guernseydisability alliance

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GDA comment: publication of ESS's Policy Letter on discrimination legislation.

The Guernsey Disability Alliance is encouraged that after twelve years of campaigning and six years of working with the government and other stake holders, including representatives from business, the Committee for Employment and Social security has published the long awaited Policy Letter laying out proposals for multi-ground discrimination legislation.

The discussions which led to the revised proposals entailed the GDA agreeing to significant compromises.

Considering the polarised views that emerged from the consultation process it is remarkable that the Committee for Employment and Social Security has managed to deal with so many of the concerns expressed.

The GDA didn't favour the phased approach to the introduction of the multiple grounds, however, it is a pragmatic approach to dealing with some of the business community's concerns. It is possible that persons with disabilities will benefit not only by protections being in place in the first phase but, also, could mean that disability is less likely to become the "also-ran" ground that, arguably, disability has become in the UK.

The GDA has a number of concerns about the proposals: but equally, we believe the Policy Letter provides a reasonable basis on which to move forward.

We hope that some of our concerns can be addressed through debate in the States Assembly and note that the Policy Letter proposes a review mechanism to help resolve any issues that are not resolved during implementation.

We are pleased that the carer ground (in relation to carers of a person with disabilities) has been included. Guernsey's population is aging rapidly, and disability increases with age. With working lives lengthening it is sensible that the island's growing numbers of carers are able to access and remain in employment as long as they may need or wish to. The proposals don't include the right for carers to request reasonable adjustments, which might have improved the lives of some carers and increased the capacity of the island's workforce. That said, we note that the Committee for Employment and Social Security has been directed to develop separate proposals for legislation concerning flexible working rights and we are hopeful that this legislation will extend the necessary improvements to carers.

We welcome the proposed strengthening of the Employment and Discrimination Tribunal since we believe these changes were needed even without the introduction of the new legislation.

It is disappointing however, that the protection against discrimination in the field of education is to be delayed. We are not convinced that protection should be delayed until the new Education Law is in place, nor, considering the proposed strengthening of the existing Tribunal, do we believe that the Tribunal could not deal with complaints in this field.

Most reasonable adjustments that allow persons with disabilities access to work cost nothing or very little. The GDA's research found that the labour market for the small number of persons with disabilities who need more costly adjustments is generally skewed towards larger employers. We therefore welcome the Committee's proposal to develop an "Access to Work Scheme" to assist smaller businesses overcome the barrier of disproportionate burden.

The GDA's major concerns include the proposed changes to the definition of disability, the watering down of proposals for an independent Equality and Rights Organisation, and the proposed level of awards for damages which we believe may not be effective, dissuasive or proportionate. Additionally, we believe that the five-year implementation period for making adjustments to buildings is longer than needed and we are disappointed that the proposals for accessibility access plans have been scrapped for the private sector. The GDA and Access for All believe that those plans might have made some of the most needed and welcome changes for persons with disabilities and that this may adversely affect understanding and compliance of the accessibility duty.

We understand that the proposed alteration to the definition of disability has followed concerns that an unrestricted definition might result in trivial complaints. Evidence from jurisdictions that do not define disability at all, and also from those that define disability in broad unrestricted terms, show that these concerns are unfounded. The Policy Letter itself provides such evidence from Ireland. The GDA has received further helpful advice directly from the Canadian and Australian National Human Rights Commissions that advise that broad unrestricted definitions are favourable and do not result in the concerns that some business groups have voiced.

The Canadian Human Rights Commission advised the GDA that:

> "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."

And

> "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."

The GDA received the following advice from the Australian Human Rights Commission:

> "The broad definition of disability helps avoid genuine complaints of discrimination falling at the first hurdle – determining whether or not the person concerned is covered by the Disability Discrimination Act (DDA). This helps focus attention on the discriminatory action rather than the person concerned."

And

> "At the federal level the Australian Human Rights Commission has not noticed any trend of nefarious or insubstantial complaints stemming from the DDA."

Perhaps it may not be realised that the GDA had indicated a willingness to compromise. We compromised initially from preferring no definition to agreeing the broad impairment-based definition included in the consultation and, more recently, a another compromise to a three-month duration of impairment qualification. We were therefore particularly disappointed to hear of the proposed six-month duration of impairment qualification.

Although we recognise there are still issues, Islanders affected by disability having been waiting far too long and we call on the States not to delay any further.

We hope that the Committee's proposals will be approved by the States and further improved in the future.

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