Section 2: How the Committee has changed its proposals in response to the consultation

In response to the consultation, the Committee has reviewed and/or reconsidered a substantial number of policy issues. Several of these relate to exceptions to the legislation. This section explains where the Committee has decided to make significant changes to the draft policy proposals on which it consulted in the summer of 2019. In other areas, the Committee decided not to change its proposals.

2.1 Phasing

In 2018[103] and 2019[104], the Committee put forward a case for a new multi-ground discrimination ordinance covering ten protected grounds. During the consultation period, some stakeholders welcomed this approach. However, a strong view from several business representatives was that the protected grounds should be phased in over a period of time, similar to the implementation approach adopted in Jersey.

The Committee remains of the view that there is significant merit in all non-discrimination provisions being set out in a single Ordinance rather than in a collection of Ordinances covering different grounds of protection and/or different fields (e.g. employment, provision of goods or services, etc). A single Ordinance will make it easier for duty bearers and rights holders to understand their respective duties and rights and will allow for a consistent approach to be taken in defining discrimination, in bringing and hearing cases and in the remedies available to complainants. However, due to the quantity of feedback received through the public consultation, and in order to manage workload, the President of the Committee announced in November 2019[105] that the proposals under development would be refocused on fewer grounds of protection, with disability and carer status as a priority.

The Committee is proposing that a phased approach is taken to the development of a single multi-ground Discrimination Ordinance under the provisions of the Enabling Law. The proposals set out in section 5 of the Committee's Policy Letter, which are explained in sections 3 to 8 of this appendix, represent the first phase in the development of this Ordinance. During phase 2, proposals will be developed in respect of age and religious belief. During phase 3, proposals will be developed for the grounds covered in the existing Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 ("the Sex

[103] P.2018/45 Le Clerc and Langlois Amendment 2 to the Policy & Resources Plan (2017 Review and 2018 Update), Billet d'État XV of 2018, Article I (Resolution set out in full in appendix 1). Available at: https://www.gov.gg/CHttpHandler.ashx?id=113327&p=0 [accessed 1st March, 2020].
[104] See www.gov.gg/discriminationconsultation
[105] Media release issued on 8 November 2019 available at: https://www.gov.gg/article/175022/Discrimination-Legislation-proposals-to-be-re-focussed [accessed 19th February, 2020].

Discrimination Ordinance") (i.e. sex, marriage, and gender reassignment - with any appropriate updates in the framing of those grounds) plus sexual orientation. The aim would be for these grounds of protection to be transferred into the new multi-ground Ordinance proposed in this Policy Letter, meaning that protection from discrimination on the grounds of sex, marriage, and gender reassignment would be extended to cover the fields of education, accommodation, goods or services and membership of clubs and associations, in addition to employment. The Sex Discrimination Ordinance would then be repealed. The Committee envisages that phase 3 will include a proposal to introduce the right to equal pay for work of equal value in respect of sex in accordance with Guernsey's obligations under the International Covenant on Economic, Social and Cultural Rights[106] and in order to support the extension of the Convention on the Elimination of All Forms of Discrimination Against Women[107].

The Sex Discrimination Ordinance will remain in force and operate alongside the proposed new Ordinance until such time as sex, marriage and gender reassignment are taken into the new Ordinance in phase 3.

2.2 Definition of "disability"

In the draft technical proposals, on which the Committee consulted in the summer of 2019, a working draft definition of disability was proposed which was based on the definition included in the Republic of Ireland's Employment Equality Acts and Equal Status Acts with various amendments[108]. This was a broad, impairment based, definition which included no requirements in terms of actual or expected duration of the disability, or impact on a person's ability to carry out, engage or participate in normal day-to-day activities.

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[106] The UN International Covenant on Economic, Social and Cultural Rights was extended to Guernsey in 1976. Article 7(a)(i) notes that State Parties recognise the right to equal remuneration for work of equal value.

[107] The States of Guernsey agreed to seek extension of the UN Convention on the Elimination of All Forms of Discrimination Against Women in 2003, Article 11(1)(b) includes a right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value.

[108] Working draft definition which the Committee consulted on in the summer of 2019:

"'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 Committee received extremely diverse feedback on this proposal. Some stakeholders supported a broad definition. Others noted that the words "disability includes but is not limited to" effectively meant that the definition was unlimited and objected to this. There was also both support for and criticism of the removal (from the Irish definition) of the word "chronic" in relation to illness, with concerns raised over how employers would be able to distinguish between short-term sickness absence and a longer-term disability. There was both support and criticism for the suggestion that the duration that a disability had existed was not relevant. Some respondents suggested that adopting the definition of disability used in the UK Equality Act 2010 or the Discrimination (Jersey) Law 2013 would be preferable for employers and businesses as they were more familiar with these definitions. Others were highly critical of the UK and Jersey definitions arguing that they sought to reduce the protected pool of people and that they focused attention on proving disability, rather than on the alleged discriminatory act.

Following the consultation, the Committee has met on a number of occasions with representatives of the Guernsey Disability Alliance and business associations, both separately and together, to try to find common ground in relation to this key issue. Unfortunately, it has not been possible to find a definition of disability that all stakeholders support.

Some stakeholders have indicated that they would support the adoption of the Jersey definition of disability with no amendments. Other stakeholders do not support the Jersey definition due to the way it defines a requirement for the impairment to be "long-term"[109] and also because it includes a requirement that the impairment "can adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law" (herein referred to as "the adverse effect test"). It is not clear how the adverse effect test will be interpreted by the Jersey Employment and Discrimination Tribunal as only one disability discrimination complaint has been considered by the Tribunal to date and interpretation of this requirement was not a key determinant in this case. Although the Committee has been advised that it is likely that UK case law will be followed by the Jersey Employment and Discrimination Tribunal, the adverse effect test in the Discrimination (Jersey) Law 2013 is actually different to the equivalent test applied under the UK Equality Act 2010, so this may be an unsafe assumption. The some stakeholders have indicated that they would be likely to support the definition of disability in the Republic of Ireland's Employment Equality Acts and Equal Status Acts with no amendments; but, at a meeting with the Committee, other stakeholders did not support this definition as it does not explicitly include any tests on duration or adverse effects (although in practice impairments of a minor or trivial nature are not considered to be disabilities under these Acts).

[109] In the Discrimination (Jersey) Law, 2013 "a long-term impairment is an impairment which –

(a) has lasted, or is expected to last, for not less than 6 months; or

(b) is expected to last until the end of the person's life."

The Committee proposes that a person would fall within the protected ground of disability if the person has one or more long-term physical, mental, intellectual or sensory impairments.

In order to provide greater clarity for individuals, employers and adjudicators, it is proposed that "impairment" is defined in terms consistent with the following:

> *""impairment" means:*
> (a) the total or partial absence of one or more 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, chronic 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, illness or disease which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour."[110]

In Jersey, the impairment(s) must have lasted, or be expected to last, for not less than six months or until the end of the person's life to be considered a disability for the purposes of the Discrimination (Jersey) Law, 2013. In the UK, the equivalent period is 12 months. The Committee accepts that the inclusion of a time limit would be helpful for employers in order to draw a clear distinction between people with short-term minor ailments and injuries, who would fall outside the scope of protection of the Discrimination Ordinance, and people with longer-term impairments who would be protected. Exactly where this line is drawn is open to debate and has been the subject of such since work on the development of these proposals first began in 2014.

Having given the matter much consideration, and taking into account the views of representatives of business associations and organisations representing disabled people, the Committee proposes that for the purposes of the new Discrimination Ordinance, a "long-term" impairment is an impairment which has lasted, or is expected to last for not less than six months; or is expected to last until the end of the person's life. The objective of this time limit is to exclude minor illnesses, injuries, etc., which do not fall within society's normal understanding of the concept of disability (for example, flu, norovirus, broken arm, etc.).

[110] This definition of impairment comes from the definition of 'disability' in the Republic of Ireland's Employment Equality Acts and Equal Status Acts, which was largely based on the definition of 'disability' in the Australian Disability Discrimination Act 1992.

For the purposes of clarification, the proposed time period would not exclude potentially relapsing/reoccurring conditions where the person was in a period of remission (e.g. cancer, multiple sclerosis, mental health conditions) or where treatment was controlling the condition (e.g. HIV, diabetes).

The Committee proposes that, unlike under the definitions of disability in the UK Equality Act 2010 and the Discrimination (Jersey) Law 2013, there should be no requirement or threshold included within the definition of disability in the new Discrimination Ordinance for the impairment(s) to have an adverse effect on the person's ability to carry out, engage or participate in normal day-to-day activities. The Committee's view, informed by its expert advisers, is that this is in line with guidance published by the Committee on the Rights of Persons with Disabilities. Paragraph 73(b) of the Committee on the Rights of Persons with Disabilities' General Comment no. 6 on equality and non-discrimination[111] says:

> "…Persons victimized by disability-based discrimination seeking legal redress **should not be burdened by proving that they are "disabled enough" in order to benefit from the protection of the law**. Anti-discrimination law that is disability-inclusive seeks to outlaw and prevent a discriminatory act rather than target a defined protected group. In that regard, **a broad impairment-related definition of disability is in line with the Convention**;" *[emphasis added]*

The UK definition of disability is highly complex, including supplementary provisions regarding the determination of disability in the Act itself, supported by a 58 page guidance document on matters to be taken into account in determining questions relating to the definition of disability[112]. Definitions of disability in use in the Republic of Ireland, Australia and Hong Kong do not include a requirement for the impairment(s) to adversely affect a person's ability to carry out, engage or participate in normal day-to-day activities (or, in fact, to have lasted or be expected to last for a particular period of time) which avoids much of the complication experienced in the UK. Evidence from these jurisdictions shows that this has not been abused.

Case numbers from the Republic of Ireland demonstrate that a broad impairment based definition of disability with no requirement for the impairment(s) to adversely affect a person's ability to carry out, engage or participate in normal day-to-day activities does not lead to an excessive burden of cases for employers and organisations. In 2018, there were just under 900 equality complaints in the field of goods and services provision

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[111] United Nations, Committee on the Rights of Persons with Disabilities, *General comment no. 6 (2018) on equality and non-discrimination,* CRPD/C/GC/6 (26th April 2018), available at: https://digitallibrary.un.org/record/1626976?ln=en [accessed 17th February, 2020].

[112] Office for Disability Issues, *Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (May 2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf [accessed 20th February, 2020].

relating to all nine of the protected grounds. Only 90 of these complaints cited disability[113]. In 2018 there were just less than 1,800 employment related complaints under all of the protected grounds. Of those, less than 300 complaints referenced disability[114]. Considering that there are about 2.5 million people in the Irish labour market[115], less than 300 disability employment complaints in a particular year is extremely low.[116]

The Committee does not support the inclusion of a requirement for the person's impairment to adversely affect their ability to carry out, engage or participate in normal day-to-day activities because this draws the initial focus of adjudication to the question of whether a person is "disabled enough" to qualify for protection from discrimination. This can be personally intrusive and embarrassing and it may also potentially deter genuine complainants from coming forwards as they may fear being effectively cross examined by a respondent's lawyer arguing that they are not disabled, leaving instances of discrimination unchallenged. The Committee is of the view that the focus of the Tribunal should be on the alleged discriminatory act. It should be recognised that a person with an impairment that does not have any impact on their ability to carry out, engage or participate in normal day-to-day activities can be discriminated against on the basis of social stigma or prejudice. It is crucial to the Committee's objectives that people disadvantaged in this way can seek legal redress.

In considering the merits of the Committee's proposal in this regard, it is important to understand that just because someone falls within the definition of disability, does not mean that they would be entitled to bring a discrimination claim. Disability, in this regard, is no different to any other protected ground - for example, everyone has an age, or a gender or race, but this does not mean that everyone can hope to succeed in an action for discrimination. For example, all men and women are protected from discrimination in the field of employment under the Sex Discrimination Ordinance and there is no evidence that this has led to a high case load in Guernsey. It follows that a broad definition of disability does not mean that all people with disabilities would seek to bring legal cases. In any case, the burden of proof initially rests on the complainant

[113] Workplace Relations Commission (2018) Annual Report, p. 21. Available at: https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/annual-report-2018.pdf [accessed 2nd March 2020].
[114] *Ibid.,* p.22
[115] Central Statistics Office (2019) Labour Force Survey – Q4. Available at: https://www.cso.ie/en/statistics/labourmarket/labourforcesurveylfs/ [accessed 2nd March 2020].
[116] Figures from Ireland for 2014 (the latest available) show of all the equality cases included in that year, around a quarter went to adjudication; that includes both employment equality cases and cases relating to goods and services on all the different protected grounds. Of the remaining equality cases that were concluded that year, about 15% reached a mediated agreement and around 60% were discontinued for varying reasons. [See Equality Tribunal (2014) Annual Report, p.6. Available at: https://www.workplacerelations.ie/en/publications_forms/equality-tribunal-annual-report-2014-fin.pdf [accessed 2nd March 2020].

who has to show primary facts from which discrimination on the basis of disability could be inferred (i.e. a prima facie case) before the burden of proof switches to the respondent[117].

It is also a key point that just because someone falls within the definition of disability, does not mean that they would be entitled to a reasonable adjustment. Under the Committee's proposals, adjustments must be "appropriate" and "necessary" and not represent a "disproportionate burden". This ensures that the duty is focussed on the removal of barriers that actually exist in a way that is sensitive to the needs of employers in terms of proportionality (taking account of available resources). So, if the person's impairment has no practical effect in the context of the particular employer's workplace, the employer would not have to make an adjustment as it would not be "necessary".

The Committee accepts that its proposal is unlikely to be seen as ideal by representatives of the business community or by representatives of disabled persons but for opposite reasons. Essentially, what the Committee is proposing is a compromise, which recognises the requirement of employers for there to be a clear distinction between short-term sickness and longer-term impairments for operational reasons, but which does not require a person to prove, through the provision of evidence, how and to what extent their impairment adversely affects their ability to carry out, engage or participate in normal day-to-day activities. That is not to say that a person need not provide evidence that they have an impairment. Sometimes this will be obvious and evidence will not be required, but if the existence of an impairment or the prognosis is in doubt, medical, or other expert, evidence may be required.

2.3 Definition of carer status

The Committee received polarised feedback on the definition of carer status included in its technical proposals. The Committee had originally proposed that carer status be defined 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 consultation respondents viewed the inclusion of carer status in this way as a positive change, others considered the proposed definition of carer status to be too broad and suggested that it should be limited to carers of disabled persons only. 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

[117] A shifting burden of proof is entirely normal in equality law, as it would otherwise be almost impossible to succeed in a claim. Once the complainant has shown primary facts from which discrimination on the basis of disability could be inferred (i.e. a prima facie case) the respondent needs to show that there is a good explanation for why the circumstances that appear to be discriminatory are actually not.

obtain (subject to business requirements) a greater degree of flexibility in their working hours and/or conditions. Some people 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. Others said they would object to any requirement for the carer to reside with the person they care for. Some questioned the need for a carer status ground at all.

While Jersey and the UK do not have a specific "carer status" ground (the UK Equality Act 2010 has some protection from direct discrimination through "discrimination by association" established through case law), the Committee was specifically directed to return to the States with proposals for discrimination legislation to protect both disabled persons **and carers** from discrimination.

As a result of consultation feedback, the Committee now recommends that a person would have "carer status" if they provide care or support (in a non-professional capacity) on a continuing, regular or frequent basis for a close relative or a person that they live with who has a disability which is of such a nature as to give rise to the need for that level of care and support. For the purposes of the Discrimination Ordinance, the Committee is proposing that a "close relative" would include a spouse or partner, parent (including step-parent and parent of a spouse/partner), grandparent, child (including-step child), grandchild or sibling (including step-sibling).

2.4 Timescale for making a complaint

The Committee originally proposed allowing a complaint to be made up to 6 months after the last incident of discrimination had allegedly taken place. Following consultation feedback that this would cause too long a period of uncertainty for business, the Committee has agreed to amend the time period for making a complaint to three months following the last incident of alleged discrimination, in line with the current Sex Discrimination Ordinance. However, following formal registration of intent to make a complaint it would be possible for the time period to be suspended to allow formal pre-complaint conciliation to take place.

2.5 Third party harassment

Following consultation feedback that the UK has repealed section 40 of the 2010 Equality Act in relation to third party harassment, the Committee has agreed to move from the Irish to the UK position on third party harassment and remove the specific protection against third party harassment in the proposed Guernsey ordinance. This means that while an employer or service provider could be liable for the conduct of an employee in certain circumstances, they could not be directly responsible in the same way for harassment by a third party such as a customer, service user, student or tenant. However, employers should still take reasonable steps to prevent harassment as explained in section 3.5.

2.6 Liability

Another criticism during the consultation was that the proposals were too heavily weighted against duty bearers without offering sufficient protection for employers and service providers in situations where employees or service users acted in ways which were beyond their control.

In a workplace context, with respect to the discrimination legislation an employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment, although it is a defence if the employer can show it has taken all reasonable steps to prevent such acts or omissions from occurring. Section 25 of the Sex Discrimination Ordinance states that: "Anything done by a person in the course of his employment shall be treated for the purposes of this Ordinance as done by his employer as well as by him*",* implying that the employee and employer are jointly and severally liable for discriminatory acts done in the course of the employee's employment. The Committee's revised technical proposals extend this position to harassment and sexual harassment and victimisation as well as to discrimination. It is the intention that an employer or principal can be held responsible for the actions of an employee or agent where they had failed to take appropriate and reasonable steps to prevent the employee or agent from doing the thing complained of, or anything of that description. The employee cannot be held responsible for following a policy or decision of the employer or principal that they do not or cannot control.

In the case of discriminatory advertisements and procuring discrimination where two businesses (employers/service providers) are involved, it is also recommended that both the principal and the agent may also be liable on a joint and several basis. An agent or employee should not be responsible if their principal has told them that there is nothing wrong with what they are doing and he or she reasonably believes this to be true.

2.7 Financial compensation structure

The Committee's draft technical proposals, published for consultation in the summer of 2019, explained that because it was proposed that in the future complaints could be registered about discrimination in the provision of education, goods, services, clubs and associations and accommodation (as well as in relation to employment), it would not be appropriate to link awards to pay where the complainant was not paid by the organisation they were making the complaint about. Consequently, the Committee suggested the introduction of compensatory awards proportionate to the loss someone had experienced and potentially made up of two elements (financial loss and injury to feelings), like in the UK and Jersey. The Committee originally suggested allowing people to make both an unfair dismissal and a discrimination complaint and revising the award structure for all employment protection cases. For example, one option to achieve consistency between the discrimination awards and other employment protection awards would have been to change Guernsey's unfair dismissal awards structure to be more akin to that operated in Jersey, the UK and the Isle of Man, with a capped basic award based on length of service plus a compensatory award subject to a separate cap.

The following is an extract from the Committee's July 2019 draft technical proposals[118]:-

> "Under our proposals, if you were not sure whether your dismissal was discriminatory or whether it was an unfair dismissal but was not discriminatory, you can still register complaints of both unfair dismissal and discrimination. However, the Tribunal would not be able to award you compensation for the same financial loss or injury to feelings under both systems of compensation. The Tribunal would determine both complaints and would calculate the award that could be given. So, for example, if you were unemployed due to a discriminatory dismissal, you would only be able to claim for the financial loss that you experienced associated with that dismissal under either discrimination or unfair dismissal, not both.
>
> Because of the close relationship between discrimination awards and other employment protection awards, we also recognise the need to review the award structure for employment protection cases (like minimum wage complaints and unfair dismissal). If the States agrees that a new discrimination law which uses compensatory financial claims and non-financial remedies for discrimination, the other legislation may also be adjusted to match this, so that there is consistency across the different pieces of legislation in force."

In its response to the Committee's draft policy proposals, the Policy & Resources Committee said:

> "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."*[119]*

As a result, the Committee has revised its thinking and is now proposing the idea of a simple development to the award structure already in operation under the Sex Discrimination Ordinance for successful discrimination complaints in the field of employment which would work alongside the current award structure for unfair dismissal without requiring any changes to that system; and to operate a separate compensatory awards structure for non-employment complaints containing two element – firstly, actual financial loss and secondly, injury to feelings[120], recognising that awards cannot be based on pay in non-employment contexts.

For discrimination in the field of employment, the Committee recommends an upper limit of 6 months' pay plus up to £10,000 for injury to feelings based on a three banded

[118] Available at: www.gov.gg/discriminationconsultation

[119] Letter from the President of the Policy & Resources Committee to the President of the Committee *for* Employment & Social Security, dated 2nd October, 2019.

[120] Compensation for injury to feelings looks at the personal impact of the experience on the individual, whether the conduct complained of continued over a long period of time, etc.

scale akin to the Vento Scale[121] used in the UK (albeit with a much lower upper limit).

The lower band tends to be for one-off relatively minor incidents, the highest band for the most serious cases which could be an ongoing situation or series of incidents which publicly humiliate or degrade an individual.

Where a claimant makes complaints for both unfair dismissal under the Employment Protection (Guernsey) Law, 1998 and discrimination in the field of employment under the existing or new discrimination legislation, and the claims are related (i.e. discriminatory dismissal), if successful the claimant could be awarded either:

- up to 6 months' pay under the employment protection legislation if the unfair dismissal complaint is upheld but the discrimination complaint is not, or
- up to 6 months' pay plus up to £10,000 for injury to feelings if the discrimination complaint is upheld but the unfair dismissal complaint is not, or
- a combined award of up to 9 months' pay plus up to £10,000 for injury to feelings if both the unfair dismissal and the discrimination complaints are upheld.

For discrimination in all other fields, the Committee proposes an upper limit of £10,000 for financial loss plus up to £10,000 for injury to feelings.

The Tribunal's current powers to reduce awards (i.e. award less than the maximum number of months' pay) or make cost awards on application would remain (noting that costs cannot be awarded in relation to legal representation/advice).

2.8 Reasonable adjustment

Several respondents preferred the terminology "reasonable adjustment" to the Committee's original suggestion of "appropriate adjustment." The Committee is happy to use the term "reasonable adjustment" and also agrees that a reasonable adjustment need only be provided where a disabled person would suffer a "substantial disadvantage" without the adjustment, where the definition of "substantial disadvantage" is "more than minor or trivial". This would be part of the determination of whether an adjustment was necessary. There would still be a requirement for the duty bearer to consult the disabled person (when responding to an individual request) before providing an adjustment to ensure that the adjustment is appropriate.

In response to consultation feedback, the Committee has agreed that there should be a five year time delay from the legislation's commencement date before an employer or service provider would have to respond to a request for a reasonable adjustment where the removal or alteration of a physical feature is requested. After five years from the

[121] See for example, UK Equality and Human Rights Commission (2018) "How to work out the value of a discrimination claim". Available at: https://www.equalityhumanrights.com/sites/default/files/quantification-of-claims-guidance.pdf [accessed 1st March 2020].

commencement date, the organisation would need to respond in a timely manner but would only need to remove or alter the feature if doing so was not a disproportionate burden. However, if it is possible to provide the service in an alternative way such that the need to alter or remove the physical feature is avoided, then there would be a duty for the service provider to respond accordingly to the request for a reasonable adjustment as soon as the legislation comes into force. The definition of "physical features" for the purposes of this delay is given in the next paragraph – it should be noted that the Committee is proposing that it would be able to alter this definition via Regulation.

Having considered the definition of a physical feature in the UK Equality Act, 2010, the Committee intends that the definition of a physical feature would include:

- a feature arising from the design or construction of a building;
- a feature of an approach to, exit from or access to a building;
- a fixture or fitting.

It is proposed that none of the following is an alteration of a physical feature in the Guernsey legislation:-

(a) the replacement or provision of a sign or notice;
(b) the replacement of a tap or door handle;
(c) the replacement, provision or adaptation of a door bell or door entry system;
(d) changes to the colour of a wall, door or any other surface

2.9 Removal of a separate anticipatory accessibility duty

Under the UK Equality Act 2010, for education and service providers the duty to make reasonable adjustments is a duty owed to disabled people generally. The effect of this is that education providers and providers of goods and services must plan ahead by considering the accessibility needs of the wider disabled community, in order to prepare for reasonable adjustment requests and not wait for a service user to approach them before considering how to meet relatively common or predictable needs. They must anticipate the type of barriers that individuals with various impairments may face. They must also anticipate the adjustments they can make to remove these barriers. The anticipatory duty might include, for example, purchasing a portable ramp or changing a doorway to ensure access for people with mobility impairments, or ensuring that a reception desk has a hearing loop available.

The Committee tried to clarify the distinction between a responsive reasonable adjustment duty and a proactive accessibility duty in its proposals. This mirrored and made explicit what is arguably implicit in the UK reasonable adjustment duty – i.e. both a responsive and (for education and goods or services providers) a proactive element. In order to show that goods or services providers and education providers had considered how to meet the proactive/anticipatory duty, the Committee had included a requirement for them to prepare an accessibility action plan. The plan would have shown that they had undertaken an access audit, had prioritised identified issues for

action, and were implementing changes within available resources.

Some feedback from respondents to the consultation queried why the Committee was proposing to introduce an anticipatory accessibility duty when the reasonable adjustment duty could be owed to disabled people generally (i.e. that the UK anticipatory reasonable adjustment duty was sufficient and there was no need to add a requirement to develop an action plan). It was argued that the duty to develop an action plan did not add anything as an indirect discrimination complaint could be made by an individual if the design of a service aimed at the public meant that a group of people (e.g. those with a particular type of impairment) would be prevented from accessing the service. They argued that this anticipatory accessibility duty did not need to be written separately into the legislation.

The Committee feels that it should be up to the legislative drafters to decide how such a duty should be drafted into the legislation but the Committee's policy intent is that there should be an anticipatory/proactive element for education and goods or services providers (but not for employers and accommodation providers, or clubs and associations if they did not provide education or services). This could, as in the UK, be framed as an anticipatory element to the reasonable adjustment duty. The individualized, responsive duty to make reasonable adjustments upon request would apply across all fields – including to employers and accommodation providers. A service provider would be able to justify not making an adjustment, such as not making a service accessible either through the defence of disproportionate burden (in the event of a claim of denial of a reasonable adjustment) or through objective justification (in the event of a claim of indirect discrimination).

With respect to the requirement to prepare an accessibility action plan, the Committee has decided that this requirement should only be compulsory for the public sector and that the duty should apply five years after the legislation comes into force. The preparation of a plan would be voluntary (at least initially) for the private and third sectors, noting such a plan could be useful as evidence when responding to a complaint.

The Committee has agreed that no complaints relating to the removal or alteration of a physical feature can be made until five years after the commencement of the Ordinance. This is a shorter time limit than the Committee was originally recommending but has been extended to include all changes to physical features, including reasonable adjustment requests and indirect discrimination complaints.

2.10 Accommodation providers and reasonable adjustments

The Committee's technical proposals originally recommended that providers of both residential and commercial property should be under a duty to provide (and pay for) appropriate/reasonable adjustments for anything which did not involve physical alterations to the fixed features of a building. This might include adjustments in how they communicate with tenants, how they collect rent, signage or adjustments to fittings like door handles where required by the tenant (provided it was not a disproportionate

burden on them to provide such adjustments).

The Committee also 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 would be allowed to specify that this alteration should be at the tenants own expense, and that they must agree, and have the resources available, to return the building to the original condition at the end of their tenancy. There was considerable feedback from private landlords against this proposal. Landlords also requested clarification on the definition of physical and non-physical features, who would have an obligation to pay for reasonable adjustments, and what could be reasonably refused.

In light of this, the Committee has reconsidered its proposals with respect to accommodation providers. The Committee is recommending that Regulations should be developed to specify:-

- what is and is not a "physical feature"; and
- when tenants can request improvements to accommodation when it is their principal residence.

At commencement of the legislation, the following position is suggested:-

Physical features would include: -

- a feature arising from the design or construction of a building;
- a feature of an approach to, exit from or access to a building;
- a fixture or fitting.

None of the following is an alteration of a physical feature:-

List A
(a) the replacement or provision of a sign or notice;
(b) the replacement of a tap or door handle;
(c) the replacement, provision or adaptation of a door bell or door entry system;
(d) changes to the colour of a wall, door or any other surface.

Therefore, landlords would have to pay for alterations to the things listed on List A from the commencement of the legislation providing that they were appropriate and necessary and not a disproportionate burden.

In addition to the above provision, five years after the commencement of the first phase of the legislation, the landlord could not unreasonably refuse for the tenant to carry out the type of improvements listed on List B (non-exhaustive) at the tenant's own expense as a reasonable adjustment.

This is based on section 190 of the UK Equality Act which defines (by example) the

improvements a tenant can ask for, at their own expense (provided the tenant or another person occupying or intending to occupy the premises is a disabled person and the disabled person occupies or intends to occupy the premises as that person's only or main home) as:-

> List B
> "improvement" means an alteration in or addition to the premises and includes—
> (a) an addition to or alteration in the landlord's fittings and fixtures*;
> (b) an addition or alteration connected with the provision of services to the premises;
> (c) the erection of a wireless or television aerial;
> (d) carrying out external decoration;
> *This could include, for example, grab rails and special sanitary fittings and stair lifts.

Private residential landlords would not have to consent to any other changes to physical features other than the improvements listed above.

Commercial landlords could not unreasonably refuse changes to physical features at the tenant's expense (whether included in List B or not).

Where changes to physical features (or improvements in List B) are concerned, both private residential and commercial landlords could specify a requirement for the building to be returned to its original condition at the tenant's expense. However, in many cases it is anticipated that they would not want to as the changes would be likely to make their property more marketable.

2.11 Equal pay for work of equal value

The draft policy proposals on which the Committee consulted in the summer of 2019 included a proposal to introduce a right to equal pay for work of equal value applying to all proposed protected grounds, as is the position in the Republic of Ireland. Equal pay for work of equal value provisions allow people doing different jobs to compare pay differences related to a ground of protection which might help to challenge systemic pay differences or occupational segregation. In response to feedback from representatives of the business community that the proposed scope of the provision was too wide and would be impractical to monitor in practice, the Committee recommends adopting the UK position where equal pay for work of equal value complaints could only be registered in relation to the ground of sex. Given that it is proposed that a review of existing provisions on the ground of sex will be included in phase 3 of the development of the multi-ground discrimination Ordinance, the introduction of the right to equal pay for work of equal value will be delayed and does not appear in these proposals. However, there is an equal pay for equal work provision in these proposals (this allows comparison only where people are doing the same or substantially similar jobs).

For clarity, and in response to a consultation response, the Committee did not intend that claims for equal pay for work of equal value should be able to be made using cross-jurisdictional comparators.

2.12 Landlords and children

The Committee has removed parents of dependent children (without a disability) from its proposed definition of carer status. This means that under the Committee's proposals for the first phase of the development of a new Discrimination Ordinance, landlords would not be prevented from specifying "no children" when letting residential property.

2.13 Advice and enforcement

Several respondents noted that additional resources would be required to provide advice and assistance to both rights holders wishing to make a complaint and to duty bearers with respect to their responsibilities under the new legislation. In addition, some respondents felt that additional occupational health support was required and that changes to the Employment and Discrimination Tribunal were necessary to enable it to manage a higher and more complex caseload. Section 7 of the Policy Letter describes the recommended service developments required to implement the new Discrimination Ordinance.

2.14 Definition of employee/worker

Some respondents to the consultation noted that the part of the technical consultation which described who could make claims of employment discrimination appeared to be narrower than the existing Sex Discrimination Ordinance.

The Committee has clarified that it intends that a-typical and casual workers would be protected in the employment field, but some situations of self-employed persons (where this is more like service provision than an employment relationship) would not be protected. The Committee would want the wording of the law to ensure agency workers are also protected.

2.15 Victimisation

In response to consultation feedback, the Committee's revised proposals recommend that for an individual to be protected under the law, the complaint or allegation they have made must have been made in good faith. For clarity, the law will provide protection from victimisation when an individual alleges that there has been a breach of the equality legislation, not just when someone makes or proposes to make a formal complaint.

2.16 Race

There was a request during the consultation that in defining "race" in the legislation, it is clarified that a racial group could 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 of any or all three of these). The Committee has included this clarification.

2.17 Multiple and intersectional discrimination

"Multiple discrimination" refers to a situation in which a person experiences discrimination on two or more grounds, leading to discrimination that is compounded or aggravated. "Intersectional discrimination" refers to a situation where several grounds interact with each other at the same time in such a way as to be inseparable.[122] Article 6(1) of CRPD recognizes that women with disabilities are subject to multiple discrimination and requires that States parties take measures to ensure the full and equal enjoyment by women with disabilities of all human rights and fundamental freedoms. The Convention refers to multiple discrimination in Article 5(2), which not only requires States parties to prohibit any kind of discrimination based on disability, but also to protect against discrimination on other grounds[123].

Given that no provisions regarding multiple or intersectional discrimination are currently in force in the UK[124], the Committee has decided to defer consideration of this matter until phase 2 when it is envisaged that additional protected grounds will be added to the proposed new Ordinance. While it would be possible under the Committee's proposals for a person to register two separate complaints on two grounds against the same employer or service provider (for example, a race discrimination complaint and a disability discrimination complaint) these would be decided separately, though they could be combined into one hearing. For example, the complainant would have to compare their treatment to someone of a different race and then compare their treatment to a person who is not disabled or who has a different disability. A decision would be made based on each complaint – the Tribunal could not, at present, consider multiple grounds in one comparison.

2.18 Striking out claims

The Committee intends to make an order giving the Employment and Discrimination Tribunal the power to strike out (amongst other things) vexatious complaints and the power to dismiss complaints with no reasonable prospect of success.

2.19 Exceptions

It is proposed that the Committee be given the power to amend the exceptions list by regulation. The Committee has also agreed a number of changes to the exceptions which are set out in section 8 of this appendix.

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[122] UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) "On equality and non-discrimination", para. 19. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en [accessed 1st March 2020].

[123] UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) "On equality and non-discrimination", para. 21. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en [accessed 1st March 2020].

[124] Section 14 of the Equality Act 2010 seeks to prohibit "combined" discrimination based on two protected characteristics, however, this section is not yet in force.