

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**COMMITTEE FOR EMPLOYMENT & SOCIAL SECURITY**

DISCRIMINATION ORDINANCE: GROUNDS OF i) RELIGION OR BELIEF AND  
ii) SEXUAL ORIENTATION

The States are asked to decide: -

Whether, after consideration of the Policy Letter entitled “Discrimination Ordinance: Grounds of i) Religion or Belief and ii) Sexual Orientation” (dated 13<sup>th</sup> September, 2021), they are of the opinion: -

1. To agree that the ground of **‘religion or belief’** should replace the ground of **‘religious belief’** in phase one of the new Discrimination Ordinance (the drafting of which was agreed by the States on 17<sup>th</sup> July 2020) and that the definition of this ground should be based on the UK definition of ‘religion or belief’ with the addition of the five tests from Grainger plc v Nicholson (2010), as set out in paragraph 4.1, and the exclusion of single issue or political beliefs.
2. Subject to exception number 48, to agree the exceptions to the Discrimination Ordinance as explained in section 4 and set out in Appendix 2.
3. To agree that exception number 48 with respect to senior leadership positions in religious/faith schools should apply for a period of five years from the date of the Discrimination Ordinance coming into force.

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**COMMITTEE FOR EMPLOYMENT & SOCIAL SECURITY**

DISCRIMINATION ORDINANCE: GROUNDS OF i) RELIGION OR BELIEF AND  
ii) SEXUAL ORIENTATION

The Presiding Officer  
States of Guernsey  
Royal Court House  
St Peter Port

13<sup>th</sup> September, 2021

Dear Sir

**1. EXECUTIVE SUMMARY**

- 1.1 This policy letter discharges the States resolution of 17<sup>th</sup> July 2020 for the Committee *for* Employment & Social Security ('the Committee') to report back to the States with a policy letter on the proposed exceptions relating to the grounds of sexual orientation and religious belief in the new Discrimination Ordinance.
- 1.2 This policy letter also asks the States to reframe the ground of 'religious belief' as 'religion or belief'. The Committee recommends aligning the definition of 'religion or belief' with the equivalent definition in the UK Equality Act 2010 with the addition of the tests from *Grainger plc v Nicholson (2010)*<sup>1</sup> and the exclusion of single issue or political beliefs.
- 1.3 The policy letter sets out details of the closed consultation that took place in the autumn of 2020 on the grounds of sexual orientation and 'religious belief' or 'religion or belief', key points relating to the responses received and the Committee's recommendations.

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<sup>1</sup> XperTHR Law Report relating to the case *Grainger plc v Nicholson* [2010] IRLR 4 EAT. Available at [https://www.xperthr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR\\_free\\_content\\_links|ptod\\_article&sfid=701w0000000uNMa](https://www.xperthr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR_free_content_links|ptod_article&sfid=701w0000000uNMa).

- 1.4 This policy letter is specific to the grounds of sexual orientation and religion or belief. The States will have the opportunity to review phase one of the new Discrimination Ordinance in full when the draft Ordinance returns to the States for consideration - it is estimated that this will be in the first quarter of 2022.
- 1.5 The Committee recommends that additional exceptions be added into the new Discrimination Ordinance (relating to Ministers of religion, events and services related to religion or belief (acts of worship), religious buildings, religious organisations and recruitment to senior leadership positions in religious schools) and that two of the original exceptions on admissions and curriculum be modified.
- 1.6 The Committee recommends, by a majority, including an exception in the Discrimination Ordinance which would allow religious/faith schools and schools with a religious ethos (hereafter referred to as 'religious schools') to take religion into account in their admissions policies.
- 1.7 The Committee is proposing an exception to allow religious schools to alter their curriculum so that they focus religious education primarily on their own religion and/or may provide only a chaplain of one religion, provided that religious schools actively teach students about the existence of, respect for and equality of people who do not conform to their religious beliefs.
- 1.8 The Committee is proposing an exception to permit the ground of religion or belief (but not the ground of sexual orientation) to be taken into account when a person is recruited into employment which is for the purposes of organised religion.
- 1.9 The Committee is proposing an exception to allow the provision of goods or services for a religious purpose only to people of a particular religious group, as explained in paragraphs 4.11-4.14.
- 1.10 The Committee is proposing an exception to allow organisations managing religious buildings, such as places of worship, to take their religious ethos into account in lettings policies if to not do so would run counter to the purpose/doctrine of the religion. The Committee is of the opinion that this exception should only cover church halls and other buildings which are predominantly used for religious purposes.
- 1.11 The Committee is proposing an exception to allow religious organisations to restrict membership or registration on the ground of religious belief. It is proposed that religious organisations will also be able to restrict the makeup or membership of their board, committees, trustees and councils on the grounds of religion or belief.

- 1.12 It is proposed that religious mutual organisations may continue to provide benefits on the basis that members have contributed on an individual member basis for the membership benefits.
- 1.13 The Committee has reservations regarding the inclusion of an exception that would allow religion or belief to be taken into account in recruitment to senior leadership positions at religious schools and recommends that this exception should apply for a period of five years from the date of the Discrimination Ordinance coming into force. During this period, discussions could take place between representatives of the Policy & Resources Committee, the Committee *for* Education, Sport & Culture, the Committee *for* Employment & Social Security, the Voluntary Schools, the grant-aided Catholic School and the Catholic Church, with the aim of discussing and attempting to resolve the issue of discrimination on the grounds of religion or belief in recruitment, remuneration, promotion and termination processes in respect of senior leadership positions at religious schools. The Committee appreciates that there are competing rights in this situation –the right of teachers and senior leaders not to be discriminated against on the ground of religion or belief (or lack of it) and the duty on the State to respect the right of parents to have their child educated in conformity with their own religion. The Law Officers have provided advice in respect of the complex issue of competing rights, which is included in section 5 of this policy letter. The Committee (by a majority) is recommending the inclusion of this exception for a period of five years whilst discussions take place. Deputy Bury does not support the inclusion of the exception at all but agrees that, if an exception is to be included in the Discrimination Ordinance, it should be for a time-limited period of five years.

## **2. INTRODUCTION AND BACKGROUND**

- 2.1 In 2003 (Billet d'État XXI of 2003, Article XIV<sup>2</sup>), the States of Guernsey discussed the principle of introducing multi-ground discrimination legislation. The first tranche of this legislation, prohibiting discrimination on the grounds of sex, marriage and gender reassignment in employment, was introduced in 2006<sup>3</sup>.
- 2.2 In 2013 (Billet d'État XXII of 2013, Article IX<sup>4</sup>), the States of Deliberation unanimously agreed to develop proposals for legislation to protect disabled people and carers from discrimination as part of the Disability and Inclusion

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<sup>2</sup> States Advisory and Finance Committee – Proposals for Comprehensive Equal Status and Fair Treatment Legislation (Billet d'État XXI of 2003, Article XIV). Available at: <https://www.gov.gg/CHttpHandler.ashx?id=3754&p=0> .

<sup>3</sup> Maternity leave and adoption leave were added to the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 with effect from 1 April, 2016.

<sup>4</sup> Policy Council - Disability and Inclusion Strategy (Billet d'État XXII of 2013, Article IX). Available at: <https://www.gov.gg/article/150421/States-Meeting-on-27th-November-2013-Billet-XXII>.

Strategy. In June 2018<sup>5</sup>, the States unanimously agreed to extend this to the development of proposals for a piece of legislation to cover multiple grounds of protection. In line with the Resolution from June 2018, the Committee consulted in the summer of 2019 on draft policy proposals for multi-ground discrimination legislation. The quantity of feedback on the details of these proposals, and the desire from some key stakeholders (who supported the principle of introducing new discrimination legislation) for a phased approach to implementing the legislation, meant that the previous Committee decided to recommend a phased approach to the introduction of the new multi-ground discrimination legislation.

- 2.3 In July 2020, the States of Deliberation considered policy proposals from the Committee for a new Discrimination Ordinance<sup>6</sup>. On 17<sup>th</sup> July 2020, the States agreed unanimously to the preparation of an Ordinance to outlaw discrimination on the grounds of disability, carer status and race. The States also approved an amendment<sup>7</sup> to the Committee’s proposals, which added religious belief and sexual orientation into the first phase of the development of the Ordinance and amended the number of implementation phases from three to two.
- 2.4 The Committee was directed to report back to the States, as soon as possible in the next States term (i.e. now the current States term), with a policy letter on the proposed exceptions for the grounds of sexual orientation and religious belief and that this should take place in parallel to the legislative drafting of the new Ordinance. An exception sets out when it would be permitted to treat people differently based on one of the protected grounds. The States noted in July 2020 that the Committee would have the power to prescribe exceptions to the Ordinance by Regulation.
- 2.5 The relevant States Resolutions referred to in paragraphs 2.3 and 2.4 are set out in full below:

*“1A. To agree that prevention of discrimination on the ground of **sexual orientation** (meaning, in accordance with the Committee for Employment & Social Security’s Technical Proposals of July 2019, “a person’s sexual orientation towards persons of the same sex, or persons of a different sex, or persons of the same sex and persons of a different sex”) shall be included within the Ordinance prepared in accordance with Proposition 1.*

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<sup>5</sup> <https://gov.gg/article/163879/States-Meeting-on-5-June-2018-Billet-dtat-XV>.

<sup>6</sup> Committee for Employment & Social Security – Proposals for a New Discrimination Ordinance (Billet d’État XV of 2020, Article XV). Available at <https://gov.gg/article/176559/Proposals-for-a-New-Discrimination-Ordinance>.

<sup>7</sup> P.2020/41 Parkinson and Tooley Amendment 2 to the Committee for Employment & Social Security’s Proposals for a New Discrimination Ordinance (Billet d’État XV of 2020, Article XV). Available at <https://gov.gg/CHttpHandler.ashx?id=127724&p=0>

*1B. To agree that prevention of discrimination on the ground of **religious belief** (meaning, in accordance with the Committee for Employment & Social Security's Technical Proposals of July 2019, "a person's religious belief, which includes their religious background or outlook, and also includes not having a religious belief") shall be included within the Ordinance prepared in accordance with Proposition 1.*

*1C. To direct the Committee for Employment & Social Security to report back to the States as soon as possible in the next States term with a policy letter on the proposed exceptions for the grounds of sexual orientation and religious belief and that this should take place in parallel to the legislative drafting of the new Ordinance."*

- 2.6 This policy letter meets the requirement of Resolution 1C for the Committee to report back on the proposed exceptions for the two additional grounds of protection. This policy letter also asks the States to agree to reframe the ground of 'religious belief' to 'religion or belief'.
- 2.7 This policy letter is specific to the grounds of sexual orientation and religion or belief. The States will have the opportunity to review phase one of the new Discrimination Ordinance in full when the draft Ordinance returns to the States for consideration - it is estimated that this will be in the first quarter of 2022.
- 2.8 The following additional information is appended:
- Appendix 1 - The exceptions to the new Discrimination Ordinance that were approved by the States in July 2020.
  - Appendix 2 - The additional and modified exceptions (in addition to those already approved and set out in Appendix 1) that the Committee is proposing be included within the new Discrimination Ordinance on the grounds of sexual orientation and religion or belief (note there are no additional exceptions on the ground of sexual orientation being proposed).
  - Appendix 3 - The consultation document that was issued to stakeholders in the autumn of 2020 in relation to the two additional grounds of protection.
  - Appendix 4 - The list of organisations consulted on the questions in Appendix 3.

### **3. STAKEHOLDER ENGAGEMENT / CONSULTATION PROCESS**

- 3.1 On 14<sup>th</sup> September 2020, the former Committee approved a consultation document on the two additional grounds of protection and related exceptions

and agreed that it should be sent out to key stakeholders prior to the end of the previous States' term, with a view to the responses informing the deliberations of the new Committee. The consultation document is attached at Appendix 3 and the consultees are listed in Appendix 4. 22 responses were received from a range of organisations listed in Appendix 4.

- 3.2 The consultation was subdivided into two parts. Part A asked about the definition of religious belief and whether, instead of protecting people from discrimination on the basis of their religious belief (or lack of religious belief) akin to legislation in Ireland, the Guernsey legislation should follow the UK and protect people on the ground of 'religion or belief', i.e. also protecting people from discrimination on the basis of philosophical belief (or lack of philosophical belief). People were asked to state their preference and the reasons for their preference and also to explain what, if any, test(s) should apply to the definition of a philosophical belief. Part B asked about what exceptions should be included in the Ordinance on the two additional grounds of protection.

#### ***Consultation responses - Part A***

- 3.3 Regarding Part A of the consultation document, the UK Equality Act 2010 makes it unlawful to discriminate against someone because of religion or belief, or because of a lack of religion or belief. For example, the Act protects Christians if they are discriminated against because of their Christian beliefs. It also protects those who are discriminated against because they are not Christians, regardless of whether they have another religion or no religious belief. 'Religion or belief' is defined in the Equality Act as follows:

*"Religion or belief*

- (1) *Religion means any religion and a reference to religion includes a reference to a lack of religion.*
- (2) *Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*
- (3) *In relation to the protected characteristic of religion or belief —*
- (a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*
- (b) *a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."*

- 3.4 Whether a particular belief constitutes a 'philosophical belief' for the purposes

of the Equality Act 2010 is open to interpretation and case law has informed this debate over time. An important case in terms of setting some parameters was *Grainger plc v Nicholson* [2010]<sup>8</sup> in which the Employment Appeals Tribunal said that for a philosophical belief to fall within the Equality Act 2010 it must:

- be genuinely held;
- be a belief and not an opinion or viewpoint based on the present state of information available;
- be a belief as to a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

3.5 'Religion or belief' is a protected characteristic under the Isle of Man's Equality Act, 2017. It is defined in exactly the same way as under the UK Equality Act 2010. Discrimination on the basis of 'religious belief' or 'religion or belief' is not currently covered under the Discrimination (Jersey) Law 2013.

3.6 Broadly speaking, four different views emerged from the consultation with respect to the questions posed in Part A.

i) Those who supported retaining religious belief and not expanding this ground to cover philosophical beliefs

This view was espoused by three religious organisations and one response from a law firm, which did not think it necessary to protect people from discrimination on the basis of philosophical belief at this point in time.

ii) Those who supported changing the ground to 'religion or belief' (including the five tests established through *Grainger plc v Nicholson* that the belief must:

- be genuinely held;
- be a belief and not an opinion or viewpoint based on the present state of information available;
- be a belief as to a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others).

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<sup>8</sup> XperthHR Law Report relating to the case *Grainger plc v Nicholson* [2010] IRLR 4 EAT. Available at [https://www.xperthhr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR\\_free\\_content\\_links|ptod\\_article&sfid=701w000000uNMa](https://www.xperthhr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR_free_content_links|ptod_article&sfid=701w000000uNMa).

Two law firms, humanist, equality, and business organisations supported this approach. Another industry body indicated that it would accept the extension of the ground to include philosophical beliefs (i.e. religion or belief) provided that the tests from the Grainger plc v Nicholson case were included. One law firm responded to say that it would recommend one amendment to the Grainger plc v Nicholson tests to add the underlined text: ‘...and not conflict with the fundamental rights of other living persons’. Another law firm felt that the UK definition was preferable to (and narrower than) the ground of ‘religious belief’ as defined under the Irish Equal Status Acts which incorporated background/outlook.

- iii) Those who were happy to change the ground to ‘religion or belief’ provided that, in addition to the requirements under point (ii), an additional test was added that the belief should be a belief system analogous to a religion

Three religious organisations said they would be prepared to accept this proposal. A humanist organisation felt that if Guernsey was not going to adopt option ii), then it should, as a minimum, consider option iii). Another response supported widening the ground to cover philosophical belief but with an additional test to those established under Grainger plc. v Nicholson that the belief must be ‘analogous to religion’ in order to avoid single issue beliefs, such as political beliefs, being protected... “*the belief should be more general than a singular whim.*” However, two law firms did not appear to favour of this approach because of the difficulty of defining what was meant by ‘analogous to religion’, instead arguing for aligning the definition with that used in the UK and the Isle of Man (i.e. approach (ii)) but excluding political and single issue beliefs too (i.e. approach (iv) below). One lawyer took a different view by not favouring extension of the ground to philosophical belief but, if the ground *were* to be extended to cover philosophical beliefs, then preferring this option.

- iv) An additional suggestion was that in addition to the tests in (ii) single issue beliefs and political beliefs should not be considered a ‘belief’ for the purposes of the Discrimination Ordinance.

As explained above, this option was suggested as an alternative to approach (iii) because of the potential difficulty of defining a belief that was ‘analogous to religion’ and the complications this would cause when trying to interpret UK case law, in the respondent’s view.

### **Consultation responses – Part B**

- 3.7 With respect to Part B, many of the religious organisations who responded to the consultation, supported the inclusion of the exceptions proposed in the consultation document, which are similar to those in the UK and Isle of Man (Jersey does not include protection from discrimination on the ground of religious belief or religion or belief).

*Applying an exception for Ministers of Religion on both the grounds of sexual orientation and religion or belief*

3.8 There were opposing views expressed about the proposed exceptions in relation to the ground of sexual orientation, especially in relation to recruitment of Ministers of Religion. This exception, proposed in the consultation document by the former Committee, had suggested that the ground of religion or belief or sexual orientation may be taken into account when a person is recruited into employment which is for the purposes of organised religion. This would apply to the recruitment of ministers, celebrants or leaders of that religion or religious denomination, but this may also include, in a limited range of circumstances, others employed in religious capacities where the job involves representing or promoting the religion (e.g. youth workers who have a role in promoting a religion). It does not cover individuals recruited by religious organisations to undertake roles which are not related to representing or promoting that religion. It was proposed that this exception would only be applied if the grounds of protection specified in recruitment are in line with the doctrine of the religion. This was originally based on Paragraph 2 of Schedule 9 of the UK Equality Act 2010 which provides that discrimination on grounds of sex, gender reassignment, marriage and civil partnership, marriage to a person of the same sex, and sexual orientation is permitted if, among other requirements, it is shown that the employment is for the purposes of an organised religion. In the UK, the requirement must be one that is either being applied so as to comply with the doctrines of the religion, or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.<sup>9</sup>

3.9 However, several respondents expressed strong concerns about the proposed exceptions, especially about the interaction of rights relating to sexual orientation and rights relating to religious belief / religion or belief. For example:

*"We are concerned at the apparent linking of the grounds of religion and sexual orientation under the matter of employment. We suggest that these are two distinct and separate issues."*

*"An exception allowing prejudice on the grounds of sexual orientation appears to go against the point of discrimination legislation.... forcing religious individuals to hide their sexual orientation if they want to pursue their career violates fundamental human rights e.g. freedom of expression... the exception could be particularly damaging e.g. for clergy who rely on their place of work for their home as well as their income."*

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<sup>9</sup> <https://www.equalityhumanrights.com/sites/default/files/research-report-97-review-of-equality-and-human-rights-law-relating-to-religion-or-belief.pdf>

*“We feel that the exception 'if a significant number of the followers of the religion would be offended' should be removed from all categories and the exception should be limited to fundamental issues of doctrine. The wording is currently imprecise and does not necessarily afford protection to minorities, a key characteristic of discrimination legislation”*

- 3.10 Others felt that *“The “Ministers of Religion” exception needs to clarify what it means by “representing or promoting the religion” and that this definition should be wide. They argued: “From a Christian perspective, the call is on everyone connected with a church to be an ambassador of Christ. This means anyone involved with the church or church building should be doing that regardless of their role. An administrator working for the church or a building caretaker should be doing this as much as a minister or youth worker.”*
- 3.11 One response noted that the proposed exception regarding Ministers of Religion covered recruitment only and should extend to termination. The respondent argued that it should be possible that regard may be had, in connection with the termination of the employment or engagement of any person covered by this exception, to any conduct on his/her part which was incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified and that this should be incorporated into the exception of Ministers of Religion. One request went further and asked for there to be a *requirement* for any person employed by a religious organisation, who may choose to change their characteristic, so that the characteristic was no longer compatible with the doctrine/beliefs of that religious organisation, to be required to advise the organisation as soon as they were aware of the change.
- 3.12 There is no easy answer to reconcile opposing views. The Committee’s view is explained in section 4.

#### *References to religion to also cover religious denomination*

- 3.13 There was a request that references to religion be extended to cover *“religion or religious denomination”*. A religious denomination is a sub-group within a larger religious organisation that follows a common faith, practice, has an identity and traditions. This has been added into the proposed relevant exceptions.

#### *Religious organisations*

- 3.14 There was also a request that religious organisations should be able to restrict the makeup or membership of their board, committees, trustees and councils on the grounds of religion or belief, which has been included.

### *Religious buildings*

- 3.15 There were conflicting consultation responses about the proposed exception relating to religious buildings (i.e. that organisations managing religious buildings, such as places of worship, may take their religious ethos into account in lettings policies). One view was that some respondents would expect that this exception would include church halls and community centres which were owned or managed by the local church and that the lettings policy for such buildings could take account of the religious ethos of the local church. The opposing view put forward by others was that, in their view, the exception relating to religious ethos should be available to intrinsically sacred/religious buildings/places of worship only, but that it should not necessarily be extended to encompass secular buildings used by religious groups (e.g. halls and other public spaces). The Committee's recommendation is included in section 4.

### *Exceptions relating to schools – admissions, curriculum and staffing*

- 3.16 The Committee for Education, Sport & Culture (CfESC) wrote to the Committee to request that an additional exception be included with respect to the Catholic Schools. Guernsey currently has two States maintained Catholic primary schools, Notre Dame du Rosaire Primary School and St Mary and St Michael Primary School and a Catholic private school, Blanchelande College. CfESC has advised that where a school is established as a Catholic school, it requires the permission of the Bishop of the local Diocese. Guernsey is part of the Catholic Diocese of Portsmouth and its Catholic schools must submit to the authority of the Bishop of Portsmouth in all matters to do with the faith. The Bishops' Conference of England and Wales issues directives which Catholic Schools are obliged to follow. The appointment of senior staff is covered in the Memorandum on Appointment of Teachers to Catholic Schools and states that senior posts are reserved exclusively for practising Catholics. As a minimum requirement, the Bishops expect that the posts of Head Teacher or Principal, Deputy Head Teacher or Deputy Principal and Head or Co-ordinator of Religious Education are to be filled by practising Catholics. CfESC therefore requested that the Discrimination Ordinance includes an exception which will enable Guernsey's Catholic schools to meet these requirements.
- 3.17 Some respondents were in favour of the exceptions that would allow religious selection in admissions criteria and permitting religious schools to only offer religious education in line with their own faith perspective. Other responses called for these proposed exceptions not to be included in the Ordinance as they were of the view that religious selection damaged social cohesion between different groups and often led to de facto ethnic and socio-economic selection. They argued that all children were entitled to have a broad and balanced education that allowed them to consider philosophical and fundamental questions from different perspectives and that every child should

have the opportunity to learn about a range of different beliefs. These exceptions were supported by some of the other religious denominations who responded to the consultation. Again, the Committee's views are explained in section 4.

#### **4. COMMITTEE'S RECOMMENDATIONS**

##### ***Definition of religion or belief***

4.1 The Committee recommends reframing the ground 'religious belief' as 'religion or belief' in order to protect people from discrimination on the basis of their religion (or lack of religion) or their religious or philosophical belief (or lack of belief), in line with the UK Equality Act 2010 and Isle of Man Equality Act 2017. In addition, the Committee recommends the application of the five tests from *Grainger plc v Nicholson* [2010]<sup>10</sup> and an additional test excluding single issue and political beliefs. The five tests are that the belief must:

- be genuinely held;
- be a belief and not an opinion or viewpoint based on the present state of information available;
- be a belief as to a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others).

4.2 In reaching this decision, the Committee has taken into consideration the strong arguments from equality stakeholders and humanist groups that people should also be protected from discrimination on the basis of non-religious beliefs, provided that they meet certain tests. This will ensure that humanists can enforce their right not to be discriminated against on the basis of their humanist beliefs. The Committee's view was that just to protect people from discrimination on the ground of religious belief (or lack of religious belief) was too limited. The Committee accepted concerns expressed by business groups and some legal professionals that if the ground was to be reframed as 'religion or belief' then it would be sensible and pragmatic to adopt the tests from *Grainger plc v Nicholson*. The Committee accepted the argument made by some legal professionals that it would not be desirable to limit the protection from discrimination on the basis of philosophical beliefs to those beliefs that were 'analogous to religion' as it was not clear what this meant and could lead

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<sup>10</sup> XperTHR Law Report relating to the case *Grainger plc v Nicholson* [2010] IRLR 4 EAT. Available at [https://www.xperthr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR\\_free\\_content\\_links|ptod\\_article&sfid=701w000000uNMa](https://www.xperthr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR_free_content_links|ptod_article&sfid=701w000000uNMa).

to protracted debate within the Tribunal setting, but to instead exclude single issue or political beliefs (e.g. opposition to fox-hunting, taxation issues, educational model, etc). The Committee agreed that it supported the policy intent that the belief should not conflict with the fundamental rights of other *living* persons, but the precise wording of that test would be a matter for the legal drafting team.

## **Exceptions**

### *Admissions policies (no.22)*

- 4.3 The Committee recommends, by a majority, including an exception in the Discrimination Ordinance which would allow religious schools to take religion into account in their admissions policies. This exception is included in the UK Equality Act 2010, a similar exception exists in the Isle of Man Equality Act 2017 and this exception reflects current practice in Guernsey. This exception is supported by the CfESC, within whose mandate the provision of education in Guernsey falls. The Committee's deliberations in this area are discussed further in paragraphs 4.20-4.30 of this policy letter.

### *Curriculum exceptions (no.23)*

- 4.4 The Committee is proposing an exception to allow religious schools to alter their curriculum so that they focus religious education primarily on their own religion and/or may provide only a chaplain of one religion, provided that religious schools actively teach students about the existence of, respect for and equality of people who do not conform to their religious beliefs. The Committee is of the view that all children are entitled to have a broad and balanced education that allows them to consider philosophical and fundamental questions from different perspectives and that every child should have the opportunity to learn about a range of different beliefs.

### *Ministers of religion*

- 4.5 The Committee is proposing an exception to permit the ground of religion or belief to be taken into account when a person is recruited into employment which is for the purposes of organised religion. This would apply to the recruitment of ministers, celebrants or leaders of that religion or religious denomination, but this may also include others employed in religious capacities where the job involves representing or promoting the religion (e.g. youth workers who have a role in promoting a religion). It will not cover individuals recruited by religious organisations to undertake roles which are not related to representing or promoting that religion.

- 4.6 This exception may only be applied if the grounds of protection specified in recruitment are in line with the doctrine of the religion.
- 4.7 The Committee agreed to add into the proposed exception on Ministers of Religion that regard may be had, in connection with the termination of the employment or engagement of any person covered by the exception, to any conduct on their part which was incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified. The Committee therefore proposes that regard may be had, in connection with the termination of the employment or engagement of any person covered by the exception, to any conduct on their part which was incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified, subject to the paragraph below.
- 4.8 The Committee took into consideration the feedback reported in paragraphs 3.8-3.11 of this policy letter. A majority of Committee Members thought that permitting discrimination in the field of employment on the basis of sexual orientation went against the spirit of equality legislation. The Committee is, therefore, not proposing the inclusion of an exception in the Discrimination Ordinance which would allow religious organisations to take sexual orientation into account when recruiting Ministers of Religion. Removing the ground of sexual orientation from this exception means that the Committee is not proposing any additional exceptions on the ground of sexual orientation in this policy letter. This is different to the UK and the Isle of Man. The UK Equality Act 2010 provides that discrimination on grounds of sex, gender reassignment, marriage and civil partnership, marriage to a person of the same sex, and sexual orientation is permitted if, among other requirements, it is shown that the employment is for the purposes of an organised religion. The Isle of Man has a similar exception. Jersey's 2013 Discrimination Law doesn't protect from discrimination on the grounds of religion or belief but does cover the ground of sexual orientation. However, an act of discrimination is not prohibited by where an employer aims to recruit a person for the purposes of an organised religion and requires the person recruited to be of a particular sex, to have a particular sexual orientation; or to be or not to be a transgender person. The Law Officers have also provided a relevant comment – please refer to their advice in section 5 of this policy letter.
- 4.9 Members of the Committee were concerned with the wording included in the consultation document “or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s [or religious denomination’s] followers” because it could create a situation where a group of people were treated unfairly because the majority group placed its own interests above the interests of the minority group and were intolerant of their differences. The Committee has, therefore, removed this phrase from the

proposed exception and recommends that it just be limited to matters of religious doctrine.

- 4.10 The Committee is not recommending including a requirement for any person employed by a religious organisation who might change a personal characteristic in a way that was not compatible with the doctrine/beliefs of that religious organisation, to have to advise the organisation as soon as they are aware of the change, as suggested by a respondent to the consultation.

#### *Events and services related to religion or belief*

- 4.11 The Committee is proposing an exception to allow the provision of goods or services for a religious purpose only to people of a particular religious group.
- 4.12 The Committee proposes that acts of worship and other religious observance are not subject to this legislation including (but not limited to) the format of worship and ceremonies and the use of religious texts and teaching. However, this exception is not intended to exempt religious organisations from all requirements to comply with the legislation. For example, religious organisations will still need to consider the access needs of disabled people and provide reasonable adjustments etc.
- 4.13 It is recommended that religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their religion or sexual orientation. However, it may not be necessary to have a specific exception within the discrimination legislation itself in relation to sexual orientation, as this is already covered by section 8 of the Same Sex Marriage (Guernsey) Law, 2016.<sup>11</sup>
- 4.14 The Committee decided to remove reference to offending the religion's followers for the same reason as given above with respect to the exception on Ministers of Religion.

#### *Religious buildings*

- 4.15 The Committee is proposing an exception to allow organisations managing religious buildings, such as places of worship, to take their religious ethos into

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<sup>11</sup> Marriage according to religious rites: no compulsion to solemnise etc. 8. (1) A person, including a religious organisation, may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement) – (a) to conduct a relevant marriage, (b) to be present at, carry out, or otherwise participate in, a relevant marriage, or (c) to consent to a relevant marriage being conducted, where the reason for the person not doing that thing is that the relevant marriage concerns a same-sex couple. (2) In subsection (1), "relevant marriage" means a marriage of a same-sex couple solemnised in a place of worship or in another place in accordance with religious rites or usages

account in lettings policies if to not do so would run counter to the purpose/doctrine of the religion.

- 4.16 The Committee is of the opinion that this exception should only cover church halls and other buildings which are predominantly used for religious purposes, such as locations that are intrinsically sacred or used as places of worship.

#### *Religious organisations*

- 4.17 The Committee is proposing an exception to allow religious organisations to restrict membership *or registration* on the ground of religious belief. It is proposed that religious organisations will also be able to restrict the makeup or membership of their board, committees, trustees and councils on the grounds of religion or belief.
- 4.18 Religious mutual organisations may continue to provide benefits on the basis that members have contributed on an individual member basis for the membership benefits; for example, a mutual insurance company which provides insurance cover for organisations of a particular religion or religious denomination.

#### *Recruitment to senior leadership positions in religious schools*

- 4.19 The Committee's recommendations in this area and rationale are covered in paragraphs 4.20-4.30 of this policy letter.

#### *Exceptions relating to religious schools and schools with a religious ethos*

- 4.20 The Committee faced a number of ethical dilemmas when considering the exceptions relating to religious schools. Committee Members were uncomfortable that the States schools' admissions policy was discriminatory in that only parents/guardians of Catholic children effectively have a choice in relation to which primary school their child would attend (i.e. their catchment school or a Voluntary Catholic school). However, the Committee, by a majority, has decided to take a pragmatic approach and recommend the inclusion of an exception to the legislation which would continue to allow the Catholic schools to give priority to Catholic children, in line with similar exceptions in the UK and Isle of Man. The Committee is also aware of the right under Article 9(2) of the Human Rights Law that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."
- 4.21 The Catholic primary schools were established at a time when the vast majority

of residents in Guernsey were either Protestant or Catholic, to serve a predominantly Catholic Irish immigrant population, and when the alternative form of education was the local parish-run Church of England school. The States took over the funding of the running costs (but not building maintenance) of the Catholic schools shortly after it was agreed that the other Parish-run schools would be centrally funded from the perspective that the States would pay all the salaries, unburdening parishes from some of the taxes they had to levy. This did not immediately apply to Catholic and Voluntary schools. Canon Hickey, who at the time had a seat in the States, spoke up for the Voluntary schools and was successful in his amendment to include the Catholic schools with the parish schools in this change, with the aim of achieving equality for all the primary schools on the Island at the time, both Church of England and Catholic. However, over time, the States schools' admissions policy has meant that some parents effectively have a choice of primary school for their child(ren) whereas others do not.

- 4.22 The following extract is taken from the CfESC's schools admissions policy<sup>12</sup>:  
*"Children should be registered for admission to their catchment primary school, or if baptised Catholics whose parents/carers wish them to go there, either of the Catholic Voluntary schools ..... There are two Catholic Voluntary Primary Schools, namely Notre Dame du Rosaire and St. Mary & St. Michael. These schools do not have defined catchment areas, but generally families living in the North of the Island will attend St. Mary & St. Michael Catholic Primary School and those living in the South will attend Notre Dame du Rosaire Catholic Primary School. Places are intended for children whose parents/carers can demonstrate affiliation to the denomination in whose interest the school is managed, by means of baptismal certificate for the child from a Catholic church.... Parents/carers of children who are not baptised Catholics but who wish their child to attend these schools should advise the Committee for Education, Sport & Culture of this. For reception-age children such requests must be received before the end of the defined registration period. Their child will usually only be considered for a place if there is no space available within the catchment school for that child or if additional children are required to make a class in the Voluntary school viable."*
- 4.23 The States do not own the buildings that currently house the voluntary schools. These are owned and maintained by the Catholic Church, with the States paying other running costs. The Catholic Church in Guernsey falls under the Diocese of Portsmouth and is required to follow guidance and policies set by the Diocese, including that Catholic schools should give first priority to Catholic applicants.<sup>13</sup> Should the Catholic Church decide that it no longer wishes the schools to continue for any reason, the Education (Guernsey) Law, 1970 allows the States use of the buildings free of charge for two years in order to continue the

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<sup>12</sup> [ADMISSIONS: PRIMARY \(gov.gg\)](http://www.gov.gg/admissions/primary)

<sup>13</sup> <http://www.casportsmouth.org.uk/admissions/>

operation of the school during that time.

4.24 The CfESC wrote to CfESS to request that an additional exception be included with respect to the Catholic Schools. CfESC requested that the Discrimination Ordinance include an exception which would enable Guernsey's Catholic schools to meet the Bishop's minimum requirement that the posts of Head Teacher or Principal, Deputy Head Teacher or Deputy Principal and Head or Co-ordinator of Religious Education are to be filled by practising Catholics.

4.25 Under the Equality Act 2010, religious schools are permitted to take into account religious considerations in employment matters relating to head-teachers and teachers, in accordance with the School Standards and Framework Act 1998 ('the 1998 Act'). Under the 1998 Act, regard may be had by the governing body of faith schools, in connection with the termination of the employment of a teacher at the school, to any conduct by a teacher which is incompatible with the precepts of, or with the upholding of the tenets of, the school's religion. In relation to independent faith schools, section 124A of the 1998 Act provides that:

"(2) Preference may be given, in connection with the appointment, promotion or remuneration of teachers at the school, to persons—  
(a) whose religious opinions are in accordance with the tenets of the religion or the religious denomination specified in relation to the school under section 124B(2), or  
(b) who attend religious worship in accordance with those tenets, or  
(c) who give, or are willing to give, religious education at the school in accordance with those tenets.  
(3) Regard may be had, in connection with the termination of the employment or engagement of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified."

4.26 Section 60 of the 1998 Act covers foundation and voluntary-aided schools and a similar provision exists in section 62 of the Education Act 2011 for Academies. Guernsey doesn't have an equivalent to the 1998 Act. For these practices to not be considered discriminatory for the purposes of the new Discrimination Ordinance, an additional exception would be required, along the lines of the text set out in paragraph 4.25 above. Within the state-funded sector all Roman Catholic Schools in England are either Voluntary Aided Schools or Academies, not Voluntary Controlled Schools.<sup>14</sup> The difference is that the governing body is the employer of the staff at Voluntary Aided Schools. In Voluntary Controlled Schools all members of staff are employed by the Local Authority; Voluntary Controlled

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<sup>14</sup> [FAQs \(catholiceducation.org.uk\)](http://FAQs.catholiceducation.org.uk)

Schools may appoint reserved teachers to teach religious education but this is different to the requirements of Catholic Schools in relation to senior leadership positions.<sup>15</sup> The ethical dilemma for the Committee is that in Guernsey the Voluntary Schools (or their governing bodies) are not the employer and the senior leaders are States of Guernsey employees when the States of Guernsey is not a religious organisation.

- 4.27 The Committee is uncomfortable recommending an exception which would permit discrimination in recruitment, remuneration, promotion and termination of teachers in senior leadership posts on the basis of 'religious belief' or 'religion or belief' especially when, in the case of the voluntary schools, the States of Guernsey is the employer. The Committee does not consider that the States, as employer, should be permitting discrimination when it comes to the recruitment, remuneration, promotion and termination of teachers in senior leadership positions as this would deny promotion opportunities to some teachers compared with others. Members are particularly uncomfortable with allowing the States, as the employer of the teachers at the Voluntary Schools (Notre Dame du Rosaire and St Mary and St Michael Catholic Primary Schools), to discriminate on the grounds of religious belief, even if this exception only related to senior leadership positions (Headteacher, Deputy or Assistant Head and Head of Religious Education).
- 4.28 The Committee is also aware of the requirements of Article 2 of Protocol 1 of the European Convention on Human Rights which states: "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Legal advice regarding this matter can be found in section 5.
- 4.29 After meeting the CfESC, considering the legal advice set out in section 5 of this policy letter and extensive deliberations, the Committee has decided, by a majority, to recommend that an exception be included in the Discrimination Ordinance based on the relevant section of the 1998 Act, for a period of five years from the date of entry into force, to allow for discussions to be held between representatives of the Policy & Resources Committee, the Committee *for* Education, Sport & Culture, the Committee *for* Employment & Social Security, the Voluntary Schools, the grant-aided Catholic School and the Catholic Church, with the aim of discussing and attempting to resolve the issue of discrimination on the grounds of religion or belief in recruitment, remuneration, promotion and termination processes in senior leadership positions at religious schools.
- 4.30 It is therefore recommended that an additional exception for all religious schools be based on section 124A of the 1998 Act with some amendments (in italics),

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<sup>15</sup> [What is the difference between VA & VC Schools? - Rochester Diocese \(rdbe.org.uk\)](http://rdbe.org.uk)

subject to any drafting modifications considered necessary by the legal drafting team at St James' Chambers but maintaining the policy intent:

“Preference may be given, in connection with the appointment, promotion or remuneration of teachers *in senior leadership positions (Headteacher (or Principal), Deputy Headteacher, Assistant Head Teacher, Head of Religious Education or Co-ordinator of Religious Education) at religious schools (including those appointed by the States of Guernsey to teach in religious schools),* to persons –

- (a) whose religious opinions are in accordance with the tenets of the religion or the religious denomination specified in relation to the school [...], or
- (b) who attend religious worship in accordance with those tenets, or
- (c) who give, or are willing to give, religious education at the school in accordance with those tenets.

Regard may be had, in connection with the termination of the employment or engagement of any *teacher in the senior leadership positions specified above* at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.”

## **5 COMPLIANCE WITH RULE 4 OF THE RULES OF PROCEDURE**

- 5.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended, to, motions laid before the States.
- 5.2 In accordance with Rule 4(1)(a) this policy letter contributes to priority 3 of the Government Work Plan, which is “Delivering the recovery actions”. Specifically, introducing the discrimination ordinance falls under the area of focus on Community Investment.
- 5.3 In accordance with Rule 4(1)(c) of the Rules of Procedure of the States of Deliberation and their Committees, the propositions have been submitted to Her Majesty’s Procureur for advice on any legal or constitutional implications in respect of the Propositions.
- 5.4 The Law Officers have advised that, in human rights terms, there are competing rights at issue. In basic terms, the legal issue is that it is not sufficient for the Committee’s proposals to look solely to prevent discrimination on the grounds of religion or belief (a right protected by Article 14 of the European Convention

on Human Rights); this aim must be balanced against other competing human rights – most notably here the Article 9 protection for freedom of religion, and Article 2 of Protocol 1, which protects a parent’s right to have their child educated in conformity with their own religion. These are set out below:

“Article 9 (Freedom of thought, conscience and religion)

1. Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 2 of Protocol 1

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

- 5.5 The Committee has been advised that other jurisdictions, most notably the UK, have “drawn the line” as between competing rights in a different place from the Committee’s proposals, which it is fair to say are more orientated towards “preventing discrimination” than “protecting religious freedom”. However, we are advised that it is not possible to give definitive legal advice on the compatibility with Convention rights of the proposals as they stand. The case law directly on point is limited and in some cases contradictory, and it is based on the legislative position in other jurisdictions.
- 5.6 On the issue of the recruitment of senior leaders to religious schools, this concerns the difficult issue of the competing rights of the religious schools to autonomy and self-determination and a job applicant’s right to not be discriminated against for not having a particular religion or belief. Added to this are the rights of the parents to have their child educated in accordance with their own religion or belief, a right which the European Court of Human Rights has held to have as its objective “the safeguarding of pluralism in education, essential for the preservation of a democratic society.”<sup>16</sup> By time limiting the

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<sup>16</sup> Kjeldsen, Busk Madsen v Denmark (1976)) 1 E. H. R. R. 71 (para 50)

exception which will allow religion or belief to be taken into account when recruiting to those positions, this raises the question of what will happen when the exception expires. We are advised that it may be arguable by the Catholic schools that they are unable to continue to operate as such if they are unable to comply with the requirements set by the Bishop in the Memorandum referred to above, and that Article 9 (and Art 2 of Protocol 1) rights are engaged.

- 5.7 As mentioned above, it is worth noting that the UK has “drawn the line” in a different place to Guernsey in the Equality Act 2010 when it comes to striking the balance between preventing discrimination in employment on the basis of religion, and freedom to practice a religion. In the UK, there are “occupational requirements” (OR) exceptions that employers might rely on – a general OR for religion or belief, one for employment in organised religion, and one for employers with a religious ethos. The Committee’s proposals for exceptions are drawn more narrowly than this (as set out in appendix 4), with no general OR for religion or belief, a narrower exception for recruitment of ministers (which allows religion to be taken into account when recruiting, but not for instance sexual orientation) and the time limited exception for recruitment to senior leadership positions in religious schools.
- 5.8 In summary, there is at least a risk of a successful legal challenge on human rights grounds, but the Committee understands that it is hard to quantify the likelihood of this. In terms of the legislation – the new Ordinance itself - the Human Rights Law means that it will be read and given effect to, so far as it is possible, in a way that gives effect to all of the Convention rights. If that is not possible, the Royal Court<sup>17</sup> may, on application being made to it, declare a provision of it incompatible with the Convention rights.
- 5.9 In accordance with Rule 4(1)(d), the Committee has considered whether it needs to include propositions relating to funding in order to implement the proposals set out in this Policy Letter. Aside from the Law Officer’s advice, the financial implications for the States of Guernsey of implementing the inclusion of these two additional grounds of protection in phase one of the Discrimination Ordinance are negligible (now that the policy work has been undertaken) provided that the exceptions list is approved. The number of expected enquiries and cases before the Employment and Discrimination Tribunal on these two grounds is likely to be smaller than the uncertainty in the number of enquires and complaints expected under the other grounds in phase one, which has already been incorporated into the budget estimates for phase one and the funding already approved by the States in July 2020 (the 2021 element of which has been included in the Committee’s budget allocation for

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<sup>17</sup> The Court of Appeal and the Judicial Committee of the Privy Council may also make such declarations.

2021). The legal drafting of the new Discrimination Ordinance is already underway.

- 5.10 In accordance with Rule 4(2) (a), the Propositions relate to the Committee's purpose:

"To foster a compassionate, cohesive and aspirational society in which responsibility is encouraged and individuals and families are supported through schemes of social protection relating to pensions, other contributory and non-contributory benefits, social housing, employment, re-employment and labour market legislation."

- 5.11 In particular, the Propositions relate to the Committee's mandated responsibilities:

"To advise the States and to develop and implement policies on matters relating to its purpose, including... equality and social inclusion, including in relation to disability... [and] labour market legislation and practices;"

- 5.12 In accordance with Rule 4(2)(b), it is confirmed that the Propositions have the unanimous support of the Committee, apart from two of the proposed exceptions - exception 22 and exception 48 in Appendix 2 - which are not supported by Deputy Bury. Deputy Bury does support the proposal that exception 48 should cease to apply after five years.

- 5.13 The Committee has consulted extensively throughout the process of the development of these proposals. All principal States Committees and the Policy & Resources Committee were consulted with in advance of, and as part of, the public consultation regarding the draft policy proposals for a multi-ground Discrimination Ordinance in July 2019. These draft proposals included the grounds of religious belief and sexual orientation and proposed exceptions on these grounds. The Committee carried out a closed consultation in the Autumn of 2020 in relation to the matters covered in this policy letter with the organisations listed in Appendix 4, the details of which are set out in section 3 of this policy letter.

Yours faithfully

P J Roffey  
President

H L de Sausmarez  
Vice-President

T L Bury  
S J Falla  
J A B Gollop

M R Thompson  
Non-States Member

R J Le Brun  
Non-States Member

# Exceptions list (approved by the States of Deliberation in July 2020)

## 1 Introduction - exceptions

If the discrimination legislation is agreed and comes into force then, as a general rule, any discrimination on the basis of carer status, disability, race, sexual orientation and religion or belief (or religious belief) will be unlawful (in addition to the grounds of marriage, sex and gender reassignment in the existing Sex Discrimination Ordinance).

However, there will be exceptions to that rule where different treatment is not considered discrimination for the purposes of the proposed legislation. The Committee is proposing that the Ordinance includes a power for the Committee to amend the list of exceptions by regulation. This list sets out the Committee's proposals for an initial list of exceptions. It should be noted that this list might change, if amended during the States debate, and also potentially at the legal drafting stage.

The exceptions are numbered for ease of reference.

## 2 Reasons for different treatment which are not exceptions

The Committee's proposals include some provisions that are not exceptions but that can allow people to act in ways that would otherwise be considered discriminatory. These include positive action measures (which treat people differently to promote equality), providing reasonable adjustments to include disabled people (or not, if it is a disproportionate burden to do so), objective justification of certain types of discrimination and genuine and determining occupational requirements.

## 3 Exceptions that apply to all fields

The Committee is proposing that the exceptions in this section would apply in all (or multiple) fields – employment, goods or services provision, education provision (when commenced), accommodation provision and in membership of clubs and associations.

### **Requirements of the law (no. 1)**

It is proposed that if someone is doing something that they are required to do by law this would not be discrimination for the purposes of the proposed legislation. This includes where someone is required to act in compliance with the law of another country. If someone believes that there are equality issues related to the operation of a law they should let us know (equality@gov.gg). It would then be for the States to consider whether, when and how to change the law. In some cases, if a person feels that a law is discriminatory, they may be able to take a case under the Human Rights (Bailiwick of Guernsey) Law, 2000.

This exception does not apply to contracts and leases. See exception no.4 on transitional

arrangements for contracts and leases.

It is also intended that the ability to make a discrimination complaint should not apply to anything done that is by the order of a court or tribunal or to judgements, awards or sentencing made by judges, magistrates, jurats, tribunals or others acting in a formal judicial capacity.

#### **Wills and gifts (no. 2)**

It is proposed that any person making a will or giving a gift can choose who benefits with regards to land, goods and property – this would not be subject to discrimination complaints. Any challenges to a will would be governed by existing legislation on wills and probate.

#### **Preferential charging (no. 3)**

It is proposed that people will be allowed to introduce or maintain preferential fees, charges or rates for anything offered or provided to carers or people with disabilities.

#### **Transitional arrangements (no. 4)**

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. It is proposed 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. The Committee recommends that a two year period of grace from the commencement of the legislation should be allowed for discriminatory terms in pre-existing contracts or leases.

#### **Protection from harm (no. 5)**

Different treatment of persons with:

- a tendency to set fires,
- a tendency to steal,
- a tendency to physically or sexually abuse other persons, or
- a tendency towards exhibitionism or voyeurism,

that could be objectively justified in order to protect from harm other people and/or their property, would not constitute discrimination.

It would also not constitute discrimination for the prison or probation services to take into account a protected ground as part of a wider package of evidence-based risk factors when assessing the likelihood and impact of re-offending and where it can be objectively justified that they do so in order to protect from harm other people and/or their property.

## **4 Exceptions related to public functions**

#### **National security (no.6)**

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

#### **Crown Employment (no.7)**

It would not be discrimination to place requirements of residence, nationality, birth or descent for employment in the service of the Crown; employment by a public body (whether corporate or unincorporated) exercising public functions, or holding a public office.

#### **Immigration (no. 8)**

It is proposed 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)**

Guernsey has a Population Management Law. The Law is designed to regulate the size and make-up of the population in order to support the economy and community both now and into the future. The Law is supported by a number of policies designed to attract the diverse range of skilled people needed to strengthen Guernsey's workforce and to provide clarity to those already resident.

It is proposed that action taken to give effect, in a proportionate way, to the population management policy adopted by the States of Guernsey and/or the Committee *for* Home Affairs may take into account 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 may be referred to but only when considering the extension and/or type of permits for people who are already resident.

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

It is proposed that any income assessment for grants, loans or benefits provided by the States of Guernsey may take into account household composition, as part of the income assessment.

#### **Determinations (no. 11)**

It is proposed that it would not be discrimination, for the purposes of the proposed legislation, for an officer or Panel, with delegated authority, to make determinations which may take into account carer status and disability in ways which are proportionate and necessary to give effect to the social insurance or social assistance policy agreed by the States of Guernsey or the relevant Committee thereof.

#### **Residency status (no. 12)**

It is proposed that a Committee of the States of Guernsey, or the States, may impose policy requirements which vary terms and conditions to access government services, facilities, grants, loans, benefits or access to employment or other opportunities based upon place of residence, length of residence and/or place of birth in order to distinguish between services for citizens/permanent residents and others. This would not constitute direct or indirect race discrimination for the purposes of the proposed legislation.

However, it should be noted that any such decisions made by the States or its Committees should otherwise align with Guernsey's human rights obligations.

*See also social housing allocations – included in the “accommodation” section 11.*

#### **Ancient monuments – accessibility action plan (no 13)**

It is proposed that the public sector duty to prepare accessibility action plans would not extend to ancient monuments where no other service is provided. For clarity, this exception does **not** apply to ancient monuments now used for another purpose or fee-paying visitor attractions or attractions where refreshments or souvenirs are sold.

## **5 – Employment**

#### **Safeguarding - employment (no. 14)**

The Committee does 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 or violent or abusive behaviour which is unlawful and there are relevant safeguarding concerns.

#### **Immigration and population management (no. 15)**

It is intended that employers must continue to appropriately take into account immigration status and the requirements of Population Management – to do so would not be discrimination for the purposes of the proposed legislation.

#### **Genuine and determining occupational requirements in part of a role (no. 16)**

In some cases an employer may employ staff across a number of postings and duties, where some of these duties or postings could be considered to carry a genuine and determining occupational requirement (i.e. that a person of a particular description is required to perform those duties or hold those postings – for example, undertaking certain kinds of security search). In such a case, it is suggested that it would not be discrimination for the purposes of the proposed legislation to allocate a person to a particular duty or posting on the basis of their meeting the genuine and determining occupational requirement, where an employer must allocate a person of a certain description in order to maintain operations and meet requirements, provided that this is both objectively justifiable and is permissible in the employee's contract of employment.

#### **Family situations (no. 17)**

It is suggested that it would not be considered discrimination for the purposes of the proposed legislation, for employers to:

- grant individual requests for flexible working arrangements (provided that remuneration, leave and other benefits are equivalent on a pro-rata basis and that the right to request a flexible working arrangement is available to all employees),
- provide benefits in relation to care responsibilities (for family members) 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 (e.g. additional paid leave during a period of family illness).

#### **Qualifications (no. 18)**

It is proposed that it would not be indirect race discrimination, for the purposes of the proposed legislation, to require a person to hold a particular qualification to undertake a role. This might apply, for example, if someone had a professional qualification from another country which was not recognised in Guernsey (both for employers and for vocational bodies).

#### **Supported employment (no. 19)**

It is suggested that, for the purposes of the proposed legislation, a person may provide supported employment for people with a particular kind of disability without this being considered discrimination against people with other kinds of disability.

#### **Genuine and Determining Occupational Requirements and Employment Services (no. 20)**

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

## **6 – Education**

#### **Different treatment based on assessed needs (no. 21)**

It is proposed that it is not discriminatory for an education provider or authority to offer alternative or additional educational services in order to meet the assessed needs of a student where another student is not offered such services due to a difference in their assessed needs.

#### **Admissions policies (no. 22)**

It is proposed that a school may set an entry standard based on ability or aptitude. If an applicant does not meet the required standard for selection, for reasons related to, or in consequence of a disability, and despite reasonable adjustments having been offered or made available where relevant, then they, like other applicants who fail to meet that standard, may be refused a place.

#### **Curriculum (no. 23)**

It is proposed that when setting the curriculum, while representation might be desirable, it is not the intention of the Committee that someone could bring a complaint against the teaching of a subject on the basis that the set material or texts are not representative of all social groups or identities.

*Please note that some of the other exceptions may be relevant for education providers. In particular see exceptions 37 on drama and 38 on sport.*

## 7 – Financial services and pensions

### **Risk (no. 24)**

It is intended that people who provide pensions (occupational or personal), annuities, insurance policies or any other services related to the assessment of risk would be allowed to use some of the protected grounds to undertake assessments and vary the service that they provide accordingly. However, this must be based on reliable and relevant data and differences in services provided should be proportionate to risk.

It is suggested disability would be a relevant ground. For example, insurance providers would be able to vary health or travel insurance premiums or exclude pre-existing conditions where based on reliable and relevant information and proportionate to the risk. Other financial services like banking services that do not relate to actuarial risk are not covered by this exception.

### **Occupational benefits, occupational pension schemes and personal pension schemes (no. 25)**

All occupational benefits and pension schemes and employers or providers of such schemes would be covered by this exception. It also applies both to occupational pension schemes and to personal pensions and employment benefit schemes such as retirement annuity contracts and retirement annuity trust schemes and to trustees and administrators of schemes as well as employers. Occupational benefits mean schemes that provide benefits to all or a category of employees on their becoming ill, incapacitated or redundant. The Committee proposes that employers or providers of occupational benefits and pension schemes and administrators of personal pension schemes can use the following criteria when administering occupational benefits and pension schemes.

- A pension scheme or occupational benefit scheme may provide ill health benefits at any age.
- The amount of benefit may increase according to the severity of the illness or disability (e.g. total incapacity benefits may be higher than partial incapacity).

The law should require non-discrimination for future actuarial benefits but not for benefits acquired/accrued prior to the commencement of the legislation.

## 8 - Health and care related

### **Infectious disease (no. 26)**

It is proposed that it would not be discrimination, for the purposes of the proposed legislation, to treat a person differently on the grounds of disability where the disability is an infectious disease, or where an assistance animal has an infectious disease, and different treatment is required for public health reasons.

### **Clinical judgement (no. 27)**

It is proposed that if the difference in treatment (including prioritisation of treatment) of a person is solely based on a registered health and social care professional's clinical

judgement this would not be discrimination for the purposes of the proposed legislation. This is not intended to protect health and social care professionals from complaints if their use of a protected ground is prejudicial and not clinically relevant. This exception also does not remove the need to provide reasonable adjustments, where applicable.

**Legal capacity (no. 28)**

It is intended to include an exception that will permit difference in treatment where this is necessary in relation to a person's legal capacity status, in alignment with the new capacity legislation being developed.

**Blood donation services (no. 29)**

It is proposed that blood donation services may refuse to accept an individual's blood if the refusal is based on an assessment of the risk to the public or to the individual based on clinical, epidemiological or other relevant data. This is because services in this area are reliant on support from the UK NHS and, in order to ensure continuity of these essential services for Guernsey, there is a need to maintain a position that is consistent with the UK's.

**Preventative public health services (no. 30)**

It is intended to allow targeted preventative public health interventions including but not limited to screening programmes, immunisation programmes, access to primary care mental health and wellbeing services, diabetic retinopathy, provision of free contraception and other such measures which are strategically aimed at particular groups where this is objectively justified through epidemiological or other relevant data.

**Care within the family (no. 31)**

It is suggested that if people are providing care to other people as if they were a family member – including care for a child, an elderly person or a disabled person – the arrangements made for how, to whom and where they provide care are not subject to this legislation.

## 9 - Goods or Services (other)

**Special interest services and services only suitable to the needs of certain persons (no. 32)**

It is intended that goods or services providers may permit differences in treatment where these are reasonably necessary to promote bona fide special interests or where the goods or services in question can be reasonably regarded as only suitable to the needs of certain persons. Segregation on the basis of colour is not permissible.

**Broadcasters and publishers (no. 33)**

It is proposed that broadcasters and publishers can exercise editorial discretion over their content (not advertising) to be able to publish a range of views and permit free speech but this would not go so far as to allow them to promote/incite discrimination, harassment or hatred (note that there is separate legislation on racial hatred).

#### **Web information services (no. 34)**

Information Society Services Providers (ISSPs) provide services through a website. The Committee intends that ISSPs would not ordinarily be held responsible for the content of the data that they process, in particular where they are acting as a conduit, they provide caching of web pages, or they provide a “hosting service”. As in the UK, an ISSP which creates cached copies of information, and becomes aware that the original information has been removed or disabled at source, must expeditiously remove or disable any cached copies it holds. Similarly, if an ISSP “hosting service” becomes aware that information they hold contravenes the proposed legislation they should expeditiously remove the information or disable access to it.

## **10 – Community, religion, cultural, entertainment, charities, sports, clubs and associations**

#### **Charities acting within their constituted aims (no. 35)**

It is proposed that charities can provide benefits to people who share the same characteristic related to a protected ground if this is in line with their constituted aims and they can show that it is either a proportionate means of achieving a legitimate aim, or is compensating for a disadvantage linked to the characteristic. Charities may also restrict participation in activities (e.g. fundraising events) to promote or support the charity to people who meet a certain requirement. Racial segregation on the basis of colour is not permissible.

#### **Clubs and associations – restricted membership (no. 36)**

The Committee is proposing that clubs and associations can restrict their membership to people who share a particular characteristic related to a protected ground. However, it is not permissible to racially segregate on the basis of colour.

#### **Drama and entertainment (no. 37)**

It is suggested that the legislation should permit differences in treatment in relation to disability or race where this is reasonably required for the purposes of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment (for example, seeking a disabled actor to portray a character with a disability in a play).

#### **Sports, games and other competitive activities (no. 38)**

It is intended that it would not be considered discrimination, for the purposes of the proposed legislation, to exclude a person from a sporting, gaming or competitive activity if the person is not capable of performing the actions reasonably required in relation to the competitive activity (including with a reasonable adjustment). Similarly, it would not be considered discrimination, for the purposes of the proposed legislation, if someone is not selected as part of a team or as a participant if there is a selection process by a reasonable method on the basis of skills and abilities relevant to the competitive activity.

It is also intended that it would not be discrimination, for the purposes of the proposed legislation, to treat people differently according to disability, nationality or national origin

in relation to providing or organising sporting or gaming facilities or events or other competitions but only if the differences are reasonably necessary and relevant.

## 11 - Accommodation and premises

### **Premises not generally available to the public (no. 39)**

It is proposed that if a person sells, lets or otherwise disposes of property without this being generally available to the public or a section of the public (for example, through advertising it via an estate agent) then decisions the person makes in relation to the sale, letting or disposal are exempt from this legislation. This is intended to exempt, for example, family property transactions or agreements between friends about house-sitting and so on.

### **Social housing and housing association allocations (no. 40)**

It is intended that social housing providers and housing associations can treat people differently when allocating accommodation or managing waiting lists based on prioritisation in line with an allocations policy related to people's needs. This applies to the following grounds only: carer status, disability, and residency status (in so far as this is associated with the race ground).

### **Specialist accommodation (no. 41)**

It is proposed that accommodation which is set aside for a particular use or for a particular category of people is permitted. For example, care homes, refuges, and sheltered accommodation.

### **Accommodation provided in someone's home (no. 42)**

It is proposed that if a person is providing accommodation in a premises where they or a near relative live (i.e. where this would affect their private or family life) then they are exempt from this legislation and may choose who they wish to accommodate. It is intended that this would cover accommodating family members or friends in spare rooms or letting a room in a family house to a lodger where the premises remains primarily an individual's or family's home. It is not intended to exempt persons running guest houses or houses of multiple occupation or letting a separate and self-contained wing or apartment from the requirements of the legislation.

### **Population Management (no. 43)**

It is proposed that accommodation providers must appropriately take into account population management requirements; to do so would not be discrimination for the purposes of the proposed legislation.

## Additional Exceptions on the Grounds of Sexual Orientation and Religion or Belief Recommended in this Policy Letter

**The current Committee is proposing the following two exceptions approved by the States in July 2020 be expanded as follows (precise wording to be determined by the legal drafting team):**

### **Admissions policies (no. 22)**

“It is proposed that a school may set an entry standard based on ability or aptitude. If an applicant does not meet the required standard for selection, for reasons related to, or in consequence of a disability, and despite reasonable adjustments having been offered or made available where relevant, then they, like other applicants who fail to meet that standard, may be refused a place.”

**It is recommended to add into exception 22 that religious schools and schools with a religious ethos can take religion into account in their admissions policies.**

### **Curriculum (no. 23)**

“It is proposed that when setting the curriculum, while representation might be desirable, it is not the intention of the Committee that someone could bring a complaint against the teaching of a subject on the basis that the set material or texts are not representative of all social groups or identities.”

**It is recommended to add into exception 23 that religious schools and schools with a religious ethos may alter their curriculum so that they focus religious education primarily on their own religion and/or may provide only a chaplain of one religion, provided that religious schools actively teach students about the existence of, respect for and equality of people who do not conform to their religious beliefs.**

**The Committee is also proposing five additional exceptions be included in the Ordinance in addition to those already agreed by the States in July 2020 (precise wording to be determined by the legal drafting team):**

### **Ministers of religion (no. 44)**

The grounds of religion or belief may be taken into account when a person is recruited into employment which is for the purposes of organised religion.

This applies to the recruitment of ministers, celebrants or leaders of that religion or religious denomination, but this may also include others employed in religious capacities where the job involves representing or promoting the religion or religious denomination (e.g. youth workers who have a role in promoting a religion). It will not cover individuals recruited by religious organisations to undertake roles which are not related to representing or promoting that religion or religious denomination.

This exception may only be applied if the grounds of protection specified in recruitment are in line with the doctrine of the religion.

Regard may be had, in connection with the termination of the employment or engagement of any person covered by the exception, to any conduct on their part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.

#### **Events and services related to religion or belief (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.

The Committee proposes that acts of worship and other religious observance are not subject to this legislation including (but not limited to) the format of worship and ceremonies and the use of religious texts and teaching. However, this exception is not intended to exempt religious organisations from all requirements to comply with the legislation. For example, religious organisations will still need to consider the access needs of disabled people and provide reasonable adjustments etc.

Religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their religion or sexual orientation (although the reference to sexual orientation may not be necessary within the Discrimination Ordinance as this is included within the Same-Sex Marriage (Guernsey) Law, 2016)

#### **Religious buildings (no. 46)**

Organisations managing religious buildings, such as places of worship, may take their religious ethos into account in lettings policies if to not do so would run counter to the purpose/doctrine of the religion). This exception should only cover church halls and other buildings which are predominantly used for religious purposes, such as locations that are intrinsically sacred or used as places of worship.

#### **Religious organisations (no. 47)**

Religious organisations are allowed to restrict their membership or registration on the ground of religion or belief. Religious organisations should be able to restrict the makeup or membership of their board, committees, trustees and councils on the grounds of religion or belief.

Religious mutual organisations may continue to provide benefits on the basis that members have contributed on an individual member basis for the membership benefits, for example a mutual insurance company which provides insurance cover for organisations of a particular religion or religious denomination.

**Recruitment to senior leadership positions in religious schools (no. 48) (exception to be included for a period of five years from the date the legislation comes into force)**

Preference may be given, in connection with the appointment, promotion or remuneration of teachers *in senior leadership positions (Headteacher (or Principal), Deputy Headteacher, Assistant Head Teacher, Head of Religious Education or Co-ordinator of Religious Education) at religious schools (including those teachers appointed by the States of Guernsey to teach in religious schools)*, to persons –

- (a) whose religious opinions are in accordance with the tenets of the religion or the religious denomination specified in relation to the school [...], or
- (b) who attend religious worship in accordance with those tenets, or
- (c) who give, or are willing to give, religious education at the school in accordance with those tenets.

Regard may be had, in connection with the termination of the employment or engagement of any *teacher in the senior leadership positions specified above* at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.



COMMITTEE *FOR* EMPLOYMENT & SOCIAL SECURITY

ORIGINAL CONSULTATION PAPER ON  
RELIGIOUS BELIEF AND SEXUAL ORIENTATION

(Superceded by those exceptions set out in Appendix 2)

## Introduction

In July 2020, the States of Deliberation considered proposals from the Committee *for* Employment and Social Security ('the Committee') for a new Discrimination Ordinance<sup>18</sup>. On 17<sup>th</sup> July 2020, the States agreed unanimously to the preparation of an Ordinance to outlaw discrimination on the grounds of disability, carer status and race. The States also approved an Amendment<sup>19</sup> to the Committee's proposals, laid by Deputy Parkinson and seconded by Deputy Tooley, which added religious belief and sexual orientation into the first phase of the development of the Ordinance.

The resolutions approved by the States included the following:

*"1A. To agree that prevention of discrimination on the ground of **sexual orientation** (meaning, in accordance with the Committee for Employment & Social Security's Technical Proposals of July 2019, "a person's sexual orientation towards persons of the same sex, or persons of a different sex, or persons of the same sex and persons*

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<sup>18</sup> Committee *for* Employment & Social Security – Proposals for a New Discrimination Ordinance (Billet d'État XV of 2020, Article XV). Available at <https://gov.gg/article/176559/Proposals-for-a-New-Discrimination-Ordinance> [accessed 20<sup>th</sup> August, 2020].

<sup>19</sup> P.2020/41 Parkinson and Tooley Amendment 2 to the Committee *for* Employment & Social Security's Proposals for a New Discrimination Ordinance (Billet d'État XV of 2020, Article XV). Available at <https://gov.gg/CHttpHandler.ashx?id=127724&p=0> [accessed 20<sup>th</sup> August, 2020].

*of a different sex”) shall be included within the Ordinance prepared in accordance with Proposition 1.*

*1B. To agree that prevention of discrimination on the ground of **religious belief** (meaning, in accordance with the Committee for Employment & Social Security’s Technical Proposals of July 2019, “a person’s religious belief, which includes their religious background or outlook, and also includes not having a religious belief”) shall be included within the Ordinance prepared in accordance with Proposition 1.*

*1C. To direct the Committee for Employment & Social Security to report back to the States as soon as possible in the next States term with a policy letter on the proposed exceptions for the grounds of sexual orientation and religious belief and that this should take place in parallel to the legislative drafting of the new Ordinance.”*

The Committee is conducting a closed consultation seeking the views of a targeted group of stakeholders regarding the following two matters:

1. The question of whether to propose to the States that the ‘religious belief’ ground of protection be reframed as ‘religion or belief’, in line with the UK Equality Act 2010 (see Part A of this consultation paper).
2. The exceptions to be included in the new Discrimination Ordinance in relation to the grounds of sexual orientation and ‘religious belief’ or ‘religion & belief’ (see Part B of this consultation paper).

## What will the new Discrimination Ordinance do?

The new Discrimination Ordinance will apply to all aspects of employment, the provision of goods, services and education, the use or the disposal of premises and the treatment by an association of its members and guests. It will apply to all employers and service providers, whether they are public or private sector bodies, and regardless of their size. It will protect employees and other workers against discrimination in selection for employment, during employment, in dismissal and post-employment. It will similarly protect actual or potential service users against discriminatory treatment by service providers. The Ordinance will set out the different kinds of unlawful discrimination, such as direct discrimination, indirect discrimination, discrimination by

association, failure to provide a reasonable adjustment, harassment and victimisation. Finally, the Ordinance will set out some exceptions to the normal rules which prohibit discrimination.

The States has directed that the Ordinance is drafted. It then needs to return to the States for approval. Following approval there will be a six month lead-in period before the Ordinance enters into force. It is anticipated that the Ordinance will come into force some time in 2022.

## Part A

# DISCRIMINATION LEGISLATION – SHOULD THE ‘RELIGIOUS BELIEF’ GROUND OF PROTECTION BE REFRAMED AS ‘RELIGION OR BELIEF’?

## What has the States agreed in respect of religious belief?

By approval of the Amendment, the States agreed a definition of ‘religious belief’ as set out in the Committee’s [Draft Technical Policy Proposals](#)<sup>20</sup> which were consulted on in the summer of 2019. The following policy intent was set out in that document:

### ***“3.2.17 Religious belief***

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

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

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<sup>20</sup> States of Guernsey (July 2019) Discrimination Legislation – Technical Draft Proposals. Available at <https://www.gov.gg/CHttpHandler.ashx?id=120055&p=0> [accessed 20<sup>th</sup> August, 2020].

Discrimination on the basis of a person’s non-religious philosophical beliefs was not included within the scope of this ground of protection in the Committee’s draft policy proposals and is therefore not included in the definition that was approved by the States in July 2020.

The Amendment directed the Committee to report back to the States as soon as possible in the next States term with a policy letter on the proposed exceptions for the grounds of sexual orientation and religious belief. This is necessary because the Committee’s policy letter (considered in July 2020) did not include necessary exceptions for these two grounds of protection. Part B of this consultation paper separately invites feedback regarding the proposed exceptions.

## Consultation feedback not taken into account by the States

Because religious belief was added to phase 1 of the development of the Ordinance by Amendment, the States was not briefed on feedback received through the public consultation on the Committee’s proposed framing of the religious belief ground of protection.

The following is an extract from the Committee’s report entitled “Consultation Findings: Draft Policy Proposals for Discrimination Legislation”, published in January 2020<sup>21</sup>:

*“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:*

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<sup>21</sup> States of Guernsey (January 2020) Consultation Findings: Draft Policy Proposals for Discrimination Legislation. Available at <https://www.gov.gg/CHttpHandler.ashx?id=123084&p=0> [accessed 20<sup>th</sup> August, 2020].

*“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).”*

**The Committee needs to consider whether to propose reframing the ‘religious belief’ ground of protection as ‘religion or belief’, in line with the UK, to address the issues raised by consultees and is inviting the views of a targeted group of stakeholders on this specific policy question.**

## The legal position in other comparable jurisdictions

### **United Kingdom**

The Equality Act 2010 makes it unlawful to discriminate against someone because of religion or belief, or because of a lack of religion or belief. For example, the Act protects Christians if they are discriminated against because of their Christian beliefs. It also protects those who are discriminated against because they are not Christians, regardless of whether they have another religion or no religious belief.

‘Religion or belief’ is defined in the Equality Act as follows:

#### ***“10. Religion or belief***

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.*
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*
- (3) In relation to the protected characteristic of religion or belief—*

- (a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*
- (b) *a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."*

Whether a particular belief constitutes a 'philosophical belief' for the purposes of the Equality Act 2010 is open to interpretation and case law has informed this debate over time. An important case in terms of setting some parameters was *Grainger plc v Nicholson* [2010]<sup>22</sup> in which the Employment Appeals Tribunal said that for a philosophical belief to come within the Equality Act 2010 it must:

- (i) be genuinely held;
- (ii) be a belief and not an opinion or viewpoint based on the present state of information available;
- (iii) be a belief as to a weighty and substantial aspect of human life and behaviour;
- (iv) attain a certain level of cogency, seriousness, cohesion and importance;
- (v) be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

### **Jersey**

Discrimination on the basis of 'religious belief' or 'religion or belief' is not currently covered under the Discrimination (Jersey) Law 2013.

### **Isle of Man**

'Religion or belief' is a protected characteristic under the Isle of Man's Equality Act, 2017. It is defined in exactly the same way as under the UK Equality Act 2010.

### **Republic of Ireland**

The Equality Acts 1998-2015 and the Equal Status Acts 2000-2015 make it unlawful to discriminate against someone because their 'religious belief'. Religious belief isn't defined as such in these Acts, but the following clarification is provided in the Act (Part 1 (2) Interpretation of the Equal Status Act, 2000):

*““religious belief” includes religious background or outlook.”*

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<sup>22</sup> XpertHR Law Report relating to the case *Grainger plc v Nicholson* [2010] IRLR 4 EAT. Available at [https://www.xperthr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR\\_free\\_content\\_links|ptod\\_article&sfid=701w000000uNMa](https://www.xperthr.co.uk/law-reports/religion-or-belief-discrimination-asserted-belief-about-climate-change-capable-of-protection-as-philosophical-belief/99646/?cmpid=ILC|PROF|HRPIO-2013-110-XHR_free_content_links|ptod_article&sfid=701w000000uNMa) [accessed 20<sup>th</sup> August, 2020].

## Part A policy questions

Organisations are invited to provide their views regarding the following policy questions:

1. In addition to protecting people from discrimination on the basis of religious belief (or lack of religious belief), do you think that the new Discrimination Ordinance should protect people from discrimination on the basis of philosophical belief (or lack of philosophical belief)? [N.B. It is important to understand that broadening protection in this way will not weaken the protection afforded to people on the basis of religious belief.]
2. If not, please explain why you think protection should not be broadened to cover discrimination on the basis of philosophical belief (or lack of philosophical belief).
3. If so, please explain why you think protection should be broadened to cover discrimination on the basis of philosophical belief (or lack of philosophical belief).
4. Do you agree that for a philosophical belief to fall within the scope of the Discrimination Ordinance it must (as is the case in the UK):
  - be genuinely held,
  - be a belief and not an opinion or viewpoint based on the present state of information available,
  - be a belief as to a weighty and substantial aspect of human life and behaviour,
  - attain a certain level of cogency, seriousness, cohesion and importance,
  - be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.
5. Do you think that any further tests should apply? For example, a further test which would narrow the scope of protection in respect of philosophical belief would be to require the belief to be a system of belief analogous to a religion. This would cover, for example, humanism, but would not cover, for example, veganism.
6. Do you have any other comments regarding this matter which you would like the Committee to consider?

## Part B

### EXCEPTIONS (SUPERCEDED BY APPENDIX 2)

#### What are ‘exceptions’?

Exceptions describe situations where it would be lawful to treat people differently on the basis of a protected ground.

#### Possible exceptions re: sexual orientation and religious belief

This section of the consultation paper sets out some possible exceptions relating to the grounds of sexual orientation and religious belief, described in policy terms. Please note that they would still stand if the new Committee *for* Employment & Social Security decides to recommend to the States that the ground of religious belief should be reframed as ‘religion or belief’, as discussed in Part A.

Please note that the possible exceptions set out below are **in addition** to the exceptions already approved by the States for inclusion in phase 1 of the development of the new Discrimination Ordinance – these are set out in Section 8.3 of Appendix 4 of the Committee’s Policy Letter entitled ‘Proposals for a New Discrimination Ordinance’ available at <https://gov.gg/CHttpHandler.ashx?id=123704&p=0>. Those exceptions will apply to the grounds of sexual orientation and ‘religious belief’ or ‘religion or belief’ (to be determined) unless the wording of the exception is explicitly limited to specific grounds.

**The current Committee is proposing that two of the exceptions approved by the States in July 2020 be expanded as follows:**

#### **Admissions policies (no. 22)**

To add into exception 22 that religious schools can take religion into account in their admissions policies.

### Curriculum (no. 23)

To add into exception 23 that religious schools may alter their curriculum so that they focus religious education primarily on their own religion and/or may provide only a chaplain of one religion. However, 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.

<b>Policy Letter (exceptions already agreed by the States)</b>	<b>Amendment to policy letter proposals</b>
<p><b>Admissions policies (no. 22)</b></p> <p>It is proposed that a school may set an entry standard based on ability or aptitude. If an applicant does not meet the required standard for selection, for reasons related to, or in consequence of a disability, and despite reasonable adjustments having been offered or made available where relevant, then they, like other applicants who fail to meet that standard, may be refused a place.</p>	<p><b>Admissions policies (no. 22)</b></p> <p>To add into exception 22:- “Religious schools can take religion into account in their admissions policies.”</p>
<p><b>Curriculum (no. 23)</b></p> <p>It is proposed that when setting the curriculum, while representation might be desirable, it is not the intention of the Committee that someone could bring a complaint against the teaching of a subject on the basis that the set material or texts are not representative of all social groups or identities.</p>	<p><b>Curriculum (no. 23)</b></p> <p>To add into exception 23:- “Religious schools may alter their curriculum so that they focus religious education primarily on their own religion and/or may provide only a chaplain of one religion. However, 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.”</p>

**The current Committee is proposing that four additional exceptions be added to those already agreed by the States in July 2020:**

Although, at first glance, the titles suggest that they are primarily linked to the ground of religious belief (or religion or belief), there is also relevance for potential discrimination claims on the ground of sexual orientation.

### **Ministers of religion**

The grounds of religion or sexual orientation may be taken into account when a person is recruited into employment which is for the purposes of organised religion.

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

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

### **Religious events and services OR events and services related to religion or belief<sup>23</sup>**

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.

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

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/doctrine of the religion (or belief

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<sup>23</sup> Depending on how the ground is defined – see Part A.

organisation), or if it would offend a significant number of the religion's (or belief's) followers because it was counter to their religious convictions or beliefs.

Religious celebrants of weddings would not be subject to a complaint of discrimination under the proposed legislation if they refuse to marry a couple on grounds of their religion or sexual orientation.

### **Religious buildings**

Organisations managing religious buildings, such as places of worship, may take their religious ethos into account in lettings policies if to not do so would run counter to the purpose/doctrine of the religion), or if it would offend a significant number of the religion's followers' because it was counter to their religious convictions or beliefs.

### **Religious organisations**

Religious organisations are allowed to restrict their membership on the ground of religious belief (or religion or belief).

Religious mutual organisations may continue to provide benefits on the basis that members have contributed on an individual member basis for the membership benefits, for example a mutual insurance company which provides insurance cover for organisations of a particular religious denomination.

## Part B policy questions

Organisations are invited to provide their views regarding the following policy questions:

1. Do you agree with the inclusion and wording of these exceptions?
2. Are there any other exceptions that you think should be included, i.e. where there may be a good reason to treat people differently on the grounds of sexual orientation or religious belief (or religion or belief)?

## Have your say

Organisations are invited to provide their views in writing on the policy questions set out in Parts A and B:

Address: Discrimination Legislation, Level 4, Edward T. Wheadon House,  
Le Truchot, St Peter Port, Guernsey, GY1 3WH  
Email: equality@gov.gg

Please ensure that any responses have reached us by **16<sup>th</sup> November 2020**.

If you have any questions please do not hesitate to contact us at the above email address or by telephone on 01481 732518.

## What will happen next?

The new Committee *for* Employment & Social Security will be appointed on 21<sup>st</sup> October 2020. The results of this consultation will be presented to the new Committee towards the end of 2020. The new Committee will need to take a view, informed by the results of this consultation, regarding whether or not to propose to the States that the 'religious belief' ground of protection should be reframed as 'religion or belief', or whether to leave the ground defined as agreed by the States in July 2020. If the new Committee decides to propose this to the States, a proposal will be included in the policy letter which the Committee has been directed to prepare setting out proposed exceptions for this ground of protection and for the ground of sexual orientation. The new Committee will also take into account the feedback received in respect of Part B of this consultation when preparing the policy letter setting out its proposed exceptions on the grounds of sexual orientation and religious belief (or religion or belief).

**The Committee *for* Employment & Social Security will process any personal data which you provide, through this consultation, in accordance with the Data Protection (Bailiwick of Guernsey) Law, 2017. Further information about how your personal data is processed by the Committee *for* Employment & Social Security can be found at [www.gov.gg/dp](http://www.gov.gg/dp) or by calling 01481 732518.**

## **APPENDIX 4**

<b>List of Consultees the consultation document in Appendix 3 was sent out to - (22 responses were received)</b>
The Dean of Guernsey
The Catholic Dean
Church of Scotland
Guernsey Islamic Charitable Trust
Zen Buddhist Group
Baha'i
Humanists UK/ Channel Island Humanists
Elim Pentecostal Churches (Vazon Elim Church & Eldad Church)
United Reformed Church
New Life Church
Salvation Army
Jehovah's Witnesses
Society of Friends (Quakers)
New Frontiers & New Ground, The Rock Community Church
Guernsey Evangelical Alliance
Bailiwick of Guernsey Methodist Circuit
Free Church Council
Evangelical Congregational Church
Baptist Union
Church of Jesus Christ of the Latter Day Saints
Jersey Synagogue
Church of Christ Scientist/Christian Science Society
Orthodox Community of All Saints
Bethesda (Strict) Baptist
Mission Halls
Evangelical Baptist Church
Equality Working Group
Liberate
Institute of Directors, Guernsey Branch
Guernsey Branch of the Chartered Institute of Personnel and Development
Guernsey Chamber of Commerce
Guernsey International Business Association
The Confederation of Guernsey Industry LBG
The Catholic National Mutual Ltd.
Guernsey International Insurance Association
Committee <i>for</i> Education, Sport & Culture
Committee <i>for</i> Economic Development
Gsy based lawyers who express interest in the consultation via the Bar Council or Employment Lawyers' Association



**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**COMMITTEE FOR EMPLOYMENT & SOCIAL SECURITY**

DISCRIMINATION ORDINANCE: GROUNDS OF I) RELIGION OR BELIEF AND  
II) SEXUAL ORIENTATION

The President  
Policy & Resources Committee  
Sir Charles Frossard House  
La Charroterie  
St Peter Port  
GY1 1FH

13<sup>th</sup> September 2021

Dear Sir

**Preferred date for consideration by the States of Deliberation**

In accordance with Rule 4(3) of the Rules of Procedure of the States of Deliberation and their Committees, the Committee *for* Employment & Social Security requests that 'Discrimination Ordinance: Grounds of i) Religion or Belief and ii) Sexual Orientation' be considered at the States' Meeting due to commence on 13<sup>th</sup> October 2021.

The Committee intends to carry out a targeted consultation in respect of the draft Discrimination Ordinance in late 2021, in order to remain on schedule for entry into force in late 2022. The decisions taken by the States in respect of these Propositions, need to be reflected in the draft Ordinance on which the Committee consults. Debate of this matter in October 2021 will allow the Committee to proceed in accordance with the project timeline.

Yours faithfully



P J Roffey  
President

H L de Sausmarez  
Vice-President

T L Bury  
S J Falla  
J A B Gollop

M R Thompson  
Non-States Member

R J Le Brun  
Non-States Member