

Anti -Discrimination legislation

Table 6.1 - Summary of changes made to policy proposals in response to consultation feedback

Extract from: PROPOSALS FOR A NEW DISCRIMINATION ORDINANCE Section 6, from page 65 <https://gov.gg/CHttpHandler.ashx?id=123704&p=0>

Issue	Draft policy proposal the Committee consulted on	Consultation feedback to which the Committee has responded	Summary of how the Committee has changed its policy proposal (2020)
Phasing of grounds	Consultation question regarding whether all ten protected grounds should come into force at once or if they should be phased in.	Mixed response. Some felt the grounds of protection should be phased in, as was the case in Jersey, in order to give businesses more time to adapt and adjust.	<p>Phased implementation.</p> <p>Phase 1: Disability, carers, race. Phase 2: Age, religious belief. Phase 3: Sexual orientation and the replacement and extension to other fields of the current Sex Discrimination Ordinance (sex, gender reassignment and marital status)</p> <p>*changed to 2 phases after resolution</p> <p>Phase 2 was added in Phase 1. Phase 3 became Phase 2</p>
Definition of "disability"	Irish definition but with some changes, for example: - addition of phrase "Disability includes but is not limited to..."; - Removal of the word "chronic" in relation to "the presence in the body of organisms causing, or likely to cause, chronic disease or illness"	Definition too broad. "Includes but is not limited to" would have the effect that disability was not - defined at all. A time limit is vital to differentiate between sickness and disability - Use UK/Jersey definition of disability.	<p>Revised definition of disability.</p> <p>Based on the Jersey definition of disability with the following changes:</p> <ul style="list-style-type: none"> - To provide additional clarity, "impairment" is defined based on the definition of "disability" in several other countries. - Without the unique and untested phrase "which can adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law." - Exclusions from the Jersey definition of disability are instead covered as a more targeted exception to protect people and property from harm. - In addition, clarification is provided that if the existence of a condition, impairment or illness or the prognosis is in doubt, medical, or other expert, evidence may be required
Definition of "carer status"	Carer status would include carers of dependent children under the age of 18 and carers of disabled people (subject to meeting a minimum threshold in relation to the provision of care).	Definition is too broad. Some respondents queried why carers of dependent children were included. Some suggested that the definition should be narrowed by including a requirement for the care-giver to be living with the person with a disability that they provide care for or to be related to that person.	<p>Scope of definition of "carer status" narrowed.</p> <p>Proposed definition no longer includes carers of dependent children, unless they have a disability.</p> <p>Requirements included for the care-giver to be living with the person with a disability that they provide care for or to be closely related to that person.</p>
Timescale for making a complaint	6 months following the last alleged incident of discrimination	6 months is too long a period of uncertainty for business	<p>Timescale for making a complaint shortened to 3 months following the last incident of discrimination, in line with the current Sex Discrimination Ordinance. Following formal registration it would be possible for the time</p>

			period to be suspended to allow formal pre-complaint conciliation to take place.
Third party harassment	Irish position on third party harassment included	The UK has repealed section 40 of the Equality Act 2010 in relation to third party harassment. Jersey does not have a specific provision relating to third party harassment.	Moved from the Irish to the UK position so there is no specific protection against third party harassment, but employers should still take reasonable steps to prevent harassment as explained in the technical proposals (see appendix 4).
Liability	Individual liability not specified	The draft proposals do not offer sufficient protection for employers and service providers in situations where employees or service users acted in ways which were beyond the employer's or service provider's control.	Now more closely aligned to the UK (sections 109 and 110 of the UK Equality Act 2010 – see technical proposals for details).
Financial compensation structure	Introduction of compensatory awards proportionate to the loss someone has experienced and potentially made up of two elements - financial loss and injury to feelings. Revised awards structure for all employment protection cases so compensatory award received once.	No need to change the unfair dismissal regime/award. Should be light touch and proportionate	No change to unfair dismissal regime and capped awards. For discrimination in the field of employment: An upper limit of 6 months' pay plus up to £10,000 for injury to feelings based on a three banded scale akin to the Vento Scale used in the UK (albeit with a much lower upper limit). For discrimination in all other fields: An upper limit of £10,000 for financial loss plus up to £10,000 for injury to feelings. Where a claimant makes complaints for both unfair dismissal under the Employment Protection Law and discrimination in the field of employment under the existing or new discrimination legislation, and the complaints are related (i.e. discriminatory dismissal), the claimant could be awarded either: - up to 6 months' pay under the Employment Protection Law if the unfair dismissal complaint is upheld but the discrimination complaint is not, or - up to 6 months' pay plus up to £10,000 for injury to feelings if the discrimination complaint is upheld but the unfair dismissal complaint is not, or - a combined award of up to 9 months' pay plus up to £10,000 for injury to feelings if both the unfair dismissal and the discrimination complaints are upheld.

<p>Reasonable adjustment</p>	<p>Committee proposed the term “appropriate adjustment”</p>	<p>Request to re- name the duty “reasonable adjustment” and for it to be more similar to the UK due to familiarity.</p>	<p>“Appropriate adjustment” to be re-named “reasonable adjustment”. The duty to provide a reasonable adjustment will only apply where a disabled person would suffer a “substantial disadvantage” (i.e. more than minor or trivial disadvantage) without the adjustment. For education providers and goods or services providers the reasonable adjustment duty will be to disabled people generally, thereby making it proactive (as well as reactive), as in the UK. Five year delay from commencement before any changes (removal or alteration) required to physical features.</p>
<p>Anticipatory accessibility duty and action plans</p>	<p>Anticipatory accessibility duty - requirement for education providers and goods or services providers to prepare an accessibility action plan within two years of commencement – but with no duty to implement physical alterations to buildings in relation to accessibility until 10 years after commencement (subject to a fine for non-compliance).</p>	<p>A separate duty is not needed. Instead, either the reasonable adjustment duty could be owed to disabled people in general or a complaint of indirect discrimination could be made.</p>	<p>Separate anticipatory accessibility duty removed. For education and goods or services providers the reasonable adjustment duty will be to disabled people generally, as in the UK. Duty to prepare accessibility action plans for publicly accessible buildings to apply only to the public sector. Five year lead-in period.</p>
<p>Accommodation providers</p>	<p>Accommodation providers cannot unreasonably refuse changes to physical features where the tenant pays for the adjustment and has the funds to return the property to its original condition.</p>	<p>Request to clarify what is to be considered a “physical feature” and opposition from private landlords.</p>	<p>Provided clarification over what constitutes a physical feature based on the UK Equality Act 2010. Only limited reasonable adjustment improvements (based on UK position) where private residential landlords cannot unreasonably refuse. See sections 6.2.8 to 6.3.3 of appendix 4 for detail.</p>
<p>Equal pay for work of equal value.</p>	<p>Applied to all protected grounds. Consultation question on whether a lead-in period was required.</p>	<p>This should only apply to the sex ground, as in the UK. Cross jurisdictional comparators should not be allowed.</p>	<p>Should apply only to the ground of sex. Delayed commencement as sex is in phase 3 - estimated implementation five years after commencement of phase 1 (estimated to be 7 years from now). No cross-jurisdictional comparators</p>
<p>Landlords and children</p>	<p>Under the protected ground of “carer status”, landlords would not be able to specify “no children” except in limited circumstances.</p>	<p>Landlords felt they should be able to specify “no children”.</p>	<p>Carers of non-disabled dependent children have been removed from the definition of carer status so landlords can continue to specify “no children” if they wish but not because of a child’s disability and not because of something arising in consequence of their disability (e.g. having an assistance animal) unless, in the case of something arising in consequence of their disability, it can be objectively justified.</p>

Advice and enforcement	Additional resource requirements for implementation and ongoing administration were not included in the original proposals (as this work was still to do).	Cost should be proportionate for a small Island. The current advisory and conciliation function would need to be expanded. The capacity, skills and expertise of the Employment and Discrimination Tribunal would need to be developed	Recommendation to expand the current Employment Relations Service to become an Employment and Equal Opportunities Service. Resource requirements for the proposed Employment and Equal Opportunities Service and the Employment and Discrimination Tribunal have been identified (see section 7 for further information).
Definition of employee/worker	Definition of employee did not cover all employees and workers covered in the UK.	The range of persons who could make an employment discrimination complaint appeared to be narrower than under the existing Sex Discrimination Ordinance and the UK Equality Act 2010.	Clarification: The Committee intends to include a wide range of “workers”. A-typical and casual workers would be protected in the employment field , but some situations of self-employed persons (where this is more like service provision than an employment relationship) would not be protected. The Committee proposes that agency workers are also protected.
Victimisation	No reference to the requirement for a complaint to have been made in good faith.	There should be a requirement for the complaint to have been made in good faith. Protection should apply from the earliest stage, not just from when a person makes or proposes to make a formal complaint.	Clarification: Complaints must be made in good faith. Protection from victimisation would apply from when an individual alleges that there has been a breach of the equality legislation , not just when a person makes or proposes to make a complaint.
Race	“Race” would include colour, descent, nationality, ethnic origins and national origins.	Request for clarification in respect of racial groups	Clarification: A racial group could comprise two or more distinct racial groups (e.g. a person may describe themselves as black, African or Nigerian, so the racial group they belong to would comprise of any or all three of these).
Multiple and intersectional discrimination	Included in the Committee’s draft proposals	Not covered in the UK.	Multiple and intersectional discrimination deferred. Propose they should be considered as part of phase 2 of the proposals when additional protected grounds are added.
Striking out or dismissing complaints or responses	Power to strike out complaints not included.	Concerns about management time required to deal with vexatious complaints.	New powers for the Tribunal. The Committee intends to make an Order giving the Employment and Discrimination Tribunal the power to strike out (amongst other things) vexatious complaints and the power to dismiss complaints with no reasonable prospect of success.

This section summarises the changes that the Committee has made to its policy proposals in response to consultation feedback received during the summer of 2019. Table 6.1 sets out the Committee’s previous proposals (that have now been superseded), the consultation feedback to which the Committee has responded and, in the right hand column, the position that the Committee is now recommending in this Policy Letter.

Further explanation in respect of the changes made can be found in section 2 of the technical proposals in appendix 4.