

Briefing Note #1

Guernsey's Proposed Discrimination Legislation (Disability Provisions): the proposed definition of disability

Summary

The proposed definition of disability will not affect an employer's ability to choose the best person for the job.

The proposed definition does not mean that employers will have to dispense with absence policies. An employer's expectations that an employee must be able to carry out the essential tasks of a job (taking account of any reasonable adjustments) will not be changed. No employer will be expected to employ a person unable to complete those essential tasks.

The GDA accepts the proposed definition as a pragmatic compromise, having been advised that persons with disabilities risk losing all protection if a compromise could not be found.

The GDA has compromised its position on defining disability on three occasions, moving from its initial stance that disability should not be defined at all (e.g. Canada, Holland, Finland, Denmark).

The GDA agreed to accept the proposed restricted definition so long as a review system was established.

The initial focus of disability discrimination legislation should be on the alleged discriminatory act, not on proving the existence of impairment to an arbitrary standard of longevity or effect.

There are six main concerns about definitions based on medical models:

1. They fail to enable all persons affected by disability discrimination to challenge and remedy that discrimination.
2. They are not compliant with the Convention on the Rights of Persons with Disabilities.
3. Proving effect of impairment is unnecessary and can be personally invasive and can even require a person to re-live previous examples of discrimination.
4. "Medical models present an irresistible invitation to litigate" (David Baker, renowned Canadian disability lawyer)
5. They promote misunderstanding about the true nature of disability and perpetuate stigma and prejudice based on concepts of "inability" and helplessness, rather than explaining that disability is a rights issue.

6. They add significant complexity for all parties, invite litigation and adds to length and costs of legislation

The definition proposed in the Policy Letter restricts protection from discrimination on the basis of duration of impairment but does not restrict by the individual having to otherwise prove that they are disabled enough to be protected from discrimination.

The proposed definition will fail to protect anyone whose impairment is expected to last less than six months.

Fears that social model definitions (discussed below) will result in frivolous and nefarious complaints are groundless and unsubstantiated.

A medical model definition of disability will offer persons affected by disability inferior protection against discrimination and introduce unnecessary complexity and barriers to justice to all parties.

Background

Guernsey's Disability and Inclusion Strategy, and the Convention on the Rights of Persons with Disabilities, are based on a social model of disability.

The Convention itself does not attempt to define disability, instead it recognises that:

“is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”

Article 1 (Purpose) explains that persons with disabilities **include** those with long term impairments. Whilst the focus of the convention is on those with long term impairments this should not be misconstrued to be defining.

Both the Convention and the Strategy have been misunderstood by some as being limited to persons with long-term impairments. The Committee for the CRPD has, through its General Comments, been clear that all persons should be protected against discrimination on the basis of impairment and that the focus of legislation should be on the discrimination, not on proving disability.

“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. Anti-discrimination law that is disability-inclusive seeks to outlaw and prevent a discriminatory act rather than target a defined protected group.” (Extract from CRPD General Comment 6)

Medical models (such as used in UK and Jersey) are structurally incapable of tackling all forms of disability based on disability as required by the Convention, this

is because they seek to target a defined group and, in doing so, exclude persons with short term impairments (12 months UK, 6 months Jersey) and many who cannot demonstrate limitations in personal functioning.

Medical models pre-suppose that discrimination resulting from short term impairments, or from impairments that do not affect personal functionality, cannot be serious enough to warrant challenge. The requirement to prove functional limitation excludes persons with disabilities that do not impact on personal capabilities but are the focus of social prejudice.

Medical definitions are deficit based. Instead of requiring a focus on a discriminatory act, the focus is on whether someone is “disabled enough” to be protected against discrimination. The use of medical definitions can be an affront to the dignity and privacy of the person. It can even result in having to re-live previous examples of discrimination.

Medical models are far more complex for all parties to understand, requiring, for example, employers to distinguish between and record absences due to illness separately from absences due to disability. Such a requirement invites employers to decide who is and who is not disabled, rather than concentrating on whether employment and service procedures are designed as inclusive from the very start, and failing that, whether and how disability can be accommodated.

Medical model definitions were originally adopted partly because of fears of opening a floodgate of complaints. These fears have proved groundless: many jurisdictions either do not define disability (e.g. Canada, Denmark, Italy, Finland) or have adopted broad impairment-based definitions, unrestricted either by duration of impairment or functional limitation (e.g. Australia, NZ, Hong Kong,) with no floodgate effect.

Some business fears are based on a misunderstanding of disability and are not evidence based. GDA has evidence from Canada, Australia and New Zealand showing that broad unrestricted definitions do not invite people to feign disability discrimination or make nefarious, vexatious, or insubstantial claims.

There is evidence¹ - that because of the stigma associated with the term “disabled”, many people who might be entitled to challenge disability-based discrimination choose not to identify as disabled.

Note: Guernsey Disability Alliance does not offer legal advice. Whilst this document has been checked for factual error by experts in human rights and discrimination law, opinions within this document are those of the Executive of Guernsey Disability Alliance LBG and are not offered as legal advice

¹ See, for example, Kennedy & Jain-Link, June 2019, [“Why people hide their disabilities at work”](#), Harvard Business Review