Guernsey Disability Alliance

Equality • Dignity • Inclusion

# Briefing Note #3

## Guernsey's proposed discrimination legislation: is there a need for impact assessments?

### Main points

- **Business groups have signalled support for the current proposals**
- **Guernsey is committed to introducing discrimination legislation and the current proposals have been substantially amended to reflect public consultation**
- **The impact on public sector finances is largely in the States' control (Accessibility Plans). Additional assessment is not needed**
- **The legislation will not place a disproportionate burden on any single business or organisation: no further assessment is needed**
- **Comprehensive impact assessment would require consideration of the wider social and economic benefits, not just cost to business. Such assessments are likely to be costly, time consuming, and not value for taxpayer's money**
- **Impact assessments in the UK and elsewhere show enduring economic benefit from such legislation**
- **Estimates of the costs of reasonable adjustments have been wildly exaggerated**
- **The proposals are not "gold plated" and do not go further than required to meet international standards**

### Summary

The legislation, as proposed in the Committee for Employment and Social Security's Policy Letter, has been developed with the intention of preventing discrimination. The legislation should be compliant with the principles of the Convention on the Rights of Persons with Disabilities (CRPD)[1] - and other Conventions - since the European Court of Human Rights treats these principles as the international benchmark on disability rights.

In the GDA's opinion, in no respect do the proposals go further than required by CRPD (not "gold plated"). In some respects, the required standards are not fully met[2]

Calls for impact assessments have probably resulted from a misunderstanding of the duties which will be introduced by the legislation in relation to,

(1) accessibility and,

[1] The States agreed, in Nov 2013, to seek extension of the Convention "at the earliest appropriate opportunity".

[2] For Example, reasonable adjustments relating to physical features of building, 6-month qualification in definition of disability, and provisions required to promote, protect and monitor rights and to implement the CRPD.

(2) reasonable adjustments, and from exaggerated estimates of costs relating to these duties. Further concerns have been voiced about the cost of other aspects of compliance (e.g. cost of implementation, defending claims, etc).

For impact assessments to be comprehensive, there would be a need to consider the wider intentions and effects of such legislation, which include the social and economic benefits that are intended to result from the prevention of discrimination, including greater social cohesion (#GuernseyTogether) and greater participation and inclusion.

Additionally, it is necessary to consider Guernsey's international standing and reputation as a modern and civilised democracy committed to complying with internationally agreed standards (as well as recognising the damage that could result from non-compliance).

Such assessments are arguably not necessary (progressively realisable rights, etc) and may indeed cost more to produce than can be justified as a prudent application of taxpayer's funds.

As example, assessments of the impact of the UK Equality Bill[3] identified that while there might be an overall cost to the UK economy in the first year of between £145m and £217 m, subsequent years would result in a net benefit of between £23m and £85m - year on year.

## Background

The consultation process, and subsequent comment (particularly from business groups) identified a perceived need for the States to carry out impact assessments.

There will be costs associated with implementation and compliance however, some estimates of costs have been wildly exaggerated.

Discrimination legislation is required by various international agreements and conventions to which the States are already committed. The costs should be viewed alongside the intended and potential benefits to society but, in any case, such assessments would not change either the need to introduce the legislation or the internationally agreed principles such as progressive realisation and undue burden. that underpin those Conventions.

The following sections explain some of these fundamental principles, both with regard to how CRPD explains their effect and with regard to how the proposed legislation either does or does not comply with these principles, which, if understood, should reduce the concerns of those calling for impact assessments.

[3] Equality Bill Impact Assessment, Version 3 (House of Commons Report Stage), November 2009

1. **The duty to anticipate general accessibility, as explained by CRPD:**

   According to CRPD, the general accessibility duty is an anticipatory duty owed to groups such as wheelchair users, persons with visual or auditory impairments or persons with learning difficulties. [4]

   The duty placed on the private sector to anticipate accessibility is not the same as the duty placed on the public sector.[5] The CRPD explains that the duty to achieve general standards of accessibility in the public sector is an unconditional duty which may be achievable over time. The accessibility duty applicable to the public sector is limited only by the overall resources available to government.

   The duty on the private sector, however, is not unconditional: it is limited by the principle of undue burden and by any standards which may be applied and regulated by government.

   CRPD requires governments to actively promote accessibility and to provide adequate guidance about accessibility in general, and about specific standards that may exist.

   Furthermore, governments are required to monitor progress in improving accessibility. Once the UK's ratification of CRPD has been extended to Guernsey, a summary of Guernsey's progress would be included within the UK's four yearly reports the UN Committee for CRPD.

2. **The Accessibility duty as currently proposed**

   The Policy Letter does not contain an explicit accessibility duty. Instead, this is implied (and partially applied) through a requirement for public sector entities to produce Accessibility Action Plans within five years of enactment, and by the provisions dealing with indirect discrimination.

   During those five years, general accessibility in the public sector will be open to challenge as a form of indirect discrimination. However, as currently proposed, claims of indirect discrimination involving changes to a physical feature of a building will not be allowed for five years from enactment. While it will be possible to challenge other matters of accessibility, all such claims may be mitigated if the relevant public sector authority is able to show that their plans include reasonable removal (at some future point) of the barrier concerned.

   Again, there is no explicit accessibility duty proposed on the private sector. Private sector entities will be encouraged, but will not be required, to produce Accessibility

[4] Committee on the Rights of Persons with Disabilities Eleventh session 31 March–11 April 2014 General comment No. 2 (2014) Article 9: Accessibility
[5] Ibid

Action Plans. This encouragement will include general advice and guidance, including on voluntarily producing Accessibility Action Plans.

As in the public sector, claims involving changes to physical features of buildings will not be possible for five years from enactment.

Private entities that choose not to complete Accessibility Action Plans may be at greater risk of not being able to use a defence that might have been available from such planning. Challenges on the basis of poor accessibility would be via claims of indirect discrimination. Such claims would be limited by the principle of disproportionate burden and expressed in the legislation as what is reasonable. The principle of disproportionate, or undue, burden is well established in legislation in, for example, Europe, USA, Canada and Australia.
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## 3. The duty to make reasonable adjustments for individuals, as explained by CRPD[6]

According to CRPD, the duty to provide reasonable adjustments is a reactive duty, enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order for that individual to enjoy their rights on an equal basis in a particular context. CRPD explains[7]- that this duty applies to both public and private entities.

Employers and service providers are required by CRPD to discuss the adjustment with the individual and, in judging reasonableness, should consider both the appropriateness and necessity of any proposed adjustment. Experience elsewhere shows that, in most instances, both the necessity and appropriateness of adjustments are obvious (discussion is still required). Where there is a dispute about either the need for, or appropriateness of, an adjustment, free guidance and advice will be available.

## 4. The reasonable adjustment duty as currently proposed

The proposals include a separate immediately enforceable duty which complies with CRPD in all respects except where claims involving a failure to adjust a physical feature of a building are concerned. Currently, the Policy Letter proposes a five-year moratorium on such claims. Whilst the moratorium on claims involving indirect discrimination as explained in 2. (above), is allowable under CRPD, a similar moratorium preventing what should be an immediately enforceable right is not. In this respect, the proposals do not meet the standard required.

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[6] For further details please see Committee on the Rights of Persons with Disabilities Eleventh session 31 March–11 April 2014 General comment No. 2 (2014) Article 9: Accessibility

[7] See the Committee for CRPD General Comment 2 (Article 9, Accessibility)

Employers and service providers would not be required to make an adjustment that would constitute a disproportionate burden.

According to Croner[8], the respected UK Employment Law, HR and Health & Safety Services experts, in most cases (approximately 60%), reasonable adjustments are procedural and will involve little or no cost other than the cost in management time to consider the appropriateness and necessity of the adjustment.

> "The average cost of a reasonable adjustment varies depending on particular reports and publications, but the estimate lies somewhere between £30 - £180 per individual. The size (and cost) of the adjustment is usually relative to the size of your company."

For most of the adjustments that do have costs implications, the costs are modest. The Policy Letter identifies that:

> *"workplace accommodations not only are low cost, but also positively impact the workplace in many ways"*

Mechanisms already exist, through Social Security, that can assist with the cost of such adjustments and the GDA understands that further consideration is proposed to broaden the employment field for persons with disabilities by providing further support for smaller employers, as the principle of undue burden tends to skew employment opportunities towards larger employers.

It is worth noting that a report[9] -into the UK's Access to Work Scheme suggested that for every £1 spent on their Access to Work Scheme produced a return to the exchequer of £1.48

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[8] https://croner.co.uk/resources/recruitment/mythbuster-expensive-hire-disabled-workers/ accessed 18th March 2020

[9] Liz Sayce, 2011, Review to government, Department of Work & Pensions, "Getting in, staying in and getting on - Disability employment support fit for the future"