

Guernsey's Proposed Discrimination Legislation: Busting the Myths

#MythBusting

1. Myth: There is no discrimination, therefore no need for legislation
2. Myth: Legislation will lead to job losses and reduced competitiveness
3. Myth: The legislation is gold plated
4. Myth: Legal costs will increase
5. Myth: The proposed definition of disability is too broad and will lead to employees gaming the system – even a lack of talent will qualify as a disability
6. Myth: The UK's reasonable adjustment standard is more sensible
7. Myth: Employers in the UK can ask pre-employment questions about existing and past disabilities

Myth 1: There is no visible discrimination, therefore no need for legislation

- Guernsey is not immune to discrimination, but, as there is currently little protection and no complaint procedure in place, most discrimination goes unreported.
- In two years, Jersey's Employment and Discrimination Tribunal dealt with 98 complaints of discrimination, and that's without having introduced all the proposed protected grounds which will finally be covered by their law.ⁱ
- If there were no discrimination, the discrimination legislation would not be problematic; merely a guarantee that discrimination could never gain a toehold in Guernsey in future.
- The State's Health and Wellbeing Survey in 2013 provided evidence of attitudinal and procedural, disability related, disadvantage. Organisations such as Citizen's Advice Bureau (CAB), Guernsey Disability Alliance (GDA), Guernsey Mind and Liberate have substantial evidence of discrimination and the recent discrimination legislation workshops uncovered further examples.
- Systemic disability discrimination (within the design of infrastructure, transport systems and public services) is widespread and evident, but often remains unnoticed by persons not affected by disability. Often, known issues are not addressed

because the moral imperative to create a fair society does not generate sufficient impetus, unless backed by legislation.ⁱⁱ

- Protection against discrimination is a fundamental right. If we don't have legislation in place, we will not be complying with certain international human rights agreements: *e.g.*, the Convention on the Rights of Persons with Disabilities. Extension of the Convention to Guernsey is dependent on having discrimination legislation in place, protecting in the fields of employment, access to goods and services and education.

Myth 2: Legislation will lead to job losses and reduced competitiveness

- The proposals are based on existing legislation from other jurisdictions where it has operated successfully for decades.
- On the contrary, there is evidence that suggests that legislation improves employment for disabled people: the UK's employment rate gap between disabled and non-disabled people has reduced by 10% since discrimination legislation was introduced.ⁱⁱⁱ
- Guernsey has full employment. If our economy is to grow, we need to improve productivity. One study^{iv} in Canada showed that improving access for disabled people to employment would allow people to work more efficiently and for longer and could increase productivity and improve Canada's GDP permanently by \$16 Billion (about 1%).
- The proposals do not mean that employers will not be able to employ the best person for the job.^v
- Concerns about the costs of appropriate adjustments are understandable but most adjustments will be small and procedural. A UK report^{vi} suggests only 4% of adjustments entail a cost and, even then, the average is £184. This excludes the management time needed to discuss, consider and implement an adjustment, but most of the time the need for adjustments is obvious and the management time spent will not be significant.
- The world's most successful companies recognise the competitive advantage that a diverse workforce and inclusive practices bring, both in terms of employee recruitment and retention and in the ability to serve diverse markets.^{vii}
- "Not respecting rights is damaging to our international reputation and costly in terms of social inequality, social cohesion and economic productivity." (Rob Platts MBE)

Myth 3: The legislation is gold plated

- Bringing in legislation covering multiple grounds may, at first sight, seem complex. However, many of the provisions apply to all grounds (a unitary approach) and are not complex. Bringing in protection on all grounds at once will allow businesses to

save time and money because they will only have to review policies and re-train once.

- To eliminate all forms of disability discrimination, legislation must allow protection against multiple, compound and intersectional discrimination (multiple grounds).^{viii}
- The proposed remedies are similar to those available in many other countries (including the U.K.). The proposals include restorative actions; compensation for actual loss, and awards for injury to feelings (using the same “Vento” system as the UK). The proposed remedies comply with international standards of best practice.

Myth 4: Legal costs will increase

- The proposals place a strong emphasis on free informal complaint resolution which is intended to be non-adversarial and non-judgmental. If that’s not successful, complaints can go to a tribunal hearing. Both are designed to be accessible without the need to resort to lawyers.
- In the UK, complaints involving access to goods and services are heard in the courts rather than a tribunal: Comparatively, Guernsey’s approach is likely to reduce, not increase, legal costs.

Myth 5: The proposed definition of disability is too broad and will lead to employees gaming the system – even a lack of talent will qualify as a disability

- Four independent experts, from three different jurisdictions, have separately warned Guernsey about the complexity, legal argument and inequity which arises from defining disability narrowly. Professor Anna Lawson, Professor of Law, Leeds University, warned that the narrow definition’s in US and UK laws are “particularly problematic”.^{ix} The experts from the University of Galway, employed by the States to advise on the legislation, agreed with Professor Lawson’s warning, and have advised Guernsey to adopt a broad definition. David baker, Human Rights Lawyer from Canada said: “Narrow definitions create an irresistible incentive to litigate and offer disabled people inferior legislation.”
- It is not true: “that even a lack of talent would qualify as a disability”. The proposals clearly state that an employer will not be required to employ someone not able to perform the essential duties of the job.
- The proposals include a mechanism (as exists currently^x) to dismiss trivial complaints before they reach a full tribunal hearing.
- Similar definitions of disability are used in Australia, New Zealand, Ireland and Hong Kong^{xi}.

- Many other jurisdictions either do not define disability or define it broadly within their discrimination legislation (e.g. Canada, Denmark, Finland, France, Holland, Italy, Norway, Poland, Portugal, South Africa, Spain)^{xii}
- Jurisdictions which either do not define disability or which define it broadly do not experience more gaming (trivial or vexatious complaints).^{xiii} In fact, there is evidence that due to the stigma and disadvantage attached to disability, many people hide their impairments from their employer.^{xiv}
- The UK definition is far more complex and troublesome for all parties than the proposed Guernsey definition: the official U.K. guidance on its definition runs to 60 pages^{xv} whereas Guernsey's guidance will need only a few paragraphs.
- In fact, the U.K. definition not only offers narrower protection but also invites litigation.^{xvi}
- As with most discrimination legislation, employees and service users claiming discrimination will have to provide evidence of less favourable treatment^{xvii}: the treatment must be substantial (more than trivial) and logically connectable to one or more protected grounds.
- The Committee for the Convention on the Rights of Persons with Disabilities stated *"...Persons victimized by disability-based discrimination seeking legal redress should not be burdened by proving that they are "disabled enough" in order to benefit from the protection of the law. Anti-discrimination law that is disability-inclusive seeks to outlaw and prevent a discriminatory act rather than target a defined protected group. In that regard, a broad impairment-related definition of disability is in line with the Convention"*;

Myth 6: The U’K’s reasonable adjustment standard is more sensible

- A 2016 House of Lords report concluded that the U.K.’s approach to reasonable adjustments is not well understood by employers and is not effective.^{xviii}
- Guernsey’s proposals regarding appropriate adjustments required in the field of employment are not actually dissimilar to those required in the U.K. however, the proposed systems for providing guidance and information, plus the focus on informal resolution, is expected to make Guernsey’s legislation more effective.
- Guernsey’s proposals comply with international standards and accepted best practice.

Myth 7: Employers in the UK can ask pre-employment questions about existing and past disabilities

- Not true: section 60 of the Equality Act 2010 makes it generally unlawful to ask questions about disability and health before a job offer is made.

- Many other jurisdictions, including, for example, the USA, Canada and Australia have made such questions unlawful unless they are connected to an essential requirement of the job (e.g. Scaffolders require a head for heights).
- The reason for this common provision is based on research^{xix} showing that when disabled people declare their disability, they are twice as likely not to get to the interview stage, even if that disability would have no effect on their ability to do the job.

End notes:

ⁱ [2018 Jersey Employment and Discrimination Tribunal Annual Report](#)

ⁱⁱ See, for example: [2017, States of Guernsey disability review: Meeting the needs of disabled islanders, Business Disability Forum](#)

ⁱⁱⁱ Since the introduction of discrimination legislation in the UK, the employment gap between disabled and non-disabled people has reduced from approximately 40% to 29.9%, see also: Powel, Andrew, May 2019, "[People with Disabilities in Employment](#)", House of Commons Briefing Paper number 7540.

^{iv} Gibbard, Desormeaux, Persaud, and Wright, 2018, "The Business Case to Build Physically Accessible Environments", The Conference Board of Canada

^v See Committee for Employment and Social Security's publication: Discrimination legislation: draft proposals Frequently Asked Questions Employers and service providers

^{vi} Reproduced from the UK's Arbitration and Conciliation Advisory Service list of top ten myths, published 2015 and cited at <https://www.acas.org.uk/media/4509/The-top-ten-myths-about-disability-in-the-workplace/doc/Top-ten-myths-about-disability-in-the-workplace.docx>

^{vii} See, for example, Microsoft's policy: <https://careers.microsoft.com/us/en/diversityandinclusion>

^{viii} Multiple discrimination is where separate acts of discrimination have occurred, based on two or more of the protected grounds (e.g., Sex + Race), Compound discrimination is where multiple acts based on two or more grounds add to each other in one particular incidence; Intersectional discrimination is where two or more grounds of discrimination interact concurrently (e.g., a disabled woman may face specific types of discrimination not experienced by disabled men or by women in general.)

^{ix} Quotation by Professor Anna Lawson, extracted from 2017 GDA video of the "[An evening with Anna Lawson](#)" event

^x Section 41(3)b of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005

^{xi} Disability Discrimination Act, 1992, The Republic of Ireland Equal Status Act, 2000 and the Employment Equality Act, 1968

^{xii} Canada, Charter of Rights and Freedoms and Canadian Human Rights Act.; Denmark, Act on Prohibition against Discrimination on the Labour Market; Finland, Non-Discrimination Act (21/2004); France, French Constitution, Holland, The Equal Treatment (Disability and Chronic Illness) Act 2003, New Zealand, The Human Rights Act, 1993; Italy, Law no. 67 of 1 March 2006 (Provisions for judicial protection of persons with disabilities, victims of discrimination); Norway, The Anti-discrimination and Accessibility Act, 2008; Poland, The Equal Treatment Act, 2011; Republic of South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 and The Employment Equality Act; Spain, Law 62/2003, Measures for implementing the principle of equal treatment (Title II, Chapter III)

^{xiii} See, for example, advice from Dutch law firm Boekel De Nerée:

...the Equal Treatment Based on Handicap and Chronic Diseases Act does not define the terms 'handicap' and 'chronic disease' because: "the Dutch government feels that a comprehensive definition is neither needed nor desirable because the limitations are determined by circumstances and not specific characteristics of a person. The unique aspect of this Act is that it also obliges employers to provide for effective measures to create a level playing field where possible, unless this would be a disproportionate burden for them."

And advice from the Canadian Human Rights commission:

From: [BENOIT FORTIN](#)

Sent: Friday, November 16, 2012 1:07 PM

To: robplatts@guernsey.net

Subject: Rép. : Re: Your email of November 14

Dear Mr. Platts,

Indeed, this has not been a concern here at the Canadian Human Rights Commission. We rarely see nefarious complaints; in the large majority of cases, there is rarely a debate on whether the person filing a complaint has a disability. The issues are usually about how employment and services rules, processes, etc., should be designed as inclusive from the very start, and failing that, whether and how the disability can be accommodated.

Regards,

Benoît Fortin

Senior Policy Analyst

Policy and International Relations Division

Canadian Human Rights Commission

From: [BENOIT FORTIN](#)

Sent: Thursday, November 15, 2012 2:32 PM

To: Rob Platts

Subject: Your email of November 14

Dear Mr. Platts,

Thank you for your email. Indeed, the definition of disability in the Canadian Human Rights Act is as broad as possible. Our experience is that this is the best approach, as it allows for a broad and purposive interpretation of the human rights protection afforded by the law, taking into consideration the wide variety of individual circumstances. During the negotiation of the UN Convention on the Rights of Persons with Disabilities, our Commission argued for not defining the term in a restrictive way, either when it comes to time matters or to the nature of the disability.

Regards,

Benoît Fortin

Senior Policy Analyst

Policy and International Relations Division

Canadian Human Rights Commission

^{xiv} See, for example, Kennedy & Jain-Link, June 2019, "[Why people hide their disabilities at work](#)", Harvard Business Review

^{xv} UK Government: [Equality Act 2010, Guidance on matters to be taken into account in determining questions relating to the definition of disability](#)

^{xvi} See for example: Bamba and Hope, 2006, "What are the effects of anti-discriminatory legislation on socioeconomic inequalities in the employment consequences of ill health and disability?", *J Epidemiol Community Health* 2007; **61**:421-426 doi:10.1136/jech.2006.052662 and Dr Belinda Smith, 2008, Models of anti-discrimination legislation – Does Canada offer any lessons for the reform of Australia's laws?, University of Sydney.

^{xvii} Or, in the case of discrimination arising from disability, unfavourable treatment.

^{xviii} See, for example, House of Lords Select Committee report on the Equality Act 2010 and Disability: "The Equality Act 2010: the impact on disabled people."

^{xix} MacRae, G. and Laverty, L. (2006) *Discrimination Doesn't Work: Disabled people's experience of applying for jobs in Scotland*, Leonard Cheshire, Scotland