Guernsey Disability Alliance

10 Years
2008 - 2018

Equality - Dignity - Inclusion

Discrimination legislation update – September 2018

General

The purpose of this communique is to update members on the progress being made on the development of legislation to eliminate disability related discrimination in Guernsey. This note gives important general information about the process and some specific information about the GDA's stance on certain provisions which are under consideration.

While we have attempted to keep the language simple, and to explain complex terminology and concepts, the update is nevertheless necessarily detailed. It is hoped that the summary (below) will help lead members to issues which may be of particular interest or importance to them (Please note that pressing ctrl and clicking on an item in the summary list should take you to the detail of that summary point).

Rob Platts and Rob Harnish would be pleased to hear from any member who would like further information or would like to discuss any of the detail of this communique or would like the information presented in a different format. Contact details are below.

Please note that information about specific legal provisions offered in this communique should not be interpreted as being States' Policy.

Summary

- In order to accommodate expanding the grounds of protection from disability to multiple grounds, and to accelerate the work, the Committee *for* Employment and Social Security (ESS) has changed its approach to developing discrimination legislation.
- GDA Executive supports extension of discrimination legislation to multiple grounds.
- Experts (Drs Quinlivan and Buckley) from National University Ireland, Galway, have been retained to advise and assist in developing policies and specific provisions.
- ESS has consulted with GDA on:
    - The legal definition of disability (based on Irish/Australian models)[i]
    - The approach and coverage of the duty to accommodate need (make reasonable adjustment)
    - Possible approaches to, and identification of resources necessary to adopt/develop, monitor and enforce standards of accessibility
- GDA has requested that consideration be given to:
    - Defining disability in line with a human rights approach as required by the Convention on the Rights of Persons with Disabilities (CRPD).

- Ensuring that any list of impairments used to explain disability is broad and non- exhaustive and that protection is not dependent on severity or longevity of impairment or on the impairment having any effect on personal functionality.
- Protecting on the basis of past, present, future and impugned impairment.
- Extending the duty placed on employers and service providers to appropriately accommodate need (make reasonable adjustments) to:
    - protect people seeking accommodation on the basis of other grounds (e.g. Sex, religion, etc).
    - protect associates and carers of persons providing support to a person with needs associated with a protected ground.
- Separating the offence of failure to accommodate need from the general offence of direct discrimination.
- Restricting the matters to be considered when judging disproportionate burden to cost (including the availability of outside funding) and health and safety.
- Confirming that a UK style "discrimination arising from disability" provision will not be required.
- Reviewing the appropriateness of existing building regulations (Part M) with the objective of protecting certain existing accessible features within buildings.
- Learning from the approach to accessibility standards taken by Manitoba and Ontario and possibly prioritising the adoption of a customer services standard.
- Establishing simple but robust systems of monitoring and enforcing compliance associated with any accessibility standards as well as general monitoring of compliance by employers and suppliers with the duty to make appropriate adjustments.

Discrimination legislation update (detail) September 2018

The process to develop legislation has changed

Previously, a group comprising politicians, civil servants, lawyers and representatives from the Guernsey Disability Alliance (GDA) and the Chamber of Commerce were responsible for discussing policy issues and providing input in relation to the draft provisions which the Committee *for* Employment and Social Security (ESS) would use to inform the Policy Letter which would, if/when agreed by the States of Guernsey, become the blueprint for the legislation to be drafted by States' Law Officers.

Two things have happened which have altered this process. Firstly, following slow progress, a decision was made to employ experts in the field of discrimination law to help identify the model of legislation on which Guernsey should base its legislation. Experts (Dr Quinlivan and Dr Buckley) from the National University of Ireland, Galway, recommended that Guernsey should model its legislation on an amalgamation of the Irish and Australian discrimination legislation. Secondly, ESS proposed and the States have agreed, that the scope of the legislation should be widened from just disability, so that people would be protected on multiple grounds (for example, yet to be agreed, sex, sexual orientation, age, race, religion & belief, family status, civil (or marital) status, gender reassignment or gender identity and disability).

The GDA executive has, for various reasons, previously expressed its support for expanding the protection of the legislation (with caveat that more resources must be available to ensure the project is not further delayed), not least of which is that disabled people may experience combined (e.g. both by reason of being disabled and of being female) or intersectional discrimination (e.g. disabled female or disabled Muslim female). The Convention on the Rights of Persons with Disabilities (CRPD) recognises that combined and intersectional discrimination may be a significant issue and requires governments to provide for this protection within discrimination legislation. In addition, rights are inherent, indivisible and interrelated[ii] and legislation which fails to recognise and take account of this interrelation and indivisibility is unlikely to lead to full realisation of rights.

The list of interested parties and groups has obviously grown, and it would be impractical to try to develop the legislation using the previous interested party, single group model. At the same time, however, ESS must still ensure that affected parties are actively involved and consulted. Disabled people, for example, have the right, expressed in the Convention on the Rights of Persons with Disabilities[iii], to be involved and consulted, through their representative organisations such as the GDA.

ESS has employed the same experts who advised on the model of legislation to advise on amendments and additions needed both to deal with known issues and to ensure compliance with international conventions and to suit the Guernsey context. ESS will, in

turn, consult with relevant groups on parts of the proposed legislation which may affect the people represented by those groups.

The goal is to have the policy letter completed and sent to the States for debate before the end of 2019.

What else is involved?

Whilst representative groups, such as the GDA, Liberate and so on, are actively involved in the process of developing policy and legislation, there is also a need to consult more widely, at some stage, with employers, service providers and indeed with the general public. The proposed date for this consultation has not yet been made public.

The policies and provisions of the legislation will generate a number of requirements which must be considered, and resourced, for example:

1. Written guidance about the legislation for employers, employees, service providers (including educators) and users,
2. System for setting, training, monitoring and enforcing accessibility standards (more info below),
3. Systems for providing advice to employers, employees, service providers and users about the legislation,
4. Systems for the general promotion of human rights (something which all parties to the Universal Declaration of Human Rights should put in place and something which is specifically required by the CRPD with regard the promotion and awareness raising of the rights of persons with disabilities). Although not a requirement of discrimination legislation, the GDA argues that increased knowledge of rights will help to ensure better acceptance of the legislation.
5. Systems for administering and resolving complaints brought under the legislation,
6. Systems for independent monitoring of compliance with international conventions (Although not specifically required in connection with discrimination legislation, but will be required by CRPD, etc), and
7. Systems for monitoring the effectiveness of the legislation and complaint resolution.

It is hoped that the proposed Equality and Rights organisation might take on some of these duties and that the existing Employment and Discrimination Tribunal could be adequately resourced and trained to deal with complaints which have not be resolved through other informal resolution processes (perhaps through the ERO or the existing Employment Relations Service).

Readers will note the importance of the proposed ERO but it is fair to say that progress on developing the business plan (not business case) required by States Resolution of November 2013 is still very slow.

Once consultation is complete, then ESS will be able to complete the Policy Letter which will go to the States for debate. Because all the main provisions and concepts will have been set out within the Policy Letter and because we will be adopting much of the legislation from

existing Irish and Australian legislation, the process of actually drafting the legislation should be relatively swift (albeit the States Debate could result in amendments). However, the drafting will still have to be prioritised, and take its place in the queue, before drafting can commence. This process is outside of ESS's hands

ESS has consulted with GDA on certain critical legal provisions

The GDA, through its representatives involved with this Disability Strategy workstream (Rob Platts and Rob Harnish) has recently been consulted on a number of critical provisions which are likely to be included in the legislation. These include the way disability should be explained or defined and how duties relating to making adjustments, needed to accommodate the needs of individual disabled employees and service users could be addressed. The GDA and Access for All were also consulted on how the whole issue of accessibility should be approached.

Explaining or defining Disability:

The GDA's research[iv] highlights that narrowly defining a group of disabled people able to claim protection from discrimination by reason of disability (as the UK and USA legislation does, for example) leads to inferior legislation protecting the ground of disability. Such an approach shifts the initial focus of courts and tribunals from establishing a prima facie (at first look) case of disability related discrimination, to instead establishing (and thereby inviting unhelpful and inequitable, and often personally invasive, legal argument about) whether a person is qualified to claim protection from discrimination. This additional step to gaining protection is not customarily required when claiming protection under other grounds.

The definitions of disability contained within both the Irish and Australian legislation are reasonably broad, but, arguably, the definitions are a based on lists of impairment groups (medical model), rather than an explanation of disability which is in line with the "evolving concept" offered by the CRPD[v] (i.e. a condition resulting from the interaction between impairments and barriers). The GDA is concerned that legislation based on a medical model understanding of disability will fail to deliver a rights-based approach to barrier removal and will do little to combat stereotypes and stigma associated with persons with disabilities. The GDA's view is supported by the Committee for the Convention on the Rights of Persons with Disabilities (Committee for the CRPD) General Comment[vi] .

The GDA has argued that if the Irish (list of impairment) approach is to be followed, reference to "Chronic illness" should be amended or removed as the term "chronic" could be interpreted as meaning long lasting and because there is a need to ensure short term conditions (e.g. many mental health problems are short-term) , that may, nevertheless, be associated with substantial discrimination, are not inadvertently excluded from protection. The GDA's stance is in line with recent general comments[vii] from the UN Committee for the CRPD. In particular, the Committee for the CRPD advises that legislation should concentrate on eliminating all forms of

disability related discrimination and individual acts of disability related discrimination, rather than protecting a certain group.

Whilst legislators in some jurisdictions do not believe it is either right or necessary to define disability within their legislation[viii] (Canada and Holland, for example) the GDA recognises local concern about insufficient guidance for employers and suppliers of goods and services and a concern that, if left undefined, Guernsey's courts may feel compelled to impose a definition - a process which, experience elsewhere shows, may not result in the most helpful definition. On this basis, the GDA Executive would not object to Guernsey's legislation offering a none exhaustive list of conditions and impairments which, together with physical or attitudinal barriers, are likely to result in a condition of disability.

Whichever approach is adopted, there is a need to ensure that definitions do not result in a circular argument. The concept of disability can be seen to differ from, for example, the grounds of age or belief, because both age and belief are readily identifiable as a personal characteristic; whereas, the CRPD/human rights understanding explains that disability results from the interaction of personal impairments and external barriers.

The GDA has also requested that clear guidance is given that an impairment need not have lasted for a particular length of time, nor is it necessary for the impairment to be of a particular severity, in order for someone to be able to claim protection against discrimination on the basis of that impairment. The GDA believes this guidance is needed because Article One (Purpose) of the CRPD

> *("Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.")*

has, in the past, been unhelpfully misinterpreted as meaning that the Convention only applies to persons with long term impairments[ix], which it does not.

The GDA also believes it is important that people are protected from discrimination which may arise in connection with an impairment which existed in the past, currently exists, is impugned or believed to exist, or which may exist in the future. For example, if someone has had cancer in the past, the GDA believes employers should not be able to discriminate on the basis that the person might be susceptible to contracting cancer again in the future. Likewise, if someone is HIV positive then in would be wrong for an employer to discriminate on the basis that they may go on to develop AIDS.

It is also important that Guernsey legislation protects people from discrimination which has resulted by reason of an impugned impairment, e.g. someone being disadvantaged because they are believed or rumoured to have an impairment or condition when in fact they do not. Again, the Committee for the CRPD expresses the

need for legislation to provide this protection in all these scenarios (General Comment of April 2018[x])

Duty to accommodate need (appropriate accommodation or reasonable adjustment) and provisions dealing with accessibility

A duty placed on employers and service providers to appropriately accommodate (make adjustments) in order to allow equal access to employment or to goods and services is a mainstay of most discrimination legislation. The duty to appropriately accommodate the known individual needs of employees or customers in order to achieve substantive equality (remove barriers which affect people associated with a protected ground more than people who are not associated with that ground), is different from duties dealing with general accessibility.

Duty to appropriately accommodate

The duty to accommodate individual needs is an *Ex Nunc* (not anticipatory) duty and required by the CRPD; but legislation may also apply this duty to protect people requiring adjustments on other grounds (e.g. religion or family status). The concept of appropriate accommodation (reasonable adjustment) was being developed as early as the mid-1980s and may first have been applied to religion. The GDA argues that Guernsey's legislation should place a duty on employers and service providers to appropriately accommodate need arising from any protected ground. The GDA believes this is the most equitable approach and will also mean that disabled people will not be seen to, yet again, be treated differently or, even, more favourably than people seeking protection on other grounds.

The CRPD requires that legislation places this duty on employers and providers of goods and services in order that they appropriately accommodate the particular needs of individual employees and service users without "disproportionate burden" to the employer or supplier. This means that an employer or supplier is not required to anticipate the needs of possible future employees or individual customers but should take steps to accommodate the needs of existing employees (and candidates for employment) and customers as soon as they are aware of those needs. The Committee for CRPD General Comment[xi] also explains that an important part of this duty is that there should be discussion between the parties (including an assessment of the appropriateness of any adjustment) and that this requirement to discuss and consult with the person who would be benefiting should be clearly stated within the legislation. An example relating to the supply of goods and services might be that if a bank customer, because of a physical impairment, is unable to visit a branch to sign a document say, or so that their identity could be verified, then it may be appropriate, and not disproportionately burdensome, for a representative of the bank to visit the customer.

The GDA is concerned that there is evidence from a number of jurisdictions, most notably perhaps from the UK[xii], that these duties are neither well understood nor

complied with. The GDA believes that, if the matters which may be taken into account when judging whether the burden to accommodate need is undue or disproportionate are too broad, employers and suppliers may be confused and more likely to fail to accommodate for the wrong reasons. The GDA has recommended that the contextual test of disproportionate burden should be limited to two matters: cost (including the availability of outside funding) and health and safety (as in Canadian legislation). The GDA argues that tests of appropriateness should be confined to assessment of whether or not the proposed measure will achieve the required result (barrier removal).

The offence of failure to accommodate need is treated by some jurisdictions as a form of direct discrimination and by others as a separate offence. The GDA believe there are good reasons to separate the offences, not least of which is that arguably, a failure to accommodate may be objectively justified (proportionality and appropriateness) whereas direct discrimination (e.g. I don't employ disabled people) is arguably never justifiable.

The assessment of failure to accommodate, if treated as direct discrimination, may become problematical and illogical in disability related cases (see for example UK case of Malcolm v Lewisham Council) because the test of "less favourable treatment" (also used in both Australian and Irish legislation) invites the identification of comparators. The GDA has given evidence to ESS of these difficulties and requested that the offences of direct discrimination and failure to accommodate are dealt with separately in Guernsey's legislation.

The difficulties experienced with the identification of comparators in the UK and the fact that the UK's restricted definition of disability and causal conditional ("because of") meant that disadvantage arising from something connected with disability was, under the UK Disability Discrimination Act,1995 (DDA) , not protected against. Examples illustrating matters "arising from discrimination" include, for example, the short term effects of drugs, such as chemotherapy, and a reliance on an assistance animal or mobility aid. The UK Equality Act, 2010, which superseded the DDA, deals with these difficulties by introducing a new provision (Section 15) protecting against *unfavorable* discrimination arising from disability. The use of the term "unfavourable" means that the use of comparators is not relevant and the "arising from" terminology requires only a logical connection with, rather than a direct causal link to, the person's impairment (disability).

The GDA has requested that ESS asks for confirmation from Drs Quinlivan and Buckley that the possible broad interpretation of disability within Guernsey's proposed legislation, together with the proposed provisions for appropriate accommodation of need will mean that a UK style provision of discrimination arising from disability will not be required.

Accessibility

The duty on providers of goods and services regarding accessibility is a more general duty than the duty to accommodate the known individual needs of existing employees or customers. This general duty is likely to apply to all organisations whose premises, goods and services (whether for profit or not) are customarily used or accessed by the public.

The object of this duty is to make access to goods and services (e.g. shops, information and communications, travel, sport, arts, culture, justice and political and public life) generally available to most people[xiii], usually to a specific standard.

In many countries, this sort of accessibility duty has, arguably, brought more positive change for disabled people than any other provision or form of discrimination legislation.

This general duty, according to the Committee for the CRPD, is *ex ante* (anticipatory) and not limited (to the same extent as the duty to appropriately accommodate the known needs of employees and customers) by a requirement to be immediately realizable. Because the duty may not be immediately realizable, a limitation of disproportionate burden may not apply, or this defence may be reduced, especially if associated standards include immediate compliance or a date by which they must be complied with. This duty might often be dealt with through ancillary regulation; for example, through building regulation, or through the setting of access standards such as; standards of accessible vehicles, standards of customer service and standards of communication and signage.

The GDA has consistently called for accessibility standards to be adopted or developed and for existing building regulations to be reviewed and for the necessary authority to develop such further regulation to be included in the discrimination legislation.

Discussions with ESS have highlighted a need to identify and prioritise the accessibility standards Guernsey should adopt or develop. Those discussions also showed there was need for the States to identify or establish mechanisms, not only to carry out this identification/adoption and prioritisation process but then also to provide guidance and training and to monitor and enforce compliance.

The GDA has requested ESS considers:

- Introducing, as a part of a review of building regulation (part M), a system to ensure accessible features of buildings are retained (at the moment there is no way to ensure such features are preserved). The GDA argues that the same importance should be placed on preserving accessible features as is applied to preserving ancient monuments.
- Learning from the approach to accessibility standards taken by the Canadian Provinces of Manitoba and Ontario[xiv] .

- Prioritising a customer service standard such as developed by Manitoba or Ontario (these standard deal with, for example, access and approach to premises, accessible store layout, lighting, accessible parking, staff training, accessibility of signage and communications and formulating and filing an accessibility plan.)

Prior to these recent discussions the GDA has been concerned with improving the recognition and realisation of air passenger rights and accessibility standards and has been in discussion with the Airport Authority, Aurigny and with ESS. These rights and standards are widely recognised and applied through the European Union, but some only apply to flights to Guernsey originating in an EU country. The GDA has identified to all parties that a system which recognises different standards and rights depending on direction of travel may not meet the standards of the CRPD or of Guernsey's future discrimination legislation and have urged all parties to regularise the standards to improve access to air travel for islanders and to avoid future individual complaint.

The GDA has stressed to ESS that its research has shown that compliance with duties to reasonably accommodate need and to improve standards of accessibility are often poorly complied with because the duties are not well understood and because enforcement mechanisms often rely on individual complaint. GDA has stressed the need for robust systems to promote, monitor and enforce these duties.

Contact information

For further information please contact:

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END NOTES:

[i] Including for example: The Republic of Ireland's Employment Equality Acts 1998-2015 and Equal Status Acts 2000-2015 and Australia's Age Discrimination Act, 2004, Disability Discrimination Act 1992, Race Discrimination Act 1975 and Sex Discrimination Act 2004.

[ii] As recognised by the Convention on the Rights of Persons with Disabilities, pre-amble (c)

[iii] Convention on the Rights of Persons with Disabilities, Article 4.3 (General Obligations)

[iv] Platts MBE, R, "Islands of Equality or Oceans of Discrimination", 2013, Guernsey Disability Alliance (draft, unpublished, but available on request).

[v] See UN Convention on the Rights of Persons with Disabilities, preamble (e).

[vi] United Nations, Office of the High Commissioner, Committee for the Convention on the Rights of Persons with Disabilities General Comment No 6 (2018), Para 2

[vii] United Nations, Office of the High Commissioner, Committee for the Convention on the Rights of Persons with Disabilities General Comment No 6 (2018), Para 73 (b)

[viii] See, for example, Platts MBE, R, Definitions and qualifications of "disability" within disability discrimination legislation - a brief study of 38 jurisdictions, Guernsey Disability Alliance, 2014 (unpublished, available on request)

[ix] See, for example European Court of Justice decision, Kaltoft v Municipality of Billund

[x] United Nations, Office of the High Commissioner, Committee for the Convention on the Rights of Persons with Disabilities General Comment No 6 (2018), Para 20

[xi] United Nations, Office of the High Commissioner, Committee for the Convention on the Rights of Persons with Disabilities General Comment No 6 (2018), Para 26 (e)

[xii] UK House of Lords Select Committee report, 2016, The Equality Act 2010: the impact on disabled people Report of Session 2015-16 - published 24 March 2016 - HL Paper 117

[xiii] Understanding that to make all services 100% accessible to all disabled people may not be reasonably possible even if the defence of disproportionate burden is reduced through progressive realisation.

[xiv] See, for example, The Accessibility for Ontarians Act and the Accessibility for Manitobans Act