

Discrimination legislation – how can legislation tackle discrimination and who is going to advise everyone and resolve complaints?

Please note that the concepts and matters discussed in this update are offered to explain issues under consideration and should not be taken as confirmation of government policy.

Many members already appreciate that one of the things Guernsey must do to comply with the Convention on the Rights of Persons with Disabilities (The Convention) is introduce legislation to tackle discrimination – but what will the legislation actually do? Who will advise people and who will enforce the legislation when it comes?

The GDA has been closely involved with and consulted on these matters, and has recently been involved in preliminary discussions about what remedies could be available, who might be responsible for giving advice, who might help resolve complaints informally and then, if complaints can't be resolved informally, who should ultimately be responsible for formally resolving complaints and enforcing the legislation. Many of these issues will be consulted on more widely in the coming months.

What's involved in preventing discrimination?

Probably the first principle to know is that tackling discrimination can involve several strategies. The most important strategies would aim to stop discrimination from happening in the first place, rather than (as some older models of discrimination laws do) simply try to put right discrimination that's already happened.

The States' Resolution of November 2013 recognises this, and requires legislation be developed to *prevent* discrimination (not simply correct discrimination). To this end, one of the few things which the Convention requires governments do straight away, other than directly tackle discrimination by introducing legislation, is to undertake awareness raising to combat stereotypes and harmful practices and to make people of all ages and in all layers of society more aware about disability and about the rights of persons with disabilities. Other things that can be done to stop discrimination happening in the first place include:

- introducing legislation to regulate certain standards of accessibility (these might include standards which must be achieved within transport systems, passenger vehicles, standards of service and in the way information is provided (websites, *etc.*);
- reviewing all existing laws to ensure that they are not themselves discriminatory (an example of such a review, in which the GDA was instrumental, was the law which prevented some people with certain mental health conditions from being able to vote);
- making sure that awards available under our discrimination legislation are fair and proportionate but large enough to be dissuasive (in other words, large enough so that people think twice before they discriminate against others); and
- including in our legislation some form of duty requiring government, and perhaps other employers and suppliers of goods and services (particularly educators), to advance equality of opportunity and to foster good relations between different groups of people.

The GDA has consistently argued that Guernsey must use all these methods.

If discrimination does happen, how can it be put right?

While the things listed above are designed to prevent discrimination happening, thought must also be given to what tools (remedies) should be available to put things right when discrimination *has* happened, and who should be responsible for applying those remedies. Remedies used in discrimination legislation may include:

- financial awards to
 - compensate for actual loss (for example, wages lost through being dismissed or through being denied promotion, or selected for redundancy for discriminatory reasons, or through being denied access to a good or service), and to
 - compensate for injury to dignity and feelings;
- an apology;
- a public statement of the rights of the person making the complaint;
- re-instatement;
- requiring an employer to provide a positive reference;
- requiring an employer or service provider to undertake training;
- requiring an employer or supplier to change a policy or procedure or to remove a physical barrier;
- requiring an employer to reasonably accommodate a specific need (make an adjustment) for an individual employee. Such accommodations could include, for a disabled person:
 - supplying a piece of equipment to assist with an employment related task,
 - assigning non-essential duties to someone else,
 - not preventing an employee to be accompanied by an assistance animal,
 - providing a parking space, and
 - allowing more breaks.

Adjustments to accommodate needs on other grounds might be made (if the legislation extends the principle to other grounds), for example: changing a work rota to accommodate someone on the ground of family commitments or religion, or altering a work-related standard judged to be non-essential and discriminatory on the ground of gender.

The GDA has argued that all these remedies should be available.

What financial awards should be available and how should they be calculated?

The GDA has argued since 2014 that the awards (3 months pay) and award system available under the existing Sex Discrimination Ordinance are not fit for purpose because the awards are not dissuasive and because the system is potentially discriminatory (may result in different awards being made to people who have experienced similar discrimination) and, because it is based on salary, would be unworkable in cases involving access to goods and services.

In Jersey, awards may be made for financial loss and for injury to feelings but the maximum award in total is £10,000. The GDA has argued that Jersey's award system is unfair and not dissuasive.

In recent discussions, the GDA has argued (with reasons backed by previous judgements from the European Court of Justice) that awards to compensate for actual loss should not be limited.

Considering the difficulty in putting a monetary value to awards for injury to dignity and feelings, the GDA is supportive of an approach based on bands of awards, which takes into account both the severity and frequency of the discrimination. This system of banding is used in the UK and, currently, the awards range from £900 to, in the very worst cases, £42,900.

Who should be responsible for giving advice and helping to resolve complaints?

The Committee for Employment and Social Security (ESS) is due to complete a business plan for the proposed Equality and Rights Organisation (ERO) in the first quarter of 2019. This plan will then be debated by the States.

The States' Resolution concerning the establishment of an ERO requires that the proposed organisation should be set up in line with something called the Paris Principles. ERO's which meet the Paris Principles must be primarily involved in the promotion and protection of human rights. The existing Employment Relations Service does not meet these criteria and is not currently tasked with protecting and promoting rights as its primary aim.

Currently, the States' Employment Relations Service offers advice to employers and employees on employment related issues, including offering guidance on sex discrimination issues. The Service is also responsible for arranging informal independent complaint resolution and for referring unresolved complaints to the Employment and Discrimination Tribunal.

An ERO may be given responsibility to resolve complaints either informally or formally but, the Paris Principles would not allow it to compromise on human rights. For this reason, ERO's might not be seen as being merely an impartial advisor.

The GDA has long argued that the Employment Relations Service should be independent of the States. Consideration is being given as to how complaints and enquiries are handled in the future and there are a number of models under consideration. One model would involve the Employment Relations Service expanding its advice and complaint resolution service in line with the expanded grounds of the forthcoming discrimination legislation. The GDA is not supportive of this model, but, if that model is selected, it would be even more important that the service becomes independent.

The GDA has proposed that, in addition to the existing service becoming independent, its duties with regard to discrimination advice should be passed to the proposed Equality and Rights Organisation (the duty to refer unresolved complaints to the Tribunal could, in theory, sit with either the Equality and rights Organisation or the Employment Relations Service).

There are a number of reasons for keeping these services separate. An ERO as well as being concerned with high level human rights issues, should be working at the coal face and should be involved in tracking and assessing trends and attitudes in how Guernsey respects and realises human rights. An ERO should have expertise and experience in matters of human rights and this is more difficult to acquire and maintain if it does not have direct contact with people affected by these issues. It's also worth noting that human rights legislation transcends all other law (all other laws should be interpreted in line with the Human Rights Law) and a service primarily involved with employment is perhaps not best placed to become involved in, and advise on, such a broad human rights remit.

The cost of protecting human rights (access to Justice)

Currently, complaints involving sex discrimination which have not been resolved informally, may be referred to Guernsey's Employment and Discrimination Tribunal for adjudication. There are no fees involved for this service (although some costs relating to witnesses may be recoverable)

In the past, it has been argued by some, for reasons to do with training needed to calculate loss and to do with how the Tribunal and Magistrate Court are limited in the level of award they can currently make, that complaints involving denial of

access to a good or service should be heard by the Royal Court. The issue here is that pursuing a complaint involving goods and services through the court system would involve court fees and fees for legal representation. The GDA argues that the protection of human rights should be achievable with no cost to the complainant. Such fees are likely to indirectly discriminate against people with disabilities who are, on average, less likely to be able to afford them.

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