a whole rather than the individual service areas).

The aim of the anticipatory accessibility duty is to ensure that accessibility is built into the design of services and is proactive. Although in principle this is already in place with regard to the creation and development of buildings, policies and services there is no set format for this and guidance would be beneficial to ensure any challenge can be assessed consistently.

6. Equality and Rights Organisation (ERO)

The Committee can see the benefits to having an independent body to offer support, advice and guidance and to promote and protect equality and human rights.

7. Implementation

Given the breadth and complexity of the services we provide, the creation of accessibility action plans and the implementation of any changes will be challenging. The longer lead in for the commencement of physical alterations to buildings will be necessary to support both the planning and funding of any works.

8. Exceptions

The Committee has also considered the exceptions highlighted in your presentation. It is pleased that there is provision for other legislation, such as within the Education Law as required. It is also positive that there are exceptions to enable the continuation of existing practice such as charging preferential rates; allowing for assessments based on household composition for grants; and policy based admissions. It is clear however that a number of the exceptions will require the review of procedures to ensure that they are not discriminatory, or that the policies could bring cause for complaint. For example whilst exception 26 allows for differing policies for mature students it may require a single definition of 'mature student' to be adopted resulting in a financial impact on learners, their

family and/or the States. Careful review and implementation of this would be necessary to ensure compliance.

The Committee expressed a preference to omit the word 'only' from the first sentence of Exception 55 – Communal Accommodation, to avoid any misunderstanding or misinterpretation.

In the case of the other education specific exceptions (and/or those most relevant to our mandate) the Committee is pleased that officers were involved in the development of these and feels that the exceptions reflect the needs of a modern and inclusive education system. There would be concerns if changes are made to these exceptions following the consultation without further dialogue with the Committee and its officers.

In this response the Committee has not commented on the proposals in relation to gender identity. This is not because discrimination legislation which incorporates gender identity grounds would have no impact on the services provided or overseen by the Committee because it certainly could. Rather, it is because members of the Committee have such a wide range of views about whether, and if so how, gender identity should be incorporated in the legislation; the Committee is confident that your Committee is already well aware of all of the conceptual and practical issues engaged by gender identity; and in any event the Committee considers that there are significant philosophical and policy issues about gender identity which need to be resolved by the States of Deliberation when considering your Committee's Policy Letter before attention turns to practical implementation between Policy Letter stage and legislative drafting stage.

Thank you again for the opportunity to respond to the consultation.

Yours sincerely

Deputy M Fallaize
President

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15 October 2019

Dear Deputy Le Clerc Mich

Draft policy proposals for new multi-ground discrimination legislation

Thank you for the chance to comment on the draft policy proposals for new multi-ground discrimination legislation.

The Committee would also like to thank you for sending representatives to one of its meetings. Members found the attendance by Deputy McSwiggan and the Manager, Policy & Legislation at its meeting of 8 August 2019 informative and appreciated sincerely the chance to ask questions on the proposed legislation.

At this meeting, the Committee took the opportunity to talk through the proposals to ensure that it understood the full implications of the proposed legislation on areas of its mandate such as highways, transport, and housing. It also provided feedback on the proposals which it is hoped will prove useful to your Committee.

Issues such as accessibility are of key importance to the Committee, which is why workstreams such as the Transport Strategy are vital as they offer the opportunity to bring improvements in this area.

The Committee thanks you once again for including it in your consultation and will continue to support the equality of opportunity for all Islanders.

Yours sincerely

Barry.

Deputy B L Brehaut
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Committee *for*
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3rd October 2019

Dear Deputy Le Clerc Michelle

Consultation: Discrimination Legislation Draft Proposals

Thank you for your letter dated 5th July 2019 regarding proposals by the Committee *for* Employment & Social Security (C*f*ESS) to introduce new multi-ground discrimination legislation. The Committee *for* Health & Social Care (C*f*HSC) was also appreciative of the additional background information provided in a presentation to Members in August 2019.

The C*f*HCS is supportive of the broad aims and objectives of the introduction of new measures to protect Islanders from discrimination and acknowledges that an all-encompassing approach is being proposed, offering protection from possible discrimination on a number of grounds. It recognises that having the legislation in place will support broader States' ambitions for a healthy and happy community, together with the Committee's objectives for the transformation of health and care, as set out in the 'Partnership of Purpose'. This will also support our collective progress towards improving the wider social determinants of health and our aims for an equal and inclusive society.

Whilst not wishing to undermine its general support for the spirit of the proposals, this letter offers detailed comment from the Committee on a number of aspects of the consultation, which have necessitated detailed consideration of the potential impact for health and social care services. A specific point is made about the challenges of applying the definition of 'disability' as set out in the consultation document, and there are a number of operational considerations that the Committee also wishes to raise for further consideration.

Proposed definition of disability

The Committee is concerned about the broad definition of 'disability' proposed by the C*f*ESS and the lack of parameters around the determination of a disability, which may be 'self-declared' by the individual on the basis of short-term symptoms being experienced, or in relation to a sustained or long-term condition.

The reasons for these concerns are two-fold. Firstly, this will offer new opportunities for challenge in relation to the services that HSC offers to the community, for example, for not taking appropriate action to meet the needs of an individual with a disability, when this disability may have been self-determined and short-term in nature.

To offer an example, HSC provides social care packages to people living in their own homes based on thresholds of need. It also provides specialist accommodation with care and support to meet the needs of Islanders with particularly high level needs, where those needs are such that they cannot be met in their own homes.

In the absence of our collective government functions being set out in statute, HSC relies upon robust policy setting to define eligibility for services that allows a proportionate response to meet the community's needs and balanced against the budget available. It must be able to continue to justify these policy approaches. The concern is that the broad definition of disability presents a real possibility of HSC finding itself challenged to provide services to people identifying themselves as having a disability, even if those needs are not currently considered to be significant enough to meet the threshold for a particular service/s, to ensure that it is not found to be operating in a discriminatory way.

Secondly, applying a broad definition of disability will impact on the way in which HSC manages sickness absence among its staffing groups. The consultation document itself (page 66 of the Technical Summary) acknowledges that adopting this definition would result in any period of sickness potentially giving rise to a complaint of disability discrimination and impact on an employers' sickness management procedures, adding a further layer of complexity to managing often sensitive issues that arise from a diverse workforce. We understand that experience in Jersey has shown that, even with a hybrid definition of disability adopted in their legislation, which makes reference to a long-term impairment, managing sickness absence is a significant challenge for employers.

The Committee does not wish to discriminate on any grounds and would continue to make every effort to make reasonable adjustments to accommodate the specific needs of an employee. However, the nature of HSC is that it operates in often challenging and stressful environments, which impacts on levels of sickness absence across the organisation.

It is undoubtedly challenging to ensure that the legislative framework carefully balances needs on all sides. However, it is the view of the Committee that as currently proposed the definition of disability unduly weighs these considerations in favour of the individual and will make processes surrounding sickness absence difficult to manage.

The C*f*HSC does not consider that the consequences of the proposed definition described above are acceptable in the context of what is intended to be achieved from the legislation and recommends a 'tightening up' of the proposed definition of disability to ensure that it's application in the broadest sense is proportionate, manageable and as fair as possible to all.

Proposed exceptions

The Committee has considered the list of proposed health-related exceptions, as set out in Appendices A and B of the consultation documents, and is supportive of the inclusion of those suggestions into the legislation, if that is the approach to be adopted. There is a concern that it will not be possible to capture all exceptions into the legislative framework initially and that something will be missed. It is therefore assumed that there will be some flexibility in the way in which the Law is drafted to add additional exceptions at a later date, as working practices and the world around us will undoubtedly change over time.

That said, the Committee is particularly encouraged that decisions based on clinical judgement, in the best interests of the patient to meet their specific needs, has been recommended as an exception. It also welcomes the proposed general exception that anything done in accordance with another law won't count as discrimination and agrees that this is a pragmatic way forward.

The Committee is happy for our respective Officers to work together to agree some wording for a proposed exception relating to the prioritisation of treatment for some individuals, where this is clinically relevant, and to report back accordingly in due course.

A query was raised at Officer-level about to the need to consider the prioritisation of services based on **medical evidence**, as a means of allocating funding to areas of greatest impact.

In this respect, the Committee would welcome clarity about whether, under the proposed discrimination Law, the Committee would be able to limit or deny funding for services based on a protected characteristic (such as age), *where the medical evidence is such that there is expected to be highly limited success of treatment*. To provide one such example, medical evidence suggests that In-Vitro Fertilisation (IVF) has greater chance of success in younger cohorts of women and is demonstrably significantly less effective in older women. Although this service is presently not funded by the States of Guernsey, would the discrimination legislation, as proposed, enable funding to be targeted to provide access to treatments to

particular age cohorts based on efficacy of treatment *where such an approach can be objectively justified using medical evidence?*

It is considered that this point extends further than the exercising of clinical judgement at an individual level, as it relates to the application of a broader policy principle for providing treatment or care where one of the protected grounds (age, in this instance) may be used as a basis for targeting services where there is medical evidence to support this practice. This point is also considered to be broader than exception no.36, which will permit targeted *preventative* public health services.

Operational and resource considerations

At a more operational level, the nature, complexity and variety of services provided by HSC are such that the introduction of the discrimination legislation will require a significant amount of work across the Service to review its policies, procedures and working practices. The Committee is concerned about the resource implications for preparing for the introduction of the Law and ensuring compliance on an ongoing basis. This view is informed by the experience of new legislation, such as the Data Protection (Guernsey) Law, 2017, which impacts on the organisation on a daily basis. Whilst legitimate issues are raised as a result and working practices have been changed for the better, significant management time is often required to address issues that arrived from vexatious cases or complaints.

There is, therefore, some apprehension that in the context of challenging public finances, the introduction of discrimination legislation may reduce the ability of service areas to effectively prioritise the allocation of resources so as not to inadvertently discriminate against some service users in some circumstances. Prioritising action in readiness for the introduction of the Law and ensuring ongoing compliance with the legal requirements, may be at the expense of others receiving services from which they would equally benefit.

For example, the C*f*HSC was asked to comment on Section 6 of the Technical Summary in relation to the proposed 'anticipatory accessibility duty' for health and social care sites. Again, whilst not disagreeing with this aspiration in principle there is concern about the potential resource implications of preparing a detailed 'anticipatory accessibility' action plan for each of HSC's sites, even with a two-year period of grace after the introduction of the Law.

The Committee agrees that the level of adjustments required in relation to anticipatory accessibility and any appropriate adjustments made on a reactive basis should not impose a disproportionate burden on the person providing the adjustment. A pragmatic approach will be required to ensure that these requirements are fairly balanced.

- **Clinical requirements**

The Committee is also mindful of the need to balance the overriding considerations of the requirements of the proposed legislation with the clinical requirements of operating a health service. It is fundamental that across HSC, where particular clinical requirements must be met, that these can be given equal priority to the requirements of the discrimination law.

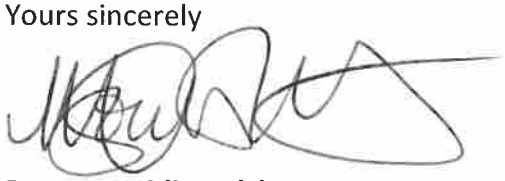
For example, in determining a suitable dress code policy, the requirement for individuals to dress appropriately whilst at work may require them to remove jewellery or types of dress for infection control purposes. This may include items that are symbolic for religious or other reasons. It is important that where such clinical reasons do exist and are justifiable, this continues to be enforceable at an operational level and that the provisions of the discrimination legislation allow for this (and other similar matters of policy) to continue.

The Committee acknowledges that further advice is needed over whether John Henry Court/ HSC key worker accommodation would be covered by the exception on specialist accommodation reserved for particular categories of person. The Committee is of the view that exception no.19 – providing accommodation proportionate to family size – should equally apply to the key worker housing that it has available. The physical constraints of some of the properties, such as John Henry Court, means that the accommodation can only be deemed suitable for a certain cohort of employees.

The Committee would welcome an opportunity for its Officers to engage in further dialogue to support this consideration, before a conclusion is reached on this matter.

I hope the above feedback is of assistance. Emma Le Tissier, Policy & Legislation Manager, Office *of the* Committee *for* Health & Social Care, would be happy to assist if further information is required.

Yours sincerely



Deputy Heidi Soulsby
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Committee *for* Health & Social Care

cc: President, Policy & Resources Committee

Committee *for* Home Affairs

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30th September 2019

Dear Deputy Le Clerc

Consultation on New Discrimination Legislation

Thank you for presenting the draft proposals for new Discrimination legislation to the Committee *for* Home Affairs ("the Committee") and its Service Leads on 5th August 2019.

The Committee supports the principles of having some form of discrimination legislation, however it would caution that the legislation as drafted could be quite onerous for public bodies and businesses, particularly considering the size of our jurisdiction.

The Committee is also of the view that ideally, the legislation itself should be more permissive to negate the need for specific exemptions.

The Committee's Service Leads have considered the proposed exemptions under the new legislation and I enclose a copy of comments they have raised in respect of their respective Services. I note that there has been officer level engagement regarding the proposed exemptions during the consultation period and in some areas these discussions are ongoing.

If you wish to discuss any of the comments made in the enclosed submission, please contact Catherine Peet on tel.717398 or catherine.peet@gov.gg in the first instance.

Yours sincerely

Mary Lowe

Mary Lowe
President
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Enc.

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2 October 2019

Dear Deputy Le Clerc,

Consultation: Discrimination Legislation Draft Proposals

Thank you for your letter of 5 July 2019 concerning the above. The D&PA is also extremely grateful to you and your officers for taking the time to present your proposals to the Committee at its meeting on 13 September.

From the land use planning perspective, the D&PA is supportive of the proposals and believe that they strike the right balance in terms of the overall requirements and proposed exceptions.

The Committee had some concerns regarding the suggested ten-year timescale for implementation of the anticipatory accessibility duty and regarding the ten-year 'grace period' for undertaking significant building operations. The Committee felt that these suggested timescales to implement physical adjustments could be seen as excessive.

However, in mitigation of this, the Committee noted that, notwithstanding the requirements of the proposed discrimination legislation, through the operation and periodic updating of the Building Regulations and the Guernsey Technical Standards, the operation of planning policy relating to accessibility as contained in the Island Development Plan and the provision of relevant pre-application advice by the Planning Service, it is highly likely that, in practice, appropriate adjustments will be achieved where necessary well within these maximum periods. Therefore, on this basis, the Committee supports these proposals.

At its meeting on 13 September, the D&PA also gave particularly careful consideration to the section of the technical draft proposals (sections 3.10.3 and 6.4) dealing with the relationship of the proposals with Planning Law. The Committee was concerned that, under the proposals, it appeared that there might be potential for someone to make an

obviously unacceptable planning application, receive a refusal of planning permission and then be effectively exempt from the need to propose other options which might be acceptable in planning terms for a period of ten years.

In practice, the Committee believes that this scenario would be unlikely to arise, as the Planning Service will normally seek to provide proactive advice on potential acceptable alternatives as part of its consideration of an unsatisfactory planning application. However, the Committee agreed that the wording of this element of the proposals might be considered for possible amendment to avoid any potential for abuse as highlighted above. The Committee would welcome the opportunity to discuss this point further with you in due course, if this would assist.

Aside from the above, the D&PA has no concerns regarding the proposals from the land use planning perspective.

I trust that the above comments are of assistance and thank you for consulting the D&PA on this important matter.

Yours sincerely

Deputy Dawn Tindall
President, Development & Planning Authority

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16th September 2019

Dear Deputy Le Clerc

Response to Consultation: Discrimination Legislation Draft Proposals

Thank you for your letter of the 5th July 2019 and provision of the information concerning the draft proposals for the States of Guernsey's Discrimination Legislation. Please note that the incorporated Trading Assets (including Aurigny) have been forwarded the same information for their separate response.

Specifically you requested comments on the list of exceptions to the legislation (Appendix A) and some issues of particular relevance to the States' Trading Supervisory Board (STSB), as set out in Appendix B. The STSB has no comments or additions to make to the list of exceptions provided in Appendix A. The identified exceptions reflect the feedback provided by the Trading Assets' Senior Leadership Team to ESS Officers, on the 8th January 2019. Regarding the specific areas of relevance to the STSB set out in Appendix B, the Board have the following comments:

1. Accessibility of roads and transport

In relation to the 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 support the proposed route of utilising an Equality and Rights Organisation as a route to the enforcement of this duty. The organisation should be able to provide experienced and impartial advice and adjudication on matters arising and should focus on information and compliance prior to enforcement.

The Traffic & Highways Services, Committee *for the* Environment & Infrastructure is the service area that leads in planning for traffic and highways. The service is responsible as the lead in planning for this function and States Works' Highways Services section implement these plans. An officer within Asset Management and Contracts Services, States Works has also been trained on the provision of appropriate accessible environments.

2. Accessibility of transport

This duty covers the providers of transport services, including planes, and ferries, which are of relevance to Guernsey Harbours and Guernsey Airports. The duty requires provision of appropriate adjustments and an anticipatory accessibility duty.

In preparation for this legislation, the States commissioned Business Disability Forum (BDF) to assess its current state of preparation. A report was provided relating to the findings across the unincorporated Trading Assets in June 2017. This identified a number of improvement actions relating to accessibility that have now been put in place. These include an accessible Harbour office for customers, situated on the Albert Pier.

The Guernsey Airport building itself is accessible, with automatic doors and lifts to the first floor. In addition, Guernsey Airport is currently tendering for a third party service provider to provide services for persons who may require additional assistance with their journey through Guernsey Airport.

In addition, Guernsey Ports are trained in the 'Sunflower Lanyard' scheme. The scheme is operated in a number of Harbours and Airports to offer a discrete way for staff to identify (by a passenger wearing a Lanyard) how they can improve the travel experience for vulnerable adult and child passengers, who may not want to share details of their hidden disabilities.

However there remain some accessibility challenges within the variety of infrastructure owned by the Trading Assets, including that at Alderney Airport. We understand from the Equality Team who are currently in discussion with the Law Officers, that transferred services such as Alderney Airport are not in scope. STSB will only likely to be required to respond to the anticipatory accessibility duty if the States of Alderney adopt the same or similar legislation.

Anticipatory Accessibility Duty

It is unclear how the States of Guernsey will be able to demonstrate how we have discharged our "anticipatory accessibility duty". There are significant accessibility challenges across the property portfolio that will need to be managed by the Property Services Trading Asset. We anticipate that there will need to be a standardised approach and the development of an accessibility action plan, which may be best led by Property

Services. However no resources have been identified and the economic costs of bringing forward this legislation do not appear to have been assessed.

Currently, there are no dedicated funds allocated for access audits and remedial works, for the States of Guernsey's property portfolio and without the appropriate resource this work will continue to dilute the minor capital maintenance funds and increase the risk for the longer term value of property assets.

A programme of accessibility audits will need to be planned and prioritised on a risk basis. Property Services have committed to training a number of staff to carry out these audits, to identify access adaptations. These adaptations will continue to be built into existing maintenance and enhancement projects as and when they are undertaken.

Given the above, it is recommended that a plan of action be developed within 12 months, that access audits be completed within 5 years of the legislation being enacted and that reasonable adaptations be completed to coincide with major property refurbishments over a period of 15 years.

Consideration should be given to include a budget for implementation of the legislation for accessibility surveys of approximately £500k over 5 years and an allocation of a significantly larger sum for the necessary adaptations.

Thank you for the opportunity to respond to the draft proposals for this legislation.

Yours sincerely,

Deputy Peter Ferbrache
President
States' Trading Supervisory Board

Appendix 4: Profile of respondents

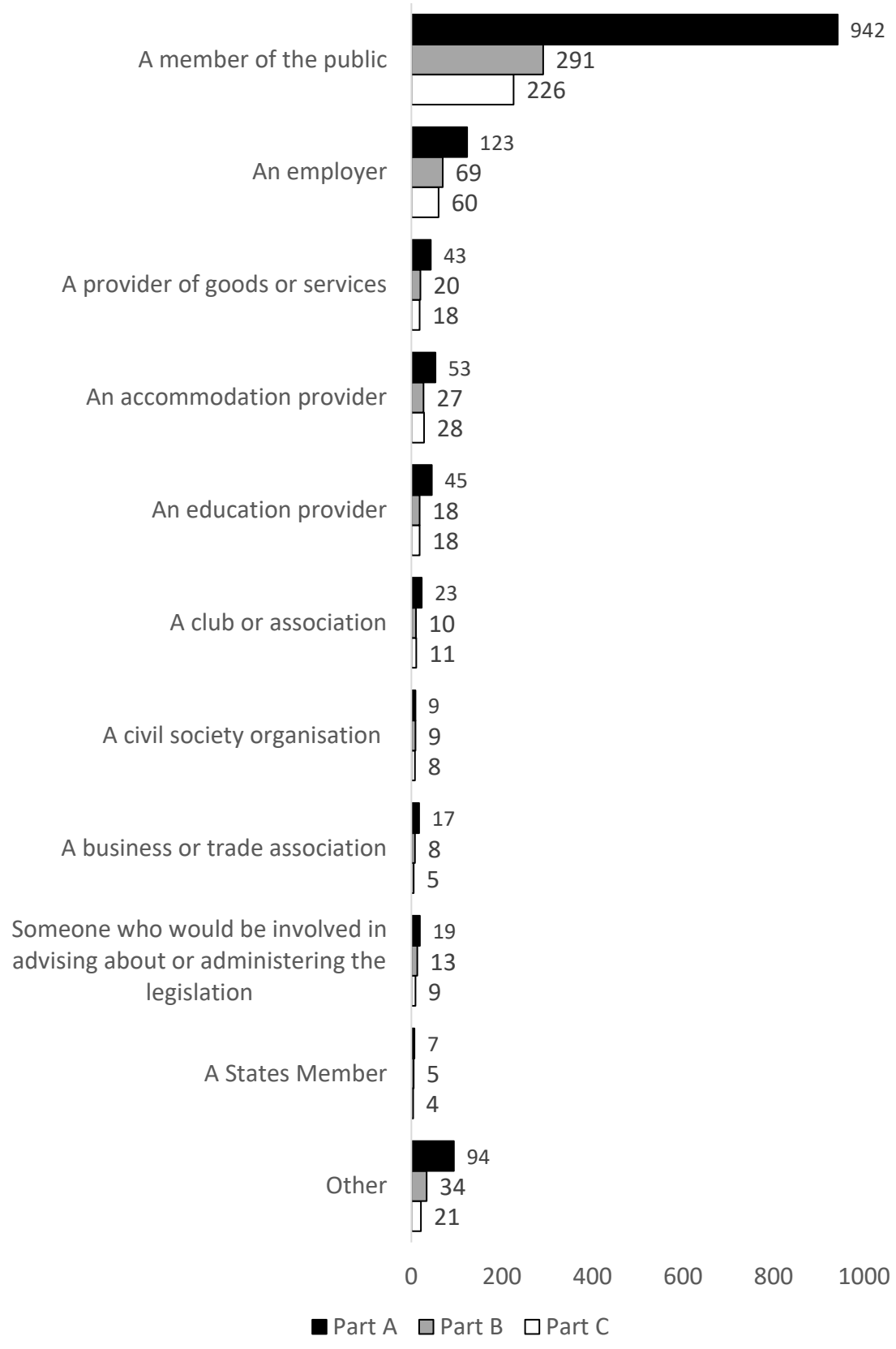
These questions were repeated at the start of each part of the questionnaire (A, B and C). Where a person responded in paper format (and the questions regarding the profile of the respondent were only included at the start of the document), their responses were manually input into each section of the online questionnaire for analysis purposes.

Respondents were invited to select all categories that applied to them, which is why the total number of responses exceeds the number of respondents.

A small proportion of responses were from respondents who categorised themselves as 'other.' This included respondents who described themselves as a student, a guest worker, a disabled person, a parent of a child with a disability, a carer, a charity, a member of the LGBTQ+ community, an academic specialising in the field of equality and inclusion, a civil servant, a volunteer, a health professional, a family, a prisoner and others.

The full breakdown of responses to this question is in **Figure A4.1** below.

Figure A4.1 – Self-identified category of respondent



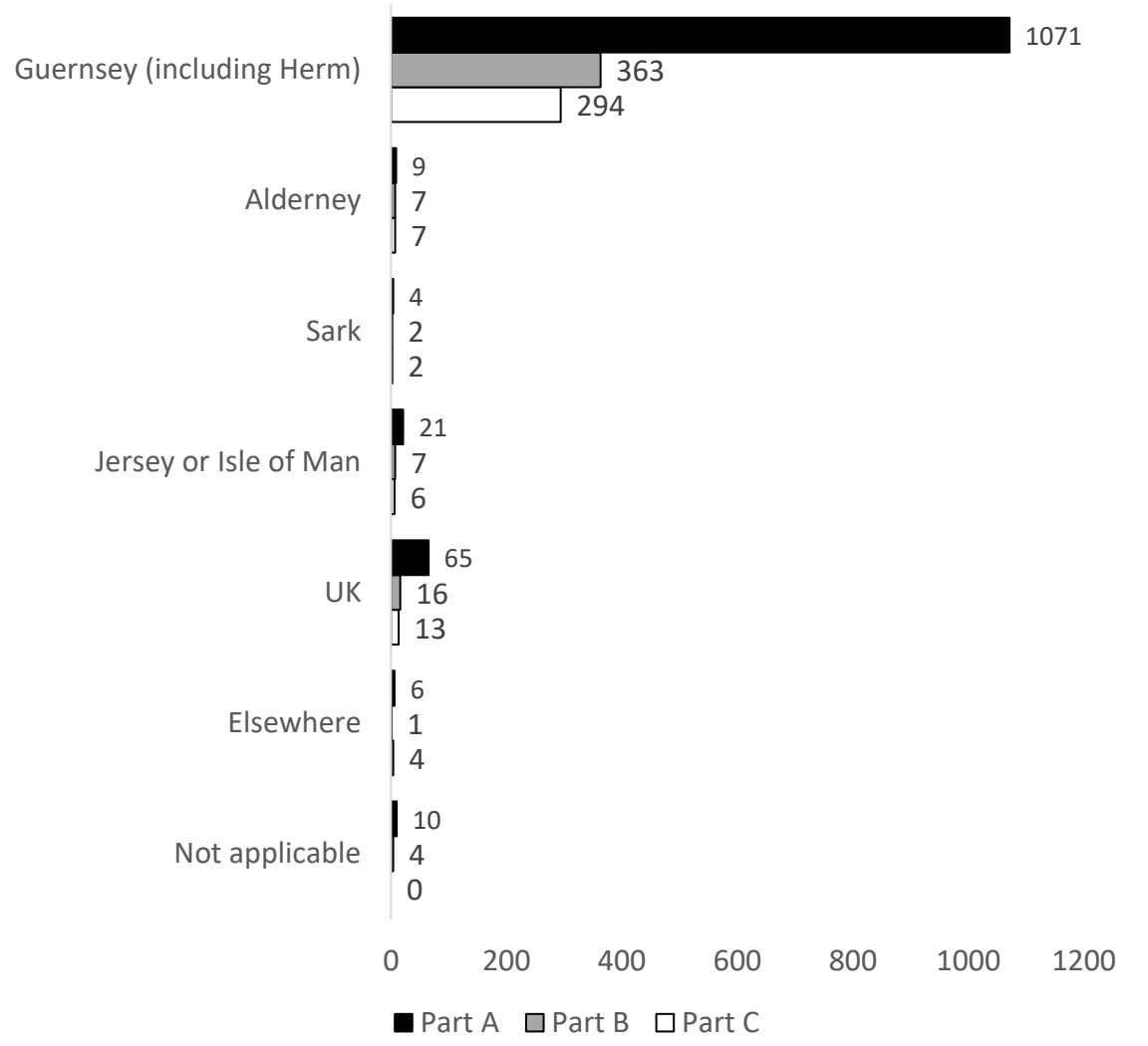
I live in (please select all that apply)

1,153 respondents answered this question in Part A, 386 in Part B and 308 in Part C.
A number of respondents provided more than one answer to this question which is why the total number of responses exceeds the number of respondents.

As expected, the vast majority of responses came from Guernsey residents (including Herm residents).

The breakdown of responses is set out in **Figure A4.2** below.

Figure A4.2 - Responses to "I live in (please select all that apply)"



My business or organisation operates in (please select all that apply)

906 respondents answered this question in Part A, 299 in Part B and 239 in Part C.

The response suggests that respondents to Part B and C included a higher proportion of respondents from businesses and organisations with cross-jurisdictional operations.

Figure A4.3 - Responses to "My business or organisation operates in (please select all that apply)"