

STATES ADVISORY AND FINANCE COMMITTEE

**PROPOSALS FOR COMPREHENSIVE EQUAL STATUS AND FAIR
TREATMENT LEGISLATION**

The President
States of Guernsey
Royal Court House
St. Peter Port
Guernsey

20th August 2003

Dear Sir

**PROPOSALS FOR COMPREHENSIVE EQUAL STATUS AND FAIR
TREATMENT LEGISLATION**

1. The Advisory and Finance Committee believes that elimination of discrimination should be a central tenet of government because it is a fundamental basis for any democratic and civilised community. A legislative framework is required to achieve this objective. The Committee is however mindful that any legislative measures must be both appropriate and proportionate to the Bailiwick's circumstances.
2. In the 2003 Policy and Resource Plan the Advisory and Finance Committee reported on the progress of work on proposals for the elimination of all forms of discrimination and, in particular, against women and on the grounds of race. The Committee reported in the following terms:

“In respect of these two Conventions [the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Elimination of Racial Discrimination] the Committee is closely monitoring discussions in the United Kingdom about the possibility of consolidating and harmonizing its discrimination laws under a single equality act. The Committee believes that there is merit in incorporating anti-discrimination measures into a single piece of legislation and is keen to learn more about the experiences of other jurisdictions of drafting and operating unified equality laws as this could produce a clearer way for ensuring and promoting equality across the board rather than in a piecemeal way and be a more proportionate approach for the Bailiwick and one that is simpler and more accessible.”

3. The introduction of a legal framework to deal with discrimination would also assist in giving effect to international obligations under a number of conventions which have been extended to the Islands, namely:
 - a) The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Registered in Bailiwick 18th March 1969 - In force 6th April 1969);
 - b) The International Covenant on Economic, Social and Cultural Rights (ICESCR) (Ratified 20th May 1976, in force 20th August 1976);
 - c) The United Nations Declaration of Human Rights 1948;
 - d) The International Covenant on Civil and Political Rights (Article 26) (ICCPR) (Ratified 20th May 1976, in force 20th August 1976).
 - e) The European Convention on Human Rights (ECHR) (Extended to the Bailiwick 23rd October 1953).

Set out below is a brief statement of the relevant article(s) in the aforementioned conventions and our current status in that regard, where there are outstanding issues.

a) The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

4. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted by the General Assembly of the United Nations in March 1969. The Bailiwick of Guernsey was included in H.M. Government's ratification of this Convention. CERD is the oldest and most widely ratified United Nations Convention relating to Human Rights.
5. Under the Convention, State Parties are required to:

“engage in no act or practice of racial discrimination against persons, groups of persons or institutions”
and
“review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination”.
6. Article 9.1 of the Convention requires State Parties to submit regular reports on:

“...the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of [the] Convention....”
7. Her Majesty's Government as a State Party is required to include in its reports measures within the dependent territories, that is the Crown Dependencies and Overseas Territories, for the elimination of racial discrimination. The Insular

Authorities have been required to submit reports periodically since 1994 and most recently in 2000. In 2000 the concluding observations of the Committee on the Elimination of Racial Discrimination included the recommendation that:

“The authorities complete the current process of enacting legislation outlawing all racial discrimination”.

8. In August 2000 the United Kingdom submitted its 15th Report to the United Nations in respect of CERD and the Committee reported in the following terms in respect of the Bailiwick’s work to fulfil its obligations under the Convention:

“ - *The Advisory and Finance Committee in Guernsey has decided, in principle, that it will lay proposals before the States later this year which will recommend the enactment of legislation rendering racial discrimination unlawful.*

- *Evidence of the Advisory and Finance Committee’s intention to pursue this matter is contained in paragraph 4 of a letter to the President of the States of Guernsey dated 5 July 2000 and will be included as an appendix to the next Billet d’Etat which is due for publication on 8 September 2000. Paragraph 4 of that letter reads:*

“The various issues raised in the Report will be addressed, in appropriate cases, in policy letters to the States. One such issue is the introduction of legislation regarding racial discrimination which the Advisory and Finance Committee intends to refer to the States later this year.”

- *Notwithstanding the fact that the States have not yet resolved on the matter, the Advisory and Finance Committee has already requested HM Procureur (Attorney General) to commence drafting appropriate legislation.*
- *Guernsey is also liaising closely with the Jersey authorities regarding the responses their Working Party is receiving in respect of their discussion paper published in December 1999 on race discrimination legislation.”*

9. The United Nations High Commissioner for Human Rights made the following comments in his concluding observations of the Committee on the Elimination of Racial Discrimination in respect of the submission made by the United Kingdom of Great Britain and Northern Ireland:

“The Committee encourages the State Party to introduce specific legislation against racial discrimination by private persons and organizations currently taking place in several of the [British] Territories.

The Committee remains concerned that specific legislation against racial discrimination has not yet been introduced in all [British] Territories and recommends the State party to continue its efforts to encourage such territories to proceed to the adoption of legislation, prohibiting and penalizing racial discrimination, in accordance with the provisions of the Convention.”

b) The International Covenant on Economic, Social and Cultural Rights (ICESCR)

10. The International Covenant on Economic, Social and Cultural Rights (ICESCR) seeks to guarantee that all human beings enjoy economic and cultural freedoms irrespective of nationality, place of origin, race or ethnicity.

“Part II, Article 2

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

c) The United Nations Declaration of Human Rights

11. The United Nations Declaration of Human Rights provides in Article 1 that **“all human beings are born free and equal in dignity and rights”** and, in Article 2 says that **“everyone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind.”**

d) The International Covenant on Civil and Political Rights (ICCPR)

12. The International Covenant on Civil and Political Rights provides in Article 2:

“1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

e) The European Convention on Human Rights

13. The European Convention on Human Rights provides:

“Article 14 - Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

14. The Committee acknowledges that the Human Rights (Bailiwick of Guernsey) Law 2000 will have some effect in this area by virtue of the concept of discrimination adopted by the Convention organs. Violations of Article 14 are not generally found, however, unless the discrimination at issue is direct and overt. In addition, the Law will be binding in the fullest sense only on public authorities.
15. The Council of Europe adopted Protocol 12 to the European Convention on Human Rights in 2000. It contains a general prohibition on discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, which affects the enjoyment of any right guaranteed by law. It also prohibits discrimination by public authorities. It is to be regarded as an additional article to the ECHR. To date the UK has not signed or ratified it but it is indicative of a general tendency within (in particular) Europe.

Conventions not yet extended to the Bailiwick

16. There is a further anti-discrimination convention which has not yet been extended to Guernsey, that is the International Convention on the Elimination of all forms of Discrimination against Women.
17. That Convention was adopted by the General Assembly of the United Nations in December 1979. The Bailiwick of Guernsey was not included in H.M. Government's ratification of this Convention.
18. It is the most comprehensive treaty on women's human rights, establishing obligations to end discrimination. Often described as an international bill of rights for women, the Convention provides for equality between women and men in the enjoyment of civil, political, economic, social and cultural rights. Discrimination against women is to be eliminated through legal, policy and programmatic measures and through temporary special measures to accelerate women's equality, which are defined as non-discriminatory.
19. State Parties are required to end all forms of discrimination against women and to ensure their equality with men in political and public life with regard to nationality, education, employment, health and economic and social benefits. Obligations are also imposed to eliminate discrimination against women in marriage and family life and to ensure that women and men are treated equally before the law. States are required to take account of the particular problems of women in rural areas, and their special roles in the economic survival of the family.

20. The rights and freedoms afforded by the aforementioned Conventions do not have any meaning unless they are deliverable, that is, they must be capable of being enforced. The rights and freedoms they embrace will exist in practice only if there exists the means and capacity to take positive steps not only to ameliorate an individual's experience of discrimination and racism but also to reduce the likelihood of its occurrence or recurrence.

Proposals for Equal Status and Fair Treatment legislation

21. The Committee is mindful that any measures to eliminate all forms of discrimination must be both appropriate and proportionate. It therefore believes that the introduction of one comprehensive law represents the best way forward because it would:
- (a) strengthen all areas of anti-discrimination measures;
 - (b) ensure that each area can draw on and learn from developments in relation to other areas;
 - (c) prevent the development of a hierarchy of equality grounds;
 - (d) encourage the promotion of equality in all areas;
 - (e) reduce the likelihood of marginalization;
 - (f) lead to the development of a societal approach which opposes any form of discrimination; and
 - (g) provide the most cost efficient and proportionate approach.
22. The approach recommended by the Committee would enable the States, by Ordinance, to legislate to define those personal attributes which justify anti – discrimination and fair treatment measures, and to prevent one person being treated less favourably than another within defined parameters. Such grounds could include: gender; race, nationality or ethnic or national status; colour; disability; marital status; family status; sexual orientation; religion; and age.
23. In the United Kingdom anti-discrimination legislation has been developed in a piecemeal fashion. In many instances legislation has been passed in response to:
- (a) immediate problems;
 - (b) determined lobbying by pressure groups seeking protection from discrimination;
 - (c) legal developments in the European Union.
24. As a result of this piecemeal approach gaps and inconsistencies have inevitably developed. In the United Kingdom legislation currently prohibits discrimination on a significant but limited number of protective grounds, namely, sex, colour, race, nationality or ethnic or national grounds, disability, marriage and gender reassignment. There is also legislation prohibiting less favourable treatment on grounds of trade union membership and for part-time workers. In Northern Ireland additional legislation also prohibits

discrimination on the grounds of religious belief, political opinion and membership of the Irish traveller community.

25. In addition to these 'domestic' provisions, in 2000 the European Community agreed a Directive for establishing a general framework for equal treatment in employment and legislation to cover discrimination in employment on the grounds of age, religion or belief, and sexual orientation. A separate Directive the same year provided for equal treatment between persons irrespective of racial or ethnic origin and covers employment as well as other areas. Furthermore, in 2002 the existing Directive on the equal treatment of men and women as regards access to employment, vocational training and promotion and working conditions was updated to incorporate the case law of the European Court of Justice and to bring it into line with the two non-discrimination Directives which were adopted in 2000.
26. The Committee is determined to avoid the problems which the United Kingdom has experienced and believes that a single equal status and fair treatment law would provide cohesion and consistency. It would also be more efficient and cost effective over time. The Committee acknowledges that in the Bailiwick there are very few protections against discrimination, and is not proposing that anti-discrimination measures should be introduced in all the aforementioned grounds at this time. Indeed the process will evolve over many years. However, it is mindful that society, and its regard to what is reasonable and acceptable conduct, is changing. Therefore, the Bailiwick must ensure that it has appropriate provisions in place to ensure that the rights and freedoms of individuals are appropriately safeguarded. An Equal Status and Fair Treatment 'enabling' law should ensure that equality and fair treatment is a core principle of our society.
27. The Committee stresses that legislation will only be proposed after the most thorough analysis of the perceived ground of discrimination, and most importantly the social and economic consequences of such legislation. In particular the States must be able to take into account whether Guernsey's economy, or the well being of any sector of the economy, or public finances, would be adversely affected by such legislation.
28. On 14th January 2003 the Equality Bill was introduced as a private Member's bill in the House of Lords which seeks to provide a comprehensive and less complex alternative to the current raft of United Kingdom anti-discrimination measures. The Committee believes that the experience of other jurisdictions, including Northern Ireland, Eire, Australia, New Zealand and Canada, suggests that such a co-ordinated approach may ensure that there is less dilution of power and resources within an equality agenda.
29. A second, but no less important strand to the elimination of all forms of discrimination is the promotion of equality of opportunity. Any obligation not to discriminate is, in most cases, a negative one. The active promotion of

- equality of opportunity and the value of diversity can serve to reduce the incidence of discrimination and so create a more harmonious society. The Committee firmly believes that promotion of equality of opportunity through education and the dissemination of information is vital complement to the enforcement of a legal framework for achieving such objectives.
30. The final factor for consideration has been the enforcement of anti-discrimination legislation. In the UK, cases of alleged discrimination are currently considered in various tribunals. The Equality Bill proposes that such cases will be referred to an employment tribunal in all situations apart from education or immigration cases which will be referred to an equality tribunal. In Ireland, cases of alleged discrimination are normally referred to the Director of Equality Investigations, the only exceptions being gender cases which are referred to the Circuit Court and dismissal cases which are referred to the Labour Court. The Director will investigate the matter and issue a binding decision which can be appealed to the Circuit Court.
 31. The monitoring of compliance with legislation and the promotion of anti-discriminatory practices, including advice to the public, is carried out by various bodies in the UK which have been established under the piecemeal legislation in this area e.g. the Commission for Racial Equality. The Equality Bill envisages the establishment of an Equality Commission to undertake this role for all grounds of discrimination. This would be similar to the Equality Authority in Ireland which also has the power to issue non-discrimination notices. These notices either require the cessation of a discriminatory action/policy or require that an equality clause be complied with.
 32. The Committee therefore recommends the States to approve the principle of progressing anti-discrimination and equality promotion measures through a single equal status and fair treatment law which will afford the most effective and responsive way of eliminating all forms of discrimination, whilst being appropriate and proportionate to the Bailiwick's needs and circumstances.
 33. It is proposed that the legislation will cover the six areas as detailed in Appendix 1, namely:
 - Part 1 – Definition of discrimination
 - Part 2 – Grounds for prohibition of discrimination
 - Part 3 – Areas for prohibition of discrimination
 - Part 4 – Enforcement
 - Part 5 – Equal Status and Fair Treatment Commissioner
 - Part 6 – Promotion of equal status and fair treatment
 34. In its very broadest terms discrimination will be defined as the treatment of a person or group of persons in a less favourable way than another person or group of persons on grounds of one or more of the areas of discrimination, as

- defined under the law. Discrimination will be established either directly or indirectly.
- (a) Direct discrimination will be made through a direct comparison, for example gender discrimination will compare the treatment of a man against a woman in like circumstances;
 - (b) Indirect discrimination will occur when practices or policies which may not appear to discriminate against one group more than another actually have a discriminatory impact. Indirect discrimination may also occur where a requirement, which may not appear discriminatory, adversely affects a particular group or class of persons.
35. The legislation would include a power for the States to amend by Ordinance the definition for a particular ground. This may only be necessary for some grounds and would not detract from the general definition in the enabling legislation. It is also proposed to address issues of harassment within the enabling legislation.
36. The proposed single equality legislation will provide an enabling legislative framework Order in Council under which subordinate legislation, principally by Ordinance, will be developed to deal with the discrimination on various grounds in the areas defined under the law. These areas may for example include employment, the provision of services, the supply of goods, the disposal of premises and the provision of accommodation, advertising, educational/vocational provision, planning matters.
37. The Advisory and Finance Committee anticipates that the first discriminatory ground which will be addressed will be racial discrimination in light of the Islands' international obligations under the International Convention for the Elimination of all forms of Racial Discrimination (see paragraphs 4 to 9 above). A non-exhaustive list of other discriminatory grounds which could be introduced by Ordinance are sex, age, sexual orientation, marital status, family status, gender reassignment, religion, political or other opinion, national or social origin, language, birth, or property. It is anticipated that the legislation will also include a common time limit for complaints.
38. The legislation will include sections detailing the circumstances where discrimination is permissible. The most important will be where any proposed measure will have an adverse effect on Guernsey's economy, or any sector of the economy, or bear unduly on public funds. Furthermore, regard may be had to permitted exceptions established in other jurisdictions, which may include;
- (a) Bona fide preferential treatment for people disadvantaged in a particular opportunity in relation to other persons;
 - (b) The provision of facilities to cater for the special needs of some individuals which would not be required by other persons;

- (c) Circumstances where there is a danger that criminal or disorderly conduct or behaviour might be induced or there is a danger that criminal damage might be occasioned;
 - (d) Restrictions in accordance with licensing laws;
 - (e) Preferential rates or charges for certain groups e.g. family membership or free admission for the over 60s;
 - (f) Medical reasons e.g. different treatment due to ongoing medical treatment or a clinical judgment.
39. The Committee envisages that the appointment of an Equal Status and Fair Treatment Commissioner will be based on similar existing offices, for example the Data Protection Commissioner and Legal Aid Administrator. This office will need to be at 'arms length' from the States as the Commissioner will be responsible for monitoring and, where necessary, taking action against the public sector in regard to anti-discrimination measures. The role of the Commissioner will also include the active promotion of equality and the equality legislation, and the ability to issue non-discrimination notices similar to those issued in Ireland. Further consideration will need to be given as to the precise mechanism for the creation of the office of Commissioner and the initial status of the Commissioner.
40. The legislation would also contain the power to impose a positive duty on public bodies to promote equality and eliminate discrimination, similar to that contained in the Equality Bill currently before the English Parliament. This would include the active promotion of non-discrimination and equality through education and training.
41. The Committee is mindful that the establishment of the post of Commissioner represents the creation of a further such office. However, it firmly believes that such offices are essential if the Island is to fulfil its international obligations and it will seek, wherever possible, to ensure that administrative resources and staff are combined and remain proportionate to the requirements of the administration of the legislation.
42. The Advisory and Finance Committee envisages that in the future, persons aggrieved by discriminatory practices will have access to a tribunal to adjudicate on the matter. A centralised tribunal system is currently under development and provision should be made in the enabling legislation to allow for this form of redress in the future.

Consultation

43. Responsibility for discrimination and unfair treatment in the area of employment rests with the Board of Industry through the Industrial Relations Service. The Committee has therefore sought the views of the Board of Industry which are:

“The Board of Industry concurs that a legislative framework that would support specific elements of anti-discrimination legislation would be a pragmatic way of dealing with this issue.

The Board of Industry is mindful that legislation for the elimination of all forms of discrimination cuts across the whole range of issues including the treatment of individuals in employment.

The Board intends to lay before the States a draft law outlawing discrimination in employment on the grounds of gender. Should the States decide at some point to extend the scope of the Sex Discrimination Law to cover the provisions of goods, services and education, or to address equal pay issues, this could be achieved through the enabling legislation, by amending the Sex Discrimination Law. Further, should the Authorities in Alderney and Sark wish to have such legislation extended to their Island this could be achieved in the same way.

The Board is also considering bringing proposals to the States later this year to strengthen the adjudication process that it currently runs under the Employment Protection (Guernsey) Law, 1998. This strengthened service may well be able to provide the mechanism to deal with complaints of discrimination in areas other than in employment.”

44. The Committee is pleased that the Board of Industry supports the proposals for comprehensive equal status and fair treatment legislation.

Alderney and Sark

45. The Committee has sought the views of the Authorities in Alderney and Sark and is pleased that both Islands support the proposals and would wish it to be drafted as Bailiwick legislation. This support for comprehensive equal status and fair treatment legislation means that all the Bailiwick’s citizens will benefit from the protection against discrimination which the proposed legislation will provide.

Conclusions

46. The Committee restates that these proposals extend only to the enactment of enabling legislation, and that no Ordinance enacting equal status and fair treatment measures under any ground will be brought to the States without the fullest consideration of the civic issues and consequences, particularly social and economic.
47. The Advisory and Finance Committee recommends the States to agree that enabling legislation to make discrimination unlawful and to promote equality of opportunity and diversity be prepared.

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48. I should be grateful if you would lay this matter before the States with appropriate propositions, including one directing the preparation of the necessary legislation.

Yours faithfully

L. C. MORGAN

President
Advisory and Finance Committee

APPENDIX 1

**OUTLINE FOR COMPREHENSIVE EQUAL STATUS AND FAIR
TREATMENT LEGISLATION**

Part One

DEFINITION OF DISCRIMINATION

**The meaning of discrimination
Actions or failure to act which constitute discrimination**

Part Two

GROUNDS FOR PROHIBITION OF DISCRIMINATION

**Sex/Gender
Race/Colour/Ethnicity
Religion/Belief
Age
Disability
Sexual Orientation
Gender Reassignment**

Part Three

AREAS FOR PROHIBITION OF DISCRIMINATION

**Employment
Education
Access to Goods, Services, Facilities and Premises
Housing
Planning
Practices and Advertisements
Professional and Representative Bodies
Exemptions**

Part Four

ENFORCEMENT

**Redress in respect of prohibited conduct
Enforcement and Mediation
Non-Discrimination Notices
Compensation**

Part Five

EQUAL STATUS AND FAIR TREATMENT COMMISSIONER

**Composition
Function, Powers and Rôle
Regulation**

Part Six

PROMOTION OF EQUAL STATUS AND FAIR TREATMENT

**Obligations on Public Authorities
Education and Training
Establishing and Monitoring Equal Status and Fair Treatment Measures
Reporting**

The States are asked to decide:-

XIV.- Whether, after consideration of the Report dated the 20th August, 2003, of the States Advisory and Finance Committee, they are of opinion:-

1. That legislation shall be enacted along the lines set out in that Report to make discrimination unlawful and to promote equality of opportunity and diversity.
2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.