States of Jersey
States Assembly

États de Jersey
Assemblée des États

Health, Social Security and Housing Scrutiny Panel

Draft Discrimination (Jersey) Law 201-

Presented to the States on 3rd May 2013

S.R.7/2013

CONTENTS

1. Introduction

Background

The States of Jersey has been working on anti–discrimination legislation since 1999. In 2011, the Home Affairs Minister advised that the proposed Draft Discrimination (Jersey) Law 201 (hereafter cited as "Draft Law") would not be lodged in time for debate, citing a number of difficulties. Responsibility for the Draft Law was then passed to the Social Security Minister who made a commitment that the legislation would be drafted during 2012. The Draft Law was lodged by the Social Security Minister in January 2013.

The Review

The Panel agreed that the Draft Law was an important piece of legislation to review, and it was very grateful to the Minister for deferring the debate until May so that it had sufficient time to conduct a review.

Around the time the Draft Law was lodged, the Panel was already undertaking a review into the Housing Transformation Programme and a review of the Health Department's Full Business Cases for the redesign of Health and Social Services. These two reviews were expected to last until the first quarter of 2013. Therefore, in the interest of time and to ensure a thorough review was carried out, it was agreed that the most appropriate course of action was to commission an independent expert advisor to undertake further study of the Draft Law.

Parslows Lawyers were appointed by the Panel in January 2013. After an initial discussion with the Panel, Parslows requested a series of meetings with various stakeholders which took place in February and March. Parslows submitted a report in April 2013 for the Panel to consider, which is included in section 4 of this report.

Panel Background Work

The Panel was advised that the Jersey Chamber of Commerce and other organisations had concerns about the Draft Law, which at the time had not been lodged, but had been part of a consultation process. The Panel wrote to the organisations[1] asking whether they had taken part in the consultation, and if not to provide it with their views on the Draft Law.

Some organisations replied with their original submissions to the Minister for Social Security and others requested a meeting with the Panel. Once the Panel agreed to commission Parslows to undertake further study of the Draft Law, the names of the organisations were passed on so that Parslows could meet with the organisations to further discuss their concerns. During a meeting with Parslows it was decided that representatives from the Citizen's Advice Bureau, the Voluntary and Community Sector and the Jersey Advisory and Conciliation Services should be contacted.

As part of the Panel's preliminary background work, it also met with the Jersey Community Relations Trust. The main message was that the Trust supports the implementation of the Draft Law and believes that it will offer legal protection to Islanders who face unequal treatment on grounds of colour, nationality, ethnic origins and national origins[2].

[1] Chamber of Commerce, Institute of Directors, Chartered Institute of Personnel and Development, Chartered Management Institute, Jersey Hospitality Association, Jersey Farmers Union, Jersey Construction Council Association of Jersey Architects
[2] The Community Relations Trust website

2. Key Findings and Recommendations

Following a review of the report submitted by Parslows, the Panel have made the following key findings and recommendations:

Key Findings

1. The development of protection against discrimination in Jersey began in 1991 with the first consultation on a draft race Discrimination Law taking place in 2006 supporting a commitment made by the States in 2002 [section 2].

2. Following further consultation by the Minister it is proposed that regulations will be introduced to address discrimination on grounds of sex, age and disability [section 5.2].

3. The Draft Law is closely based on the UK Equality Act, which has several advantages including generating a relatively low volume of case law since Jersey is a small jurisdiction, as well as the ability to look at UK case law which assists in interpretation of the legislation, enabling a greater measure of certainty as to the likely outcome of cases [section 9.1.1].

4. Article 2 of the Draft Law applies to acts of discrimination committed in Jersey, but it is unclear whether a prohibited act occurring outside the Island may give rise to a breach of the Draft Law [sections 5.8 and 5.9].

5. Article 12 of the Draft Law only covers Jersey law partnerships and not partnerships formed under the laws of other jurisdictions which may be operating in Jersey. The Minister has since lodged an amendment to address this issue [section 5.13].

6. The automatic consideration of conciliation once a complaint of discrimination has been lodged is appropriate due to the success of the Jersey Advisory and Conciliation Service in resolving complaints under the Employment (Jersey) Law 2003 [section 9.1.6].

7. Although the Draft Law does not currently provide the Tribunal with authority to award costs against an unsuccessful party Article 42(3)(c) does allow the Minister to prescribe "the circumstance in which costs may be awarded and their amount"[section 5.18.1].

8. The level of compensation provided for under the Draft Law is subject to a maximum limit of £10,000 however compensation for hurt and distress is limited to a maximum of £5,000. The £10,000 cap was considered reasonable by the Institute of Directors, the Jersey Advisory and Conciliation Service and Citizen's Advice Bureau in terms of paid employment, although concern was expressed as to the effect this would have on a smaller employer, given the current difficult economic climate [section 9.1.8].

9. Concern was expressed as to the effect a compensation award, made at the maximum level permitted, would have on the voluntary sector and other non-profit making areas covered by the Draft Law. Under Article 46 the Minister is able to issue codes of practice which would operate in a similar way to the Magistrates Court Guidelines which apply in relation to the sanctions that may be imposed in specified classes of criminal cases [section 6.20].

10. The Panel note that the provision of discrimination notices had been included in previous drafts of the Law as an alternative or complementary method of addressing complaints of

discrimination was removed because it was considered “inappropriate and disproportionate” [section 5.19.9].

11. Under the provision of Schedule 3 of the Draft Law, appeal from the Jersey Employment Tribunal may be made on questions of law only to the Royal Court. It is noted that the Royal Court retains a general jurisdiction to award costs and it is considered on this basis that the cost of bringing such an appeal deters parties from proceeding to bring appeals [section 5.20.1].

12. Guernsey currently has no race discrimination legislation, but enacted an Ordinance to address sex discrimination in 2005 which is restricted to the employment sphere. This is in contrast to Jersey where the scope of the Draft Law is far wider as it covers not only paid work but also voluntary work including voluntary workers, selection for voluntary work, organisations for voluntary workers and volunteer bureaux. In addition it also covers education, goods, facilities and services, access to and use of public premises, disposal of management of premises, clubs and requests for information [section 6.10].

13. The choice of Guernsey to restrict its sex discrimination legislation to the employment sphere offers one alternative method to addressing similar discrimination issues in Jersey [section 6.9].

14. The attitudes in Jersey in relation to discrimination are already changing and the Draft Law will and already is having an effect on society [section 7.5.11].

15. The Guernsey Ordinance provides for breaches of it to be addressed not just by way of compensation orders but also by non-discrimination notices, which give rise to criminal sanction in the event of non-compliance [section 9.2.2].

16. There is great similarity between the discrimination legislation enacted by the Isle of Man, Guernsey and the UK, which appears to have arisen due to the relevant legislation in these jurisdictions having been based on UK discrimination legislation [section 9.2.4].

17. Smaller businesses are likely to need additional support and training prior to the introduction of the Law to ensure that they have the relevant policies in place. The Jersey Conciliation and Advisory Service would provide training to all business if the Draft Law was accepted by the States [section 7.6.9].

18. Following approval of the Draft Law, there may be additional costs for employers in terms of training and Human Resources costs [section 7.8.13].

19. Although the Draft Law was considered by the Council of Ministers and Chief Officers before it was lodged, it was unclear whether any audits had been carried out to assess whether the Draft Law would directly impact on legislation within other Departments [section 7.8.6].

20. The Jersey Advisory and Conciliation Service and the Employment and Discrimination Tribunal (to be established under provisions of the Draft Law) have considered their resourcing in anticipation of the Draft Law being brought into force and are satisfied that no practical problems will arise [section 9.3.11].

Recommendations

1. The Minister should issue additional guidance for the Jersey Employment Tribunal in order to clarify the uncertainty of whether a breach of the Draft Law may be committed by an employer extra-territorially.

2. In view of the international nature of many businesses that trade within Jersey, the Minister should consider broadening Article 12 of the Draft Law to encompass foreign law as well as Jersey law partnerships which operate within Jersey.

   The Panel discussed this recommendation with the Minister before the report was published, and the Minister has since lodged an amendment to the Draft Law to address this issue.

3. The Minister should consider taking a different approach to the sanctions which may be imposed on profit and non-profit making sectors in relation to the same discrimination acts.

4. Over time, it would be beneficial for the Minister to consider establishing an Employment and Discrimination Appeals Tribunal to sit in common between Jersey and Guernsey in order to hear appeals from both jurisdictions. Discussions should take place with Guernsey to determine whether a joint Employment and Discrimination Appeals Board could be established.

5. The Minister should give further consideration to providing the Tribunal with other options such as the power to issue non-discrimination notices in the first instance as part of the "bedding-in" process.

6. Following approval of the Draft Law, the Minister should ensure that plain English guidance notes are made available to all businesses and voluntary organisations to assist them in complying with the Law.

3. Conclusion

The Draft Law has been largely based on the UK Equality Act, and therefore there are significant similarities between Guernsey and Isle of Man legislation. This would suggest that there is opportunity for joint working practices with other Crown Dependencies, particularly in relation to the appeals process. The Panel has recommended that the Minister initiates a discussion with Guernsey to determine whether a joint Employment and Discrimination Appeals Board could be established.

Some employment organisations identified a number of concerns relating to the Draft Law and its implementation. Most put forward the argument that in the current economic climate, businesses should be encouraged and have an opportunity to flourish and the implementation of this Law would create additional pressure and red-tape. For example, the level of compensation provided for under the Draft Law is subject to a maximum limit of £10,000 however compensation for hurt and distress is limited to a maximum of £5,000. The £10,000 cap was considered reasonable by the Institute of Directors, the Jersey Advisory and Conciliation Service and Citizen's Advice Bureau in terms of paid employment, although concern was expressed as to the effect this would have on a smaller employer and the voluntary sector, given the current difficult economic climate.

The Panel has recommended that the Minister ensures that plain English guidance notes are available to all businesses and voluntary organisations in order to assist them in complying with the Law. Furthermore, the Panel has suggested that, as part of a bedding-in process, further consideration should be given to providing the Tribunal with other options such as the power to issue non-discrimination notices in the first instance. It was noted that the provision of discrimination notices had been included in previous drafts of the Law, but had been removed after being considered "inappropriate and disproportionate". The Panel disagree and believe that a discrimination notice in the first instance would assist businesses and voluntary organisations in fully understanding and complying with the Law.

Since smaller businesses are likely to need additional support and training prior to the introduction of the Law, it is clear that organisations such as the Jersey Advisory and Conciliation Service (JACS) will play a vital role. Some questioned whether JACS and other bodies such as the Citizen's Advice Bureau and the Jersey Employment Tribunal would have the resources to cope with an increased workload. After discussions with these organisations, however, they assured that the resource implications had been considered and were satisfied that no practical problems would arise.

The States has been contemplating the introduction of this Law for a considerable time. The benefit of this is that most people have become aware of discrimination in general and the forthcoming legislation. The attitudes towards discrimination are already changing and the Draft Law will and already is having an effect on society. The Panel hope that the report has captured not only the general support for the Draft Law but also the genuine concerns expressed by those who took part in the review process.

4. Parslows Lawyers: Discrimination Law Report

April 2013

Health, Social Security and Housing Scrutiny Panel

Report on the
Draft Discrimination (Jersey) Law 201-

Produced by

Advocates, Solicitors and Notaries Public
17 Broad Street
St. Helier
Jersey

Contents

1. Introduction

1.1. In December 2012 the draft Discrimination (Jersey) Law 201- (the "Draft Law") was presented to the Council of Ministers, Corporate Management Board and the Health, Social Security and Housing Scrutiny Panel.

1.2. In February 2013 the Health, Social Security and Housing Scrutiny Panel appointed Parslows, a local firm of Advocates, Solicitors and Notaries Public, to produce a report on the Draft Law.

1.3. The Terms of Reference for the Report that the Health, Social Security and Housing Scrutiny Panel commissioned from Parslows are set out below at Section 3 of this Report.

1.4. In order to compile the Report Parslows undertook wide ranging discussions with representatives of a number of bodies in relation to the Draft Law, including Miss Kate Morel, Policy Principal at the States of Jersey Social Security Department (the "Policy Principal"), and Mr Darren Newman ("Mr Newman"), expert advisor to the States of Jersey Social Security Department concerning the Draft Discrimination (Jersey) Law 201-, Mr David Witherington ("Mr Witherington"), Director of The Jersey Advisory and Conciliation Service ("JACS"), Mrs Caroline Coleman, Assistant Judicial Greffier (the "Assistant Judicial Greffier") of the States of Jersey Judicial Greffe which is responsible for The Jersey Employment Tribunal ("the Tribunal"), Mr Jason Laity ("Mr Laity") and Advocate Vicky Milner ("Advocate Milner") of The Institute of Directors (the "IOD"), Mr Hugh Thomas ("Mr Thomas") and Mr Will Austin-Vautier ("Mr Austin-Vautier") of the Jersey Employment Lawyers Association ("JELA"), Mr Malcolm Ferey ("Mr Ferey") Chief Executive of The Citizen's Advice Bureau (the "CAB"), Mrs Toni Airley ("Mrs Airley") of The States of Guernsey Commerce & Employment Department, Mr John Pinel ("Mr Pinel"), Chief Executive of the Jersey Voluntary and Community Partnership, and collectively with representatives of: The Chamber of Commerce, the IOD, the Chartered Institute of Personnel and Development ("CIPD"), the Chartered Management Institute, the Jersey Hospitality Association, the Jersey Farmers Union, the Jersey Construction Council and the Association of Jersey Architects.

2. Background

Summary of the history of the development of protection against discrimination in Jersey:[3]

1991 – 1993: Codes of Practice: A number of Codes of Practice were introduced by the States and States Committees dealing particularly with the issue of sex discrimination, sexual harassment and maternity rights to establish guidelines and raise awareness of what amounted to acceptable practice.

1998: Employment legislation: In 1998, the former Employment and Social Security Committee issued "Fair Play in the Workplace" which consulted on a range of topics connected with the workplace, including discrimination. The research culminated in the Committee taking a proposal to the States on Employment Legislation (P.99/2000, adopted by the States) which advocated that issues surrounding discrimination in the workplace should be dealt with through a separate all-encompassing Discrimination Law to be championed by the then Policy and Resources Committee.

1999: Race Relations Working Party: The former Legislation Committee established a Race Relations Working Party which consulted on the issues of race relations and racial hatred in 1999.

November 2000: Racial Discrimination Forum: The Racial Discrimination Forum, led by the then Policy and Resources Committee was established. Members were from both the public and private sectors and their work culminated in the States voting to set up the Jersey Community Relations Trust (P.120/2003).

March 2002: Legislation Committee: The Legislation Committee lodged a proposal for the preparation of a Race Discrimination Law (P.32/2002), based upon the recommendations of the Working Party (published as R.C.46/1999). In May 2002, the States voted overwhelmingly in favour of the proposal. However, the Committee then reviewed the lack of legislation in Jersey aimed at eliminating forms of discrimination other than race. It concluded that it would be desirable to take the opportunity to bring forward legislation which would promote not only the elimination of racial discrimination, but also, other forms of discrimination.

[3] Taken from Appendix 1 of the Report on the Draft Discrimination Law 201-

2004: Jersey Advisory and Conciliation Service (JACS): JACS was established as part of the phased development of employment legislation and opened in 2004. The service advises employers and employees on employment issues.

2005: Jersey Community Relations Trust (JCRT): The JCRT was established in 2005. It aims to "eliminate discrimination on any ground … and to encourage mutual respect among all people in the Island".

July 2006: First consultation on the Draft Law: The Chief Minister's Department consulted on draft legislation and proposed 'race' as the first protected characteristic in furtherance of the commitment made by the States in 2002. Forty-one responses were received, of which 100 percent were in favour of introducing a law to protect against discriminatory acts. There were some requests for greater clarification or adjustment to certain sections of the draft legislation and these were taken into account in the preparation of a further draft of the Law.

2007: Ministerial responsibility: Responsibility for the Draft Law was transferred from the Chief Minister to the Minister for Home Affairs.

September 2007: JCRT discrimination conference: The JCRT held a major Island-wide conference on discrimination issues that was attended by nearly 300 people from a wide section of the community including many who might be affected by discrimination. It revealed clear support for the introduction of Discrimination Law in Jersey.

February - March 2008: Second consultation on draft legislation: The Home Affairs Department consulted on the changes that had been made to the draft legislation as a result of the 2006 consultation. Only 8 responses were received, which were generally of a technical nature relating to the terminology and application of the Draft Law.

March 2009: Enforcing the law: During discussions with stakeholders in 2008 about the most appropriate method of enforcing the law, the former Chairman of the Employment Tribunal had suggested that the Employment Tribunal should hear all discrimination complaints, not only those that are employment-related. This was proposed instead of options that would involve a Discrimination Panel and the Petty Debts Court, which could be confusing and potentially

inconsistent. The Minister for Social Security supported the suggestion that the Employment Tribunal should adjudicate on all discrimination complaints and be renamed the Employment and Discrimination Tribunal.

April – July 2010: Scrutiny: A Draft Law containing the protected characteristic of race was prepared and was sent to the Education and Home Affairs Scrutiny Panel by the Minister for Home Affairs.

2011: Funding: The Home Affairs Department's budget for Discrimination Legislation (£100,000) was agreed as a CSR saving proposal and so the Draft Law was not progressed.

July 2011: Ministerial responsibility: The States adopted P.118/2011 "Discrimination Law and delay on pension reform", as amended by the Council of Ministers, and responsibility for the **Discrimination Law transferred to the Minister for Social Security, along with sufficient funding** allocated by the Minister for Treasury and Resources for the implementation of discrimination legislation for 2013 and beyond.

May 2012: Law Drafting: The Minister for Social Security submitted the first Law Drafting instructions to the Law Draftsman and drafting continued during 2012.

September – October 2012: Consultation on the Draft Law was undertaken with stakeholders, including representatives of the Tribunal, JACS, CAB, Chamber of Commerce and Institute of Directors. In view of the comments received, the Minister requested further amendments to the draft legislation.

December 2012: The Draft Law was presented to the Council of Ministers, Corporate Management Board and the Health, Social Security and Housing Scrutiny Panel.

3. Terms of Reference

3.1 The following terms of reference for this report were provided by the Health, Social Security and Housing Scrutiny Panel:

1. To provide specific comment on the Draft Law itself.

2. To provide general comment on the Draft Law by comparison with similar legislative provisions in other jurisdictions.

3. To consider the anticipated impact of the Draft Law by reference to the comments received concerning it from interested bodies within Jersey.

4. To consider the justification for choosing race as the first characteristic to be addressed.

4. Glossary of Terms

"Equality Act" – the Equality Act 2010

"Minister" - The Minister for Social Security

"Ordinance" - The Sex Discrimination (Employee) (Guernsey) Ordinance 2005

"Mrs Coleman" – The Assistant Judicial Greffier, Jersey Employment Tribunal

"JASS" – Jersey Annual Social Survey 2012

"JEND" – Jersey Employers Network on Disability

"JCRT" – Jersey Community Relations Trust

"The Policy Principal" – Miss Kate Morel, Policy Principal, States of Jersey Social Security Department

"Mr Newman" – Mr Darren Newman, expert advisor to the States of Jersey Social Security Department concerning the Draft Discrimination (Jersey) law 201-

"Mr Witherington" – Mr David Witherington, Director of the Jersey Advisory and Conciliation Service

"Tribunal" – The Jersey Employment Tribunal

"Mr Laity" – Mr Jason Laity, Chair, Jersey Institute of Directors

"IOD" – Jersey Institute of Directors

"Advocate Milner" – Advocate Vicky Milner, Member, Jersey Institute of Directors

"Mr Thomas" – Mr Hugh Thomas, Jersey Employment Lawyers Association

"Mr Austin-Vautier" – Mr Will Austin-Vautier, Jersey Employment Lawyers Association

"Mr Ferey" – Mr Malcolm Ferey, Chief Executive, Citizens Advice Bureau

"Mrs Airley" – Mrs Toni Airley, Principal Employment Relations Officer, Commerce & Employment, States of Guernsey

"CIPD" – Chartered Institute of Personnel and Development

5. The Draft Law

5.1. As is acknowledged within both the background summary to the Draft Law[4] and by the Expert Advisor to the Minister for Social Security, Mr Newman[5], the Draft Law is closely based on the United Kingdom's Equality Act 2010 (the "Equality Act"), although being restricted to a single protected characteristic, race, whereas the Equality Act sets out 9 protected characteristics.

5.2. It is noted that the Draft Law is intended by the Minister for Social Security (the "Minister") to be "an overarching law that provides a framework for protection against discrimination", and that, following further consultation by the Minister, it is proposed that further Regulations may be introduced to address discrimination on grounds of sex, age or disability[6]. The decision by the Minister to introduce race as the first protected characteristic is addressed subsequently within this report at Section 8.

5.3. Since Jersey is a small Jurisdiction which will inevitably produce a far more limited body of case law than the United Kingdom, it is perceived that there is benefit from directly mirroring many of the legislative provisions contained within the Equality Act, since this will enable both the Employment and Discrimination Tribunal which is to be established to hear cases arising from the Draft Law, and those appearing as parties before that Tribunal/their advisors, to obtain guidance from UK case law on issues arising from similarly drafted articles within the Equality Act, although such case law will be of persuasive authority only, rather than being binding on the Tribunal.

5.4. This perceived advantage has been expressly acknowledged by a number of the commentators on the Draft Law, including Mr Thomas[7]. The comments made by Mrs Airley in relation to the Sex Discrimination (Employment)(Guernsey) Ordinance, 2005 (the "Ordinance"), which is based on the pre-Equality Act UK anti-sex discrimination legislation, are instructive in that respect, her observation being that the Guernsey Employment Tribunal which hears cases arising under that Ordinance found the ability to have regard to the interpretation that has been made of similarly worded legislation to be extremely helpful, with the non-binding nature of such judgments permitting the Tribunal

[4] Draft Discrimination (Jersey) Law 201-, page 4
[5] Appendix 1, page 74
[6] Draft Discrimination (Jersey) Law 201-, page 4
[7] Appendix 1, page 78

to adapt those precedents as necessary to fit the particular requirements of a smaller jurisdiction where they deemed that appropriate.

5.5. It is argued that the ability to have regard to previous judicial interpretations of similarly worded legislation benefits both parties, since it provides a greater degree of guidance than may otherwise be available concerning the likely interpretation of the Draft Law, with the effect that parties will have a clearer indication of where they stand, facilitating settlement of cases which may otherwise proceed to hearing. The argument extends to both reducing costs for the parties involved, as well as reducing the caseload for the Tribunal, with a corresponding saving for the States of Jersey.

5.6. Turning to the specifics of the Draft Law, we consider that a number of specific drafting issues arise which warrant specific comment.

5.7. Article 1 – Interpretation

5.7.1. "employee" and "employer" have the meaning given in Article 1A of the Employment (Jersey) Law 2003 and are to be construed accordingly. Section 3 of the Draft Law prohibits acts of discrimination on grounds of race in paid work. The primary focus of all the parties whose views on the Draft Law are annexed to this report[8] is on the impact of the Draft Law within the field of employment, which is considered to be the primary area in which cases under the Draft Law will arise. On that basis the majority of the complaints arising under the Draft Law, if enacted, would appear likely to occur from employment related breaches, and may accordingly be linked to parallel claims brought under the terms of the Employment (Jersey) Law 2003.

5.7.2. In such circumstances it is clearly helpful for a common definition of employee and employer to be adopted between the two laws, particularly since it is envisaged (as noted from Mr Newman's comments[9]) that claims arising under the Employment (Jersey) Law 2003 and the Draft Law may be effectively consolidated and heard together by the Tribunal, for example if a person was dismissed from by reason of race then this may give rise to claims both in relation to unfair dismissal and on grounds of discrimination which would be based on many of the same facts. In such circumstances it clearly makes sense for the evidence in relation to both claims to be heard by and determined at one time by the same Tribunal. Mr Newman explained that the provisions in this regard would be

[8] Appendix 1
[9] Appendix 1, page 74

provided under the employment Law Order making powers contained within Schedule 3(1)(12) of the Employment (Jersey) Law 2003.

5.8. Article 2 – the application of the Draft Law:

"**2 Application of Law**

(1) This Law applies to acts of discrimination committed in Jersey.

(2) Without prejudice to the generality of paragraph (1), this Law applies to an employment which requires the person to work wholly or mainly in Jersey."

5.9. As is noted by Mr Thomas[10] and Mr Witherington[11], the territorial application of this article potentially remains ambiguous, since although it states that the Draft Law applies to acts of discrimination done within Jersey, its application to situations where, for example, an employee was sent by their employer to another jurisdiction where they were then subject to discrimination, is less clear cut. The application of the Article 2(1) is clarified somewhat by Article 2(2) of the Draft Law, but uncertainty still remains as whether a breach of the Draft Law may be committed by an employer extra-territorially nevertheless remains. Clarification of this point by revised drafting would be beneficial.

5.10. Article 6 and 7 of the Draft Law – definitions of direct and indirect discrimination

"6 What constitutes direct discrimination

(1) A person discriminates against another person (the "subject") if, because of a protected characteristic, the person treats the subject less favourably than the person treats or would treat others.

(2) In relation to the protected characteristic of race, less favourable treatment includes segregating the subject from others.

[10] Appendix 1, page 78
[11] Appendix 1, page 85

7 What constitutes indirect discrimination

(1) A person discriminates against another person (the "subject") if the person applies to the subject a provision, criterion or practice which is discriminatory in relation to the subject's protected characteristic.

(2) For the purposes of paragraph (1), a provision, criterion or practice is discriminatory in relation to a subject's protected characteristic if –

(a) a person applies, or would apply it to other persons who do not share that subject's characteristic;

(b) it puts, or would put, persons with whom the subject shares the characteristic at a particular disadvantage when compared with other persons who do not share the characteristic in question;

(c) it puts, or would put the subject at that disadvantage; and

(d) a person cannot show it to be a proportionate means of achieving a legitimate aim.

(3) In determining whether the application of a provision, criterion or practice can be shown to be proportionate for the purposes of paragraph (2)(d), the matters to be taken into account shall include –

(a) the nature and extent of the resultant disadvantage;

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is disproportionate to the result sought by the person applying that provision, criterion or practice.''

5.11. In relation to Article 6 it is noted by both Mr Witherington[12], Mr Thomas[13], and Advocate Milner within her letter of 3 April 2013 written on behalf of the IOD[14], that the issue of comparators are not straightforward, and are envisaged to be one of the areas within the Draft Law which parties will find it most difficult to understand, particularly in relation to the concept of a hypothetical comparator that arises in relation to the prohibition on treating a person less favorably because of their race than they "would" treat another (unidentified, and therefore hypothetical) person. Articles 6 and 7 of the Draft Law are drafted in virtually identical terms to Articles 13 and 19 of the UK's Equality Act, and the concept of a hypothetical comparator can be argued to be fundamental to much anti-discrimination legislation, where the objectives of that legislation may be stymied if it were

[12] Appendix 1, page 85
[13] Appendix 1, page 78
[14] Appendix 1, page 89

drafted in such a way that a breach of the law may only be made out in circumstances where the complainant could actually point to another party who had been treated more favorably than them due to them not sharing the relevant protected characteristic which was possessed by the complainant. Nevertheless, the experience of Guernsey in relation to this same area would support the view that it will be one of the harder concepts arising from the Draft Law to grasp. If the Draft Law is to effectively enable its aims to be achieved, then this will inevitably involve grasping some difficult concepts, and the option of attempting to simplify the terms of the law to remove the concept of a hypothetical comparator appears a poor compromise if it results in the Draft Law effectively losing its ability to protect the individual in one of the very circumstances that it was enacted to address.

5.12. Article 12 of the Draft Law – Partnerships

5.13. It was noted by both Mr Witherington[15] and by Mr Thomas[16], that the Draft Law only covered Jersey law partnerships, but not partnerships formed under the laws of other jurisdictions which may be operating in Jersey. Broadening the drafting of this article to encompass those partnerships was considered to be of benefit.

5.14. Burden of proof

5.15. Mr Thomas[17] expressed the view that the burden of proof was "an ambiguous area...//…and that under the Equality Act 2010, the test amounts to a "reverse burden of proof" (complainant to put forward prima facie case with the burden then switching to respondent to prove that no discrimination occurred, for example). Mr Thomas further expressed the view that the discrimination concepts within the Draft Law…//…do not lend themselves well to analysis based solely on a balance of probabilities and that the drawing of inferences by tribunals in the UK was fundamental to which they dealt with such issues."

5.16. Advocate Milner within her letter of 3 April 2013 on behalf of the IOD[18] similarly notes that "It is understood that the question of the burden of proof – and specifically the way that the burden of proof changes in UK tribunals, falling first on the claimant and then on the respondent – is one that has caused difficulties and confusion." For these reasons it is

[15] Appendix 1, page 85
[16] Appendix 1, page 78
[17] Appendix 1, page 78
[18] Appendix 1, page 89

considered helpful for the Draft Law to be amended to incorporate an Article expressly addressing the question of how the burden of proof is to be approached in discrimination cases, and it is noted that the Guernsey Ordinance contains just such a provision at Article 42:

"Burden of proof before Tribunal.

44. (1) This section applies to any complaint under this Ordinance made to the Tribunal under section 38.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent -

(a) has committed an act of discrimination against the complainant which is prohibited by any provision of Part II, or

(b) is, by virtue of section 25 or 26, to be treated as having committed such an act of discrimination against the complainant,

the Tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."

5.16.1. Mrs Airley[19] noted that this provision was often of assistance to the Tribunal, although she also notes that the Guernsey Employment Tribunal was composed of lay (non-legally qualified) members, and accordingly the question of who have to prove what within a claim formed a significant focus for the Tribunal. This factor may accordingly be of less significance for Jersey, where, on the basis that the composition of the panel will mirror that of the Jersey Employment Tribunal, the panel will include a legally qualified member, but it may clearly be of assistance to a litigant in person who is bringing or defending a claim before the Tribunal.

5.17. Conciliation

5.17.1. Articles 38 and 39 of the Draft Law make provision for automatic consideration of conciliation:

"38 Conciliation in employment-related complaints by conciliation officer

[19] Appendix 1, page 101

(1) The Secretary of the Tribunal shall refer a complaint which concerns, or is done in connection with, employment or work, whether paid or voluntary, to JACS and inform the complainant and respondent of the referral.

(2) If the complainant and respondent so agree, JACS shall appoint a conciliation officer to deal with a complaint referred to it under paragraph (1), and the conciliation officer shall endeavour to resolve the complaint by conciliation.

(3) Notwithstanding paragraph 2(1) of the Schedule to the Jersey Advisory and Conciliation (Jersey) Law 200312, the conciliation officer shall have regard, in conducting the conciliation, to any code of practice approved by the Minister under Article 46.

(4) A conciliation officer appointed to deal with a complaint, who resolves the complaint by conciliation, shall report the outcome to the Secretary of the Tribunal.

(5) The Minister may, for the purposes of paragraphs (1), (2) and (4) prescribe a timescale within which the Secretary of the Tribunal or the conciliation officer (as the case may be) shall do any of the matters referred to in those paragraphs.

39 Conciliation in other complaints

(1) This Article applies to a complaint which does not concern, and is not done in connection with, employment or work.

(2) If the complainant and respondent so agree, the Secretary of the Tribunal shall refer the complainant and respondent to a person qualified in conducting conciliation or mediation who shall endeavour to resolve the complaint and report the outcome to the Secretary of the Tribunal.

(3) The Minister may for the purposes of paragraph (2) prescribe a timescale within which the Secretary of the Tribunal or the person qualified in conducting conciliation or mediation (as the case may be) shall do any of the matters referred to in that paragraph."

5.17.2. It is noted that the approach between complaints connected with employment or work in Article 38 and those which are not so connected in Article 39 is subtly different, in as much as the referral to JACS under Article 38 is mandatory, whilst that under 39 is not. However, in practice this distinction is not considered to materially change the situation, since under the provisions of sub-clause (2) of either Article the decision to engage in conciliation rests with the parties themselves.

5.17.3. It is noted by a number of parties who have been interviewed for the purposes of this report, including the Assistant Judicial Greffier, Mrs Coleman, for the Tribunal itself, that "JACS was an extremely important service to the Tribunal. She explained that the Tribunal works closely with JACS and that frequently, JACS help to settle cases before they go to the Tribunal"[20].

5.18. Should the Tribunal have the jurisdiction to award costs?

5.18.1. It has been noted by a number of those interviewed concerning the Draft Law that it does not contain any provision by which the Tribunal may award costs to a successful complainant, although Article 42(3)(c) does provide that the Minister may prescribe "the circumstances in which costs may be awarded and their amount". It is noteworthy that Article 91(4)(g) of the Employment (Jersey) Law 2003 contains a similar provision for the Minister to make orders for the award of costs or expenses, but such an order has yet to be made by him in relation to that legislation. It is also noted that during the meeting between Parslows, Mr. Newman and the Policy Principal on 7 March 2013 the Policy Principal advised that "in 2011 the Employment Forum consulted and recommended to the Minister that the Tribunal should not have the power to award costs and the Minister accepted the recommendation at that time."[21]

5.18.2. The current absence of this provision has notably divided opinion, with the representatives of management and employer's organisations expressing concern that the current absence of a costs jurisdiction means that there is effectively no financial deterrent to unfounded/unmeritorious claims being lodged and pursued, since the complainant has nothing financially to lose, particularly if they are pursuing the complaint as a litigant in person. In comparison it is argued that the employer may in such circumstances be put to significant expense, both directly in terms of legal fees and indirectly in terms of organizational time and resource costs in order to defend themselves against such a claim, which costs they are unable to recover from the complaint if the claim is unsuccessful. Mr Witherington has commented in this regard that "...employers should be protected, especially in the context of vexatious claims. The notion that employees can take their

[20] Appendix 1, page 99
[21] Appendix 1, page 74

employer to Tribunal and have nothing to lose was identified as a poor aspect of the law."[22]

5.18.3. However, this is clearly an area where a careful balance has to be struck between imposing a mechanism to protect parties against whom an unfounded claim is brought, and imposing a costs regime at a level which will deter parties with a genuine complaint from pursing it due to the fear that, should they be unsuccessful, they will potentially face a significant costs award being made against them.

5.18.4. The question of costs should also be considered in light of the level of the compensation which the Tribunal is able to award, which is capped under the provisions of Article 42 of the Draft Law at a maximum of £10,000. We return to the question of the appropriateness of the level of that cap below, but its importance in the context of a consideration of costs is that the level of costs should be proportionate to the level of compensation that may be awarded. The danger with introducing a costs regime which mirrors that in operation in Jersey's civil courts (where it should be noted that costs nevertheless remain at the discretion of the Court), is that the level of costs claimed may equal or exceed the level of compensation awarded, which would be both disproportionate and may well act as a bar to potential claimants lodging a complaint.

5.18.5. One potential solution may be to adopt a system similar to that which Mrs Airley describes as being operated by the Guernsey Tribunal[23], whereby the Tribunal can award costs, but they are limited to exclude legal costs, and include those for document preparation and the costs associated with attendance at the Tribunal.

5.18.6. It is noted that the Jersey Employment Tribunal similarly has no current jurisdiction to award costs against an unsuccessful party, although provision for such to be introduced exists under the Employment (Jersey) Law 2003.

5.18.7. It is noted in this context that the Draft Law likewise contains provision under Article 47 for the States by Regulations or Orders to make amendments or further enactments concerning the Draft Law, which may be used to subsequently introduce a power to award costs should that be considered appropriate.

5.19. Level of Compensation Award

[22] Appendix 1, page 85
[23] Appendix 1, page 101

5.19.1. As has been stated above, under Article 42 of the Draft Law the level of compensation that may be awarded is limited to a maximum of £10,000:

"42 Remedies available

(1) Where the Tribunal finds that a complaint is well-founded, it may do one or more of the following –

(a) declare the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) order the respondent to pay to the complainant compensation for any –

(i) financial loss, in an amount not exceeding £10,000, and

(ii) hurt and distress, in an amount not exceeding £5,000,

provided the sum of any award made under sub-paragraph (b)(i)

and (b)(ii) does not exceed £10,000;

(c) recommend that the respondent take, within a specified period, action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

(2) Where there is more than one respondent, the Tribunal may order that the payment of compensation be apportioned in such amounts as it considers just and equitable.

(3) The Minister may prescribe the following –

(a) the matters which the Tribunal may take into consideration in determining amounts of compensation under paragraph (1)(b),

including having regard to any award made in an employment dispute to which Article 86 of the Employment Law applies, which was founded on the same facts as those in respect of which compensation is being sought under this Law;

(b) the circumstances in which interest may be added to amounts of compensation, and the rates of interest that may be applied;

(c) the circumstances in which costs may be awarded and their amount.

(4) The States may by Regulations amend paragraph (1)(b) so as to –

(a) amend the maximum amounts of compensation that may be ordered by the Tribunal;

(b) introduce different maximum amounts that may be so ordered in respect of the elements of compensation for financial loss or for hurt and distress;

(c) remove any limit on any amount that may be so ordered, being a limit on the amount of compensation or on the amount of any element of compensation for financial loss or for hurt and distress."

5.19.2. By way of comparison the level of compensation which may be awarded under the UK Equality Act 2010 is uncapped[24], whilst that which may be awarded for sexual discrimination by the Guernsey Tribunal is capped at 3 months pay, and that which the Jersey Petty Debts Court was able to award was similarly capped at £10,000. The view of the IOD, JACS and the CAB was that cap at £10,000 was reasonable, although this appeared to be predominantly approached from the perspective of a claim being brought in the context of an employment relationship. In that regard it is important to highlight that the scope of the Draft Law covers not only discrimination in the context of paid work (Articles 9 to 16), but also Voluntary Work and Organisations (Articles 17 to 20), Education (Article 21), Goods, facilities and services (Article 22), Access to and use of public premises (Article 23), Disposal or management of premises (Article 24), Clubs (Article 25), and Requests for information (Article 26).

5.19.3. Within the scope of these areas, for example voluntary work/organisations and clubs, the impact of a compensation award being made at the maximum level permitted under the Draft Law (or indeed at a level below that) may be entirely disproportionate to the resources of the organization/club involved, and have a devastating if not fatal impact on the ability of that organization/club to remain in existence. There are two obvious ways of addressing that concern. The first is to simply rely on the discretion of the Tribunal when determining the level of the award, whilst the second is to produce a scale of levels of compensation which may be awarded taking into account specified criteria, which may include the seriousness of the discrimination complained of and the type/resources of the respondent to the complaint. Such guidelines, which may be prescribed by the Minister under the provisions of Article 42(3)(a) would operate in a similar way to the Magistrates Court Guidelines which apply in relation to the sanctions that may be imposed in specified classes of criminal cases.

5.19.4. The latter of those options would additionally provide guidance which would be helpful for Conciliators and the parties themselves/their advisors when attempting to settle complaints prior to a Tribunal hearing, since in the absence of such guidance the question

[24] Mr Newman, Appendix 3, page 74

of what level of compensation (up the maximum of £10,000) is likely to be awarded remains at large until a body of case law (reported cases) is built up providing guidance on how the Tribunal has dealt with similar cases that have come before it.

5.19.5. It is noted that within the Minister's Report to the States concerning the review of the Jersey Employment Tribunal produced by Mr Darren Newman dated March 2013, the Minister comments that, amongst other things,

"The following matters were identified in the report;

1. It is efficient to include provision in the Employment Law that fixes the amount of unfair dismissal awards, as this means that the Tribunal can often decide the merits of the case and remedy at the same time, without the need for a separate remedies hearing. However, fixing the award of compensation in this way can sometimes appear unfair in specific cases.

2. In some cases, the Tribunal has declined to reduce compensation for unfair dismissal. Article 77F(10) of the Employment Law allows the Tribunal to reduce the amount of compensation to take into account any circumstances that it considers would be 'just and equitable'. While this power might be wide enough to allow a Tribunal to make what is known in the UK as a 'Polkey' deduction - to reflect the extent to which the employee would have been dismissed even if the employer had behaved reasonably - in practice the Tribunal has not yet considered such a reduction to be 'just and equitable'."

5.19.6. Applying these conclusions by analogy to the Draft Law, they would arguably support a fixed tariff approach to instances of discrimination, albeit that such may "…sometimes appear unfair in specific cases". Such an approach may offer a similar benefit to that set out in relation to the Employment Law by permitting the case to be determined without the potential necessity for a separate remedies hearing.

5.19.7. Returning the level of cap specified in relation to the Draft Law, Mr Ferey commented that: "It was the Chief Executive's opinion that the £10,000 cap on compensation was right, and from his experience, the money side is usually a secondary consideration for most people and that seeking an apology is the main priority. When questioned on how the damages

will be monitored, the Chief Executive agreed that guidelines would need to be developed for levels of compensation."[25]

5.19.8. However, Mr Newman has commented, in the context of codes of practice relating to the requirements for an employer to adhere to, that "…codes of practice are not always a good idea. They could be seen as imposing further requirements on employers which might be seen as burdensome or bureaucratic. All that the law required of employers was that they do not discriminate on the grounds of race. There was no positive duty to be complied with."[26]

5.19.9. One alternative or complementary method of addressing complaints of discrimination that was addressed by a number of the commentators was introduce a provision into the Draft Law whereby discrimination notices may be issued by the Tribunal. It was noted in the Ministers Report[27] that previous drafts of the Draft Law had contained this provision, which was also contained in the Guernsey Ordinance and within UK anti-discrimination legislation, including that which preceded the Equality Act 2010. It is noted within Appendix to the Minister's Report on the Draft Law that this was removed because it was considered "inappropriate and disproportionate"[28], and the Minister notes that "…similar provisions appear to be rarely used in the UK (around 7 notices in 35 years) and in Guernsey (zero notices in 7 years)"[29].

5.19.10. Two points arise from this. Firstly, that fact that the provision to issue such notices has not utilized in the UK does not of itself mean that a similar system may not be used or useful in Jersey. Secondly, it is apparent from Mrs Airley's comments[30] that "…the reason that no non-discrimination notices had been issued in Guernsey was that prior to the issuance of such it was her practice to issue a 'notice to furnish information' letter as a stated preliminary to issuance of a non-discrimination notice, and stated that such letters were issued on average between 7 – 12 times per year, albeit that the issuance of those notices had dropped off significantly in the two years. The non-discrimination notices provision within the Ordinance accordingly operated by way of the advance notice that the issuance of such a notice was under consideration, which in her experience was of itself

[25] Appendix 1, page 82
[26] Draft Discrimination (Jersey) Law 201-, page 2
[27] Draft Discrimination (Jersey) Law 201-, page17
[28] Draft Discrimination (Jersey) Law 201-, page 17
[29] Draft Discrimination (Jersey) Law 201-, page 17
[30] Appendix 1, page 101

sufficient to ensure that the problem complained of was resolved without the necessity to issue a notice itself."

5.19.11. Regarding the frequency with which these notices are issued in Guernsey, Mrs Airley stated that the Guernsey Employment Tribunal would deal with approximately 50 to 70 unfair dismissal claims in a year, and that 23 claims had been lodged before the Tribunal on the ground of sex discrimination (all bar 3 alongside a claim for unfair dismissal) since the commencement of the Ordinance, with just 7 of those being referred to the Tribunal for determination. Of those 7, 4 were found in favour of the applicant (3 on grounds of discrimination and one purely on the ground of unfair dismissal). On that basis we consider that the ability of the Tribunal to issue non-discrimination notices under the terms of the Draft Law is worthy of further consideration.

5.20. Appeals

5.20.1. Under the provisions of Schedule 3 of the Draft Law, Appeals from the Jersey Employment and Discrimination Tribunal which is to be established under the terms of the Draft Law, may be made on questions of law only to the Royal Court.

5.20.2. A number of issues have been raised by commentators in relation to this appeals process, primarily in relation to the issue of whether the costs which may thereby be incurred by appellant (since the Royal Court exercises a jurisdiction to award costs), when viewed against the sum in issue, would be sufficient to deter most parties from appealing purely on that financial ground. This was concisely summed up by Advocate Milner: "Parslows asked why there were so few appeal cases. Advocate Milner said that it was her understanding that this was purely down to the high cost of bringing appeals, the low value of most Tribunal claims and the fact that there was no costs regime: at present it made little financial sense to try to appeal a Tribunal decision as it was likely to mean throwing good money after bad"[31]. A number of the other commentators who's views are set out in Appendix 1 to this report were of the view that it would be beneficial to investigate the possibility of establishing an Employment (and Discrimination, if the Draft Law is adopted) Appeals Tribunal, which certain commentators suggested may be set up to sit in common between Jersey and Guernsey in order to hear Appeals from the Tribunals in both jurisdictions.

[31] Appendix 1, page 89

5.21. The definition of race

5.22. Race is defined in Schedule 1 of the Draft Law in the following terms:

"2 Race

(1) Race is a protected characteristic.

(2) Race includes –

(a) colour;

(b) nationality;

(c) national origins;

(d) ethnic origins.

(3) In relation to the protected characteristic of race –

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(4) A racial group is a group of persons defined by reference to race, and a reference to a person's racial group is a reference to a racial group into which the person falls.

(5) The fact that a racial group comprises 2 or more distinct racial groups does not prevent it from constituting a particular racial group.

(6) For the purposes of this Law, "national origins" includes being of Jersey origin."

5.22.1. The decision to single out the fact that being of Jersey origin is included within the definition of race for the purposes of the Draft Law has been subject to criticism by Mr Thomas[32] in who's view it would be better for Guernsey or the Channel Islands as a whole to be included. Moreover, Mr Thomas was of the view that this section would be better included within the statutory guidance.

[32] Draft Discrimination (Jersey) Law 201-, page 3

6. The approach - comparison with similar legislative provisions in other jurisdictions

6.1. As is set out elsewhere in this report, it is acknowledged by the Minister and his advisers that the approach that was taken when preparing the Draft Law was to base it on the UK Equality Act, albeit that the Draft Law is currently restricted to the characteristic of race, whereas the Equality Act encompasses 9 protected characteristics.

6.2. A number of issues arise from that decision, including whether it was possible or appropriate to approach the issue from an alternative legislative perspective, and whether approaching it from the perspective of the Equality Act, which was drafted for a jurisdiction having a population of 63.2 million,[33] is proportionate to a jurisdiction having a population of 97,857[34].

6.3. Moreover, the question arises as to whether the scale of the problem in Jersey warrants the introduction of such comprehensive legislation, or whether the issue may be more proportionately addressed by other means, such as the introduction of codes of practice, increased public education, or amendments to existing legislation to enable race discrimination to be addressed by it.

6.4. By way of comparison in those respects the legislative approach to discrimination in Guernsey and the Isle of Man has been examined, with those jurisdictions having been chosen since they are broadly comparable to Jersey in terms of both their population size and economic situation.

6.5. <u>Guernsey</u>

6.6. Guernsey has no race discrimination legislation in force, but introduced The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 (the "Guernsey Ordinance"), which came into force on 1 March 2006.

6.7. Like the Draft Law in Jersey, the Guernsey Ordinance was based on anti-discrimination legislation enacted in the UK, albeit that which preceded the Equality Act, which itself codified the proceeding UK legislation in that area.

[33] Office of National Statistics, 2011 Census Day estimate
[34] States of Jersey Statistics Unit, Census 2011

6.8. However, unlike the Draft Law, which is extremely comprehensive in regard to the areas which it covers, the Guernsey Ordinance is broadly limited in scope to sex discrimination in the employment field and in relation to discriminatory practices and advertisements.

6.9. It has been suggested by certain commentators on the Draft Law[35] that a similar approach of largely restricting the scope of the Draft Law to the employment sphere may be adopted in relation to race discrimination in Jersey, and that this may be achieved by an amendment to Article 3 of the Employment (Jersey) Law 2003, such that employers were required to have a written non-racial discrimination policy within their employment contracts, and that at the same time JACS or the Minister could publish a non-discrimination policy dealing with racial discrimination. If desired, adherence to this policy may be enforced by inserting a new Article 3(2)(n) into the Employment Law, such that failure to have such a policy could give rise to civil sanction and or a criminal prosecution.

6.10. In contrast with the position in Guernsey, the scope of the Draft Law is far wider, and, as is set out at paragraph 5.20.2 of this report, expressly covers not only paid work but also voluntary work, including voluntary workers, selection for voluntary work, organisations for voluntary workers and volunteer bureaus. It also covers education, goods, facilities and services, access to and use of public premises, disposal or management of premises, clubs, and requests for information. The consequence of this is that the effect of the Draft Law on discrimination in Jersey is significantly more far reaching than the Guernsey Ordinance, and accordingly the repercussions resulting from its introduction are far more difficult to accurately predict. This has led a number of commentators to raise concerns that the Draft Law, if introduced, may have unforeseen and unwanted consequences. This issue is returned to within section 7 of this Report.

6.11. Under the terms of Article 46 of the Guernsey Ordinance, the amount of the award which may be made by the Tribunal if an act of discrimination is proven is fixed at 3 months pay or one weeks pay multiplied by 13 if the complainant is paid on a weekly basis:

"Amount of award.

46. (1) Subject to the provisions of subsection (3) and section 47, the amount of an award of compensation under section 45 is a sum equal to -

(a) three month's pay, or

[35] Appendix 1

(b) where the complainant is paid on a weekly basis, one week's pay multiplied by 13.

(2) For the purposes of subsection (1), the amount of a month's pay or (as the case may be) a week's pay is, subject to the provisions of subsection (3), an amount equal to the complainant's average monthly pay during the three month period immediately preceding the relevant date or (where the complainant was paid on a weekly basis) his average weekly pay during the 13 week period immediately preceding that date.

(3) In a case where, in the opinion of the Tribunal, the basis set out in subsection (1), as read with subsection (2), for calculating the award is inappropriate, the award shall be calculated on such other basis as the Tribunal (having regard to the provisions of those subsections) considers to be just and equitable in the circumstances of the case."

"Reduction of award in certain cases.

47. Where in relation to a complaint under this Ordinance the Tribunal finds that the complainant has unreasonably refused an offer by the respondent which, if accepted, would have had the effect of putting the complainant in all respects in the position in which he would have been had the act which founded the complaint not occurred, the Tribunal shall reduce the amount of the award of compensation under section 45 to such extent as it considers just and equitable having regard to that finding."

6.12. As has been explained by Mrs Airley, the starting position under the Guernsey Ordinance is that the Tribunal must, if the complaint is proven, make an award at the specified level, subject to the exception set out in Article 47 of the Ordinance.

6.13. In contrast, the position under Article 42 of the Draft Law is that the Tribunal will have discretion to make an award at the level it considers appropriate up to a maximum of £10,000:

"42 Remedies available

(1) Where the Tribunal finds that a complaint is well-founded, it may do one or more of the following –

(a) declare the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) order the respondent to pay to the complainant compensation for any –

(i) financial loss, in an amount not exceeding £10,000, and

(ii) hurt and distress, in an amount not exceeding £5,000, provided the sum of any award made under sub-paragraph (b)(i)

and (b)(ii) does not exceed £10,000;

(c) recommend that the respondent take, within a specified period, action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates."

6.14. In regard to the financial penalties which may be imposed on voluntary organisations and/or their members, it is noted that Mr Witherington considered that "How the system would cope with non-employment issues such as charities was questionable. It was agreed that the punishment should not necessarily be a monetary sum, and a warning in the first instance via a notice would be appropriate. In order for this to be carried out effectively, the Director agreed that there should be a contact point and it was suggested that the Enforcement Officers based at Social Security may be able to do this."[36]

6.15. In terms of the available sanctions, the Guernsey Ordinance makes provision for sanctions both by way of awards of compensation, and, under Part VI of the Ordinance, for the issuance of non-discrimination notices in relation to discrimination occurring under Part II of the Ordinance, whether or not an act of discrimination which is prohibited by any provision of that part has been brought or not. Such notices may be issued:

"(2) If the Department is satisfied that a person is committing, or has committed, any such act or contravention, the Department may serve on him a notice ("a non-discrimination notice") requiring him -

(a) not to commit any such act or contravention, and

[36] Appendix 1, page 85

(b) where compliance with paragraph (a) involves changes in any of his practices or other arrangements -

(i) to inform the Department that he has effected those changes and what those changes are, and

(ii) to take such steps as may reasonably be required by the notice for the purpose of affording that information to other persons concerned.

(3) A non-discrimination notice may also require the person on whom it is served to furnish the Department with such other information or documents as may reasonably be required by the notice in order to verify that the notice has been complied with.

(4) The non-discrimination notice may specify the time at which, and the manner and form in which, any information or document is to be furnished to the Department, but the time at which any information or document is to be furnished in compliance with the notice shall not be later than five years after the notice was served.

(5) The Department shall not serve a non-discrimination notice in respect of any person unless it has first -

(a) given him notice that it is minded to issue a non-discrimination notice in his case, specifying the grounds on which it contemplates doing so,

(b) offered him an opportunity of making oral or written representations in the matter (or both oral and written representations if he thinks fit) within a period of not less than one month specified in the notice, and

(c) taken account of any representations so made by him.

(6) A person who -

(a) without reasonable excuse, fails to comply with any requirement contained in a non-discrimination notice, or

(b) wilfully alters, suppresses, conceals or destroys a document required to be produced by a non-discrimination notice,

is guilty of an offence and liable on summary conviction -

(i) in the case of an offence under paragraph (a), to a fine not exceeding level 5 on the uniform scale,

(ii) in the case of an offence under paragraph (b), to a fine not exceeding level 5 on the uniform scale, imprisonment for a term not exceeding 3 months, or both."

6.16. As will be seen from the above, the Ordinance provides for criminal sanction in circumstances where the compliance notice is not complied with without reasonable excuse.

6.17. Moreover, the Ordinance provides for a register of non-discrimination notices to be established, which may be publically inspected on payment of such fee as may be determined by the department, and additionally provides for the department to obtain information where it believes that a person may be committing or may have committed specified breaches of the Ordinance or have failed to comply with any requirement contained within the non-discrimination notice.

6.18. The evidence of Mrs Airley, which is set out in section 7 of this Report, is that the advance notice that the department is considering issuing a non-discrimination notice has itself been sufficient to ensure compliance with the Ordinance.

6.19. The Draft Law contains no equivalent to this statutory notice system, and opinions on whether such would be beneficial are divided amongst the commentators on the Draft Law.

6.20. Both the Guernsey Ordinance and the Draft Law make provision for codes of practice to be issued, the Guernsey Ordinance specifically stating that failure to observe any provision of a code of practice may be taken into account in any proceedings under the Ordinance. A similar provision, which occurs under the provisions of Article 46 of the Draft Law, has been considered to be helpful in Jersey by certain commentators on the Draft Law.

6.21. <u>The Isle of Man</u>

6.22. The Isle of Man has enacted extensive anti-discrimination legislation covering the areas of equality at work, discrimination on the ground of sex, marriage and civil partnership, race, religion or belief, sexual orientation, trade union grounds, discrimination against ex offenders, disability, age, and goods and services. There is currently a proposal for an equality bill which will deal with discrimination comprehensively in relation to the majority of those areas.

6.23. The area of racial discrimination is covered by two pieces of legislation in the Isle of Man, the Race Relations Act 2004, which makes it unlawful to discriminate in the provision of goods and services on the grounds of race, and the Employment Act 2006, section 125 of

which makes it unlawful to dismiss an employee on the ground of his or her race. Within that context the Act covers direct and indirect discrimination in similar terms to the Draft Law:

"125 Racial discrimination and dismissal

(1) Where an employer dismisses an employee-

(a) in circumstances in which the employee is treated less favourably than he or she would have been treated if he or she had been of another racial group; or

(b) because the employee does not meet or has not attained a standard which applies equally to employees who are not of the employee's racial group, but-

(i) which is such that the proportion of persons of the employee's racial group who can meet or attain it is considerably smaller than the proportion of persons not of that group who can do so, and

(ii) which the employer cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied, and

(iii) which is to the employee's detriment because he or she cannot meet or attain it;

the dismissal shall be regarded as unfair for the purposes of this Part.

(2) In this section 'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group are to any racial group into which he or she falls."

6.24. The Isle of Man's Employment Act 2006 permits an order for reinstatement, reengagement, or compensation of up to £50,000, plus a further award of compensation for injury to feelings of up to £5,000. However, Article 145 acts to prevent 'double recovery' by the applicant in circumstances where the discriminatory act may give rise to claims under more than one legislative provision:

"145 Acts which are both unfair dismissal and discrimination

(1) This section applies where compensation falls to be awarded in respect of any act under-

(a) the provisions of this Act relating to unfair dismissal,

(b) the provisions of the Employment (Sex Discrimination) Act 2000, or

(c) the provisions of such other Acts of Tynwald as the Department may by order designate.

(2) The Tribunal shall not award compensation under any one or more of those Acts in respect of any loss or other matter which is or has been taken into account under any other of them by the Tribunal in awarding compensation on the same or another complaint in respect of that act."

6.25. The Isle of Man's Race Relations Act 2004 operates to impose a general duty on public authorities, advertisers, and employers as well as certain other specified classes.

6.26. The Act provides for various remedies for racial discrimination, including for civil claims to be brought on the basis of tort, and appears to be unlimited in nature, subject to the provisions of Article 145 of the Employment Act 2006.

6.27. Although couched in somewhat different terms and with different degrees of application, there is a striking similarity between the Draft Law and the discrimination legislation which has been enacted in the UK, Guernsey and the Isle of Man. This is undoubtedly because they all derive their basic framework and terminology from Anti-discrimination legislation which was first enacted in the UK.

6.28. However, the choice of Guernsey to restrict its sex discrimination legislation to the employment sphere provides one alternative method of addressing the issue of race discrimination in Jersey which may be regarded as appropriate for further consideration if it is not considered appropriate to anti-discrimination legislation of the comprehensiveness of the Draft Law at this stage. The comments which have been received in that respect concerning the Draft Law are explored further in section 7 of this Report.

7. Anticipated impact of the Draft Law

7.1. Pursuant to the terms of reference for this Report, the anticipated impact of the Draft Law is considered by reference to the comments concerning it which have been received from various interested bodies within Jersey.

7.2. In view of the issues highlighted within section 8 of this report concerning the statistical basis for the introduction of the Draft Law, the impact which it may have in the broader context within Jersey must be considered uncertain, since the scale of the problem of racial discrimination within Jersey is itself uncertain. In the absence of more full and focused research it is impossible to assess the true level of the problem that the Draft Law is intended to address.

7.3. The comments which have been received concerning the anticipated impact of the Draft Law may for convenience be broken down into the following areas:

7.3.1. Jersey society

7.3.2. Paid work/employers within Jersey

7.3.3. Voluntary work within Jersey

7.3.4. The other areas prohibited within the Draft Law

7.3.5. The impact on the administrative/judicial bodies who will be involved in the administration of the Draft Law: JACS, The Employment and Discrimination Tribunal, The Royal Court.

7.4. We address these areas in turn.

7.5. The Effect on Jersey Society

7.5.1. A general concern was expressed by certain commentators on behalf of a number of business, professional and employer organisations that anti-discrimination legislation had not been proven to be effective at combating the problem it was intended to address, and that its introduction within Jersey in the form of the Draft Law was disproportionate to the scale of the problem that was perceived to exist here.

7.5.2. The former of those issues has and continues to be a source of academic debate, and as such is not a topic which we consider can be addressed in any meaningful fashion within a report of this scale and nature. We accordingly record the comments which have been made in relation to it by way of a reflection of the opinions of those commentators.

7.5.3. Turning to the latter of those issues, Advocate Milner conveniently summed up many of the concerns that have been expressed when she stated that "…the implementation of any employment legislation (including but not limited to Discrimination Law) was a form of social engineering. There was nothing wrong with this but it was very important that such legislation was appropriate to the society in which it was being implemented, had been assessed as likely to resolve the issue it was being introduced to address, was proportionate and would be more beneficial than harmful."[37]

7.5.4. In regard to raising awareness of the problem of discrimination and providing a mechanism by which it can be addressed, Mr Ferey "…agreed that the Discrimination Law was a form of social engineering. It was hoped that awareness would be raised to employers/employees and the wider general public before the law was implemented. It was noted that Public Relations/media would assist with this."[38]. He went on to state that he considered that Draft Law will, and indeed is already, having an effect in Jersey, commenting that "More people had been asking CAB about the legislation since it has been announced in the media, and the Chief Executive advised that more people would be made aware of discrimination though the law being implemented itself and the media."[39]

7.5.5. He further commented "…that the main feature of such a law is protecting people and giving them the right not to be discriminated against. It would ensure that the correct policies and procedures were in place."[40]

7.5.6. The view of Mr Newman "When asked what effect the UK Law had had on the relationship between employers and employees, Mr Newman explained that it had been transformed."[41]

7.5.7. This view was echoed by Mr Thomas, who"…explained that the benefit of implementing a Discrimination Law was that it would make employers address issues in the workplace, and his experience in the UK was that race legislation had reformed workplaces."[42]

7.5.8. However, "Advocate Milner explained that there was a risk that introducing laws such as non-discrimination legislation may have the opposite effect from what was intended. For example, in the UK many employers will say that they deliberately avoid employing women of child-bearing age through fear of the costs associated with family friendly legislation.

[37] Appendix 1, page 89
[38] Appendix 1, page 82
[39] Appendix 1, page 82
[40] Appendix 1, page 82
[41] Appendix 1, page 74
[42] Appendix 1, page 78

There is also a risk that discrimination legislation simply drives discriminatory conduct under-ground and makes it more subtle without changing attitudes. In addition, Advocate Milner queried whether publicity about such legislation and cases could generate an environment in which people from specified groups start to feel more vulnerable and start to associate normal (but perhaps rude or inappropriate) behaviour with behaviour which is targeted at them because of their racial or other characteristics."[43]

7.5.9. At a more fundamental level, the comments of Mr Witherington are helpful in appreciating an understanding the limitations of the Draft Law, the note of the discussion conducted with him by Parslows for the Scrutiny Panel recording that "Parslows explained that there was an "urban myth" that the law would deal with every situation of race discrimination, including people on the street being discriminative. The Director advised that JACS would assist in conquering this belief but it would be an interesting point to get people to understand. His view was that race discrimination would help people get into the right mindset about discrimination."[44]

7.5.10. In contrast, many of the employers organisations expressed the view during their joint meeting with Parslows that changes taking place in society over the period since the introduction of anti-Discrimination Laws in Jersey were first mooted had now rendered them unnecessary -"It was explained that attitudes to discrimination had changed over the years and that this was not as a result of legislation. It was questioned whether it was appropriate for a small jurisdiction such as Jersey to have Discrimination Law. It was highlighted that legislation is only one option and that there are other ways to deter discrimination."[45]

7.5.11. It is clear from the foregoing that it is perceived that attitudes in Jersey in relation to discrimination are already changing, and that the Draft Law will, and is already, having an effect on society in Jersey, although the question of whether the means of producing that effect would be proportionate to the results remains a matter of contention between the various commentators.

7.6. The effect on paid work in within Jersey

7.6.1. The majority of commentators on the Draft Law for the business, professional and employers organisations considered that the Draft Law would be detrimental to the

[43] Appendix 1, page 89
[44] Appendix 1, page 85
[45] Appendix 1, page 95

operation of businesses in Jersey. Within its letter to Mr. Pritchard, Director of Policy and Strategy Development, Economic Development Department, dated 6 December 2012 the IOD commented that "Great care had to be used when implementing social legislation to ensure that it does not unduly impede businesses' ability to operate properly and effectively, introducing obstructive layers of red tape that do not resolve the problems they were intended to address while creating new problems".

7.6.2. During a meeting between Parslows for the Scrutiny Panel and representatives of the IOD it was recorded that "It was the IoD's view that introducing the Discrimination Law would increase the burden of statutory requirements which businesses already have to comply with, adding another layer of red tape for businesses, in a climate in which unemployment is high. It was noted that the Chief Minister had been advocating that businesses advertise jobs and employ people, but the introduction of the Discrimination Law would be difficult for businesses to welcome especially in the current economic climate. If businesses are being encouraged to employ more people, adding another layer of red tape was described as "counter-intuitive"."[46] This view that the introduction of the Draft Law would act as an impediment to business expansion and the generation of new/permanent jobs within Jersey was generally endorsed by the business, professional and employers organisations who commented on the Draft Law.

7.6.3. This point was linked with concerns expressed by a number of the professional, trade and employers organisations at a collective meeting with Parslows, at the wisdom of introducing the Draft Law during the current recession. In particular, the change in the state of the economy since initial consultations concerning anti-discrimination legislation had occurred was hi-lighted, with the view being expressed that: "…given the different economy, the organisations explained that it seemed strange that Jersey was planning to introduce new laws that would affect business more than any others in the current climate, especially when every other government was trying to relax rules to help stimulate economic growth."[47]

7.6.4. This point was addressed by the Minister within his letter to the Jersey CIPD Group of 5 November 2012 "I agree that we should not burden business with unnecessary regulation. However, Jersey is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which includes a requirement to adopt laws forbidding race

[46] Appendix 1, page 89
[47] Appendix 1, page 95

discrimination. Other jurisdictions may appear to be reducing regulation, but I am not aware of any who are abandoning fundamental protections such as this."

7.6.5. It was considered by a number of the employers organisations that the effect of the Draft Law would be to discourage employers from taking on further permanent employees, and noted, by analogy with the effect of the Employment (Jersey) Law 2003, that whilst "It was agreed that the Employment Law had the right intentions i.e. protecting the employee, but since its inception, employers had found other ways to comply with the law which were less of a burden, for example employing through agencies. It was explained that lessons should be learnt from the introduction of the Employment Law. These should be identified and used in subsequent legislative processes, otherwise the same errors will occur."[48]

7.6.6. Moreover, it was perceived (by the employers, professional and trade groups at their joint meeting with Parslows) that "If the Draft Law was to come into force, it was thought that Jersey would be less of an attraction to business because of the barriers that come with such legislation. The risk of bringing in the Discrimination Law was that it would make Jersey less competitive because it would have a similar legislative structure of Europe."[49]

7.6.7. As a counterbalance to this viewpoint, during the interview between Parslows and Mr Witherington "Parslows questioned whether it was the right time to bring in such legislation taking into consideration the economic climate, but the Director explained that this was not a reason not to face up to discrimination issues. His view was that there is an obligation in Jersey to implement discrimination legislation, and he could not identify any other alternative."[50]

7.6.8. A further commonly expressed concern of the business, professional and employers organisations was in relation to the additional operation costs which they would incur to ensure that they were compliant with the Draft Law should it be enacted. In that regard the IOD commented that "…there will be a cost to businesses from the implementation of the proposed draft Discrimination Law, although it is not aware that any assessment of such costs has been conducted. Businesses would need to develop internal policies, arrange training and deal with any complaints or claims that were raised under or in respect of matters covered by the new law. IoD noted that the Minister for Social Security had stated in the proposition that "The Minister is confident that responsible employers will not have to devote time and money to comply with the Law". The IoD disagreed with

[48] Appendix 1, page 95
[49] Appendix 1, page 95
[50] Appendix 1, page 85

this statement. The IoD explained that employers would be forced to invest time and money: in attending training sessions, reviewing and amending employment documentation and dealing with any claims lodged under the law, whether or not such claims had any merit – employers could not pick or choose whether they dealt with claims that were lodged in the Tribunal."[51]

7.6.9. The IoD elaborated on that statement, noting "…that many or most larger businesses in Jersey would already have some form of nondiscrimination, equal opportunities or anti-bullying policy. The smaller businesses on the other hand, would be less likely to have such policies – and it was explained that many of them had very basic employment contracts. It was Advocate Milner's experience that some of the smaller businesses had employment contracts which either pre-dated the employment law or had never been updated since it came into force in 2005."[52]

7.6.10. In that respect, and by analogy to the Employment (Jersey) Law 2003, Mr Witherington, Director of JACS, "…recalled that when the Employment Law was first implemented, JACS ran training sessions for businesses in the evenings, but the attendance had been disappointing. He advised that the same would be carried out if the Discrimination Law was approved, but he expected that there would be the same level of attendance. It was noted that the larger firms were more likely to undertake training rather than small businesses. This was concerning because it is more likely that the smaller businesses will infringe the law."[53]

7.6.11. These comments are supported by Report to the States made by the Minister following the report on the Employment Tribunal made by Mr Newman in March 2013, which states that the conclusions of the Tribunal show that:

"9. Show that cases were predominantly against small and medium sized businesses, many of which have no formal human resources function. It may be that larger employers are more likely to agree a settlement." Moreover:

"4. A small number of cases illustrate that some employers (mostly small owner-managed businesses) are unaware of, or are prepared to disregard, fundamental requirements of the Employment Law. The report suggests that further efforts might be

[51] Appendix 1, page 89
[52] Appendix 1, page 89
[53] Appendix 1, page 85

targeted to small employers, via the Jersey Advisory and Conciliation Service (JACS), to ensure that there is awareness of the need to provide fair warning of dismissal or redundancy."

7.6.12. In order to ameliorate the effects of the introduction of the Draft Law on smaller businesses a number of commentators proposed that the Draft Law should have an extended lead in period, or alternatively that small businesses should be exempt initially. Mr Witherington stating that "The lead-in period of the law, if approved, would be key to ensure that businesses were not overwhelmed by the full impact of the law."[54], whilst Mr Thomas of JELA "…questioned whether small businesses/organisations should be exempt until they are better prepared to deal with the law in terms of resources. It was suggested that the law could be exempt for the first year for any business/organisation which employs less than 12 people. The reason for this was that small businesses/organisations were more likely to infringe the law when it first comes into force. As mentioned earlier in the meeting, it is more likely that they do not have the expertise or resources by comparison to larger organisations. It was also noted that many small/medium sized Jersey businesses employ staff from ethnic minorities and, in some cases, minority groups constitute a notable proportion of the business' workforce (i.e. those operating in the agriculture and hospitality industries). Arguably, therefore, it is possible that many Jersey businesses employing groups/individuals to whom race regulations might be of most relevance are of a size (and resource/expertise) least able to meet the procedural and administrative obligations that the Draft Law will introduce once in force."[55]

7.6.13. This view is by analogy supported by the report on the Employment Tribunal made by Mr Newman in March 2013, which, although prepared in relation the Employment Law, may provide an indication as to the situation which will arise if the Draft Law is introduced. Mr Newman concludes that:

"A number of cases in 2012 illustrate that some employers – mostly small, owner-managed businesses - are either unaware of, or prepared to disregard, these fundamental requirements. There were a number of examples of 'on the spot' dismissals or cases where there was no attempt to follow anything approaching a disciplinary procedure. Not all of

[54] Appendix 1, page 85
[55] Appendix 1, page 85

these cases resulted in a finding of unfair dismissal, but clearly an employer who dismisses an employee in this way is running a serious risk of ending up in the Tribunal. This risk is all the greater if the employer has failed to pay the correct amount to an employee on termination – a situation which arose regularly in the 2012 cases. Perhaps more effort can be targeted at small employers so that they are aware of their legal obligations and the consequences of failing to meet them."

7.6.13.1. As a consequence of Mr Newman's report the Minister, inter alia, notes that the decisions of the Employment Tribunal:

"9. Show that cases were predominantly against small and medium sized businesses, many of which have no formal human resources function. It may be that larger employers are more likely to agree a settlement."

7.6.13.2. By analogy it is submitted that this predominance of cases being against small and medium sized businesses is also likely to occur in relation to discrimination cases if the Draft Law is adopted.

7.6.13.3. In terms of direct training costs, it is noted that Mr. Newman confirmed that JACS "had been providing training on the Discrimination Law (free to delegates during 2013 and 2014) and would provide written guidelines when the law has been adopted by the States. It was noted that, although JACS would provide training to businesses, it was unclear how the service would ensure that businesses undertake the training."[56]

7.6.14. As well as the direct costs of compliance with the Draft Law, the diversion of resources from core business activities by the need to comply with increasing levels of legislation in the employment arena was emphasised during the collective meeting between Parslows and representatives of employers, professional and trade associations: "The Employment Law was highlighted by the JHA as a major contributor of taking business managers out of customer-facing roles and into more administrative roles, significantly increasing red-tape."[57]

[56] Appendix 1, page 74
[57] Appendix 1, page 95

7.6.15. This was summed up during an interview between Parslows and various business, professional and employers groups, when it was stated that "The knock-on effect of introducing the Draft Law would be that the economy would be less effective because employers would spend too much time concentrating on compliance."[58]

7.6.16. In that regard, Mr Thomas "…explained that the Minister for Social Security had identified within the notes to the Draft Law that there would not be an administrative burden on employers once the Draft Law had been implemented. Mr Thomas considered that this may be optimistic. It was agreed that this may be the case for the implementation of the race characteristic, but Mr Thomas expected there to be administrative burden on employers once the other characteristics such as sex were to come into force."[59]

7.6.17. However, it should be noted that within a survey into the Employment law which the CIPD carried out between September and November 2012, it had noted that 71% of respondents answered "no" to the question "Would the introduction of race and discrimination legislation prevent you from recruiting new staff?". This clearly appears to contradict the assertions concerning the perceived effects of the Draft Law which are set out above.

7.6.18. A further concern which was raised by the employers, business and professional groups was that employers would incur significant additional business costs due to legal fees incurred in defending claims/paying compensation/settling claims brought under the Draft Law: the concerns are recorded in an discussion between Parslows and the IOD: "Parslows asked whether the IoD thought that employers would instruct lawyers to assist them with claims. The IoD explained that it was certainly likely that employers would instruct someone to assist them with claims (whether lawyers or other advisers). Employers would be very likely to want to settle discrimination cases for fear of reputational damage – all of the risk would be with employers and this had a significant associated financial burden."[60]

7.6.19. In this context Mr Witherington "…advised that, in his opinion, there would be no need for employers to seek legal advice to represent them, particularly if they had good H.R resources within their organisation. The Tribunal's use of Direction and Interim Hearings was helpful to the parties involved in a claim. After further discussion it was noted that it

[58] Appendix 1, page 95
[59] Appendix 1, page 78
[60] Appendix 3, page 89

would be a difficult balance for the employer to achieve – financing a lawyer or accepting a 3,000 pound compensation fine."[61]

7.6.20. In this regard the report on the Employment Tribunal prepared by Mr Newman for the Minister dated March 2013 records that:

"The Applicant appeared 'in person' in 42 of the 49 claims considered. Of the 7 cases in which a representative was identified by the Tribunal, two were solicitors, one was the Applicant's interpreter, one was a union representative, one was the Applicant's father and two were lay representatives.

It is not quite so obvious who represented employers. The Tribunal often identified the individual who appeared on behalf of the employer but did not always indicate the capacity in which he or she appeared. Often an individual was named as a representative but it was clear from the judgment that he or she was an owner or director of the employer. However, taking this into account, it appears that the employer was represented either by the owner or by a member of its own management team in 27 of the cases and in one case by a member of the employer's family. In a further four cases, there was no appearance by or on behalf of the employer. Of the cases where a representative was identified, two were lawyers from the Law Officer's Department representing the States Employment Board, four were solicitors and four were barristers or advocates. The remainder were HR consultants or other representatives whose status was not made clear."

7.6.21. An additional fear expressed by the employers groups was that claimants may be motivated to bring claims due to the prospect of an award of compensation. That viewpoint may be tempered somewhat, in relation to compensation, by Guernsey's experience in relation to its Ordinance, Mrs Airley having "…stated that she considered that the larger focus for most applicants was an over-riding feeling that what had occurred to them had been unjust, rather than the promise of compensation."[62] This view was echoed by Mr Ferey, who stated that "…from his experience, the money side is usually a

[61] Appendix 1, page 85
[62] Appendix 1, page 101

secondary consideration for most people and that seeking an apology is the main priority."[63]

7.6.22. Moreover, the Report of the Minister in relation to the Report dated March 2013 produced by Mr Newman concerning the Employment Law, notes that the decisions of the Employment Tribunal (which by analogy may provide an indication of what may occur if the Draft Law is introduced) "Provide no basis for a conclusion that employers are being forced to defend hopeless (frivolous or vexatious) cases. It is possible that vexatious or frivolous complaints are made but are withdrawn or settled before they reach the Tribunal. If that is the case, then it is perhaps evidence that the system works."

7.6.23. The employers groups expressed the fear that the Draft Law may act to prevent them from recruiting effectively. In this regard "Mr Newman explained that the law would never stop an employer employing the best person for the job. A language requirement, such as a requirement to speak fluent English, would potentially amount to indirect discrimination – but would not be unlawful if the requirement to speak a particular language was a genuine and proportionate requirement for the role."[64]

7.6.24. Some perspective on the forgoing concerns may be derived from the findings of the Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, which was published by the UK Department of Business Innovation & Skills in March 2013. Many of the findings and observations recorded within that report bear a striking similarity to the concerns expressed by employers in Jersey. The following excerpts drawn from the Report are accordingly quoted since they are considered to be of assistance in crystallising certain issues that arise as a consequence of the concerns which have been expressed regarding the proposed introduction of the Draft Legislation in Jersey, in relation to which they may inform further research which it may be considered should be conducted in that respect:

"Striking a balance between the objectives of improved economic performance and the provision of an appropriate regulatory framework can prove challenging."[65]

[63] Appendix 1, page 82
[64] Appendix 1, page 95
[65] Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, page 5

"Employment law has been identified as one of the principal 'regulatory burdens' in need of reform (Beecroft 2011; BIS 2012a). Business associations insist that the volume and complexity of employment law causes problems for many, particular smaller, employers and that the law is now weighted too far in favour of the employee (e.g. British Chambers of Commerce 2010; Federation of Small Businesses 2012b), However, the OECD (2008) report indicates that, along with Canada, the UK has the second most business-friendly framework of labour law in the developed world, second only to the US."[66] Since both the Draft Law and the Employment (Jersey) Law 2003 are closely modelled on similar UK Legislation, it is considered that these comments may be applicable to Jersey also, although research on the point would be required to substantively determine that question.

"Surveys of business owners/managers routinely demonstrate regulation to be perceived as a cost to, or constraint on, business activity and performance (eg Carter et al. 2009; Forum of Private Business 2011b; Federation of Small Businesses 2012b; BIS 2012c). Regulation is argued to raise the substantive, administrative and psychological costs to businesses, and to encourage business owners to divert resources from profit-generating to 'unproductive' activities and consequently to weaken business performance (Chittenden et al. 2002). Such costs might deter start-up, investment, innovation and growth (eg van Stel et al. 2007). Commentators argue that employers might be deterred from recruiting employees in order to grow because they fear being taken subsequently to an employment tribunal to fight allegations of unfair dismissal (e.g. British Chambers of Commerce 2010). Surveys differ in their estimates of the proportions of employers reporting employment regulations as a burden, cost or obstacle to business success – but support the general finding that regulation can be burdensome for employers."[67]

"In summary, by treating regulation exclusively, or primarily, as a cost or a constraint on small firm activity and performance, largely because it is understood in terms of the obligations it places upon small employers, studies often ignore the enabling and motivating impacts of regulation, and the benefits that might arise. Regulation enables

[66] Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, page 11
[67] Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, page 12

businesses to achieve their aims by making certain actions possible; it motivates by incentivising businesses to act in particular ways rather than others; and it constrains businesses by limiting their scope for action (Kitching 2006). The precise impact of particular employment regulations for businesses is contingent upon not only the scope of the regulatory obligations and entitlements created, important though these are, but also, crucially, upon how employers adapt to them.

Regulatory burden should not be viewed simply in terms of costs (both time and monetary) to the business. Peck et al (2012) distinguish between regulatory costs and regulatory burden, the latter incorporating the anxiety resulting from poor understanding amongst employers of the law, the perception that the law is too complex and a lack of confidence that they were compliant with it. Given the disparity between survey and qualitative data regarding the impact of employment regulations this research seeks to explore if there is a perception – reality gap and whether employers' responses about business burdens arise from the real impact on their working practices, or are based on assumptions made about the burden, which arise from a lack of knowledge or misconceptions about the regulations and / or the perceived risk of being noncompliant. The approach adopted by the research seeks to address this issue by not directly asking about the impact of regulation, but by initially exploring employers' working practices and then understanding how regulation has affected these."[68] It is submitted that by analogy with the position in the UK, the "perception-reality gap" may equally explain many of the comments which are recorded from the commentators on the Draft Law, but detailed research would be required to determine whether that is correct.

"KEY FINDINGS:

- Medium and large businesses were proactive in learning about legislation and keeping up to date with changes, whereas small and micro businesses were reactive, seeking out information around critical events and when problems arose.
- Small and micro employers only learnt about changes to legislation through the media. Medium and large employers received email updates from a supplier, such as an HR consultancy, payroll bureau, or a government resource including Directgov

[68] Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, page 16

and Acas (Advisory, Conciliation and Arbitration Service - aims to improve organisations and working life through better employment relations).”[69]

“Implications

- When employers describe regulation as burdensome, this may be a poor indicator of the actual impact or cost of compliance to the businesses. However, it does highlight the level of anxiety experienced by employers dealing with unfamiliar regulation or entering into a dispute with employees.
- Employers tend to have an inflated idea of the risk of being taken to an industrial tribunal when dismissing staff. The “high risk” myth needs to be dispelled as this would help to reduce the perception that all employment regulation is burdensome;
- Employment legislation communications and/or support should prioritize disciplinary and dismissal procedures. The erroneous belief that there is a statutory process to follow when dismissing employees increased anxiety and the perception that regulation was unfair to employers.
- Tribunal outcomes were perceived as unpredictable. Therefore, pre-tribunal compromise agreements can seem the safest option for employers that are anxious about having to pay a tribunal award.
- There is a clear need to provide a single information portal that guides employers to the relevant information to support employers who had no internal HR and considered regulation too complex to understand. The new single government website launched on 18 October 2012 may provide a gateway to this information, if the level of detail meets users' needs.
- There is a need for targeted support at the small / micro employer level which educates them about the value of having formal employee management and monitoring processes should they wish to employ such measures. Further research is required to determine the appetite for formalisation, including which practices would benefit from formalisation and which should remain informal in order to maintain a 'family' approach whilst also safe-guarding against litigation.”[70]

[69] Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, page 39
[70] Employment Relations Research Series 123, Employment Regulation, Part A: Employer perceptions and the impact of employment regulation, page 46

7.6.25. In summary, it is impossible to effectively resolve the competing issues set out above, not least since the decision on how the needs of the economy and those of the individual should be prioritized is a political decision.

7.7. The effect on voluntary work within Jersey

7.7.1. It is difficult to comment substantively in this area due to the very limited information available.

7.7.2. Mr Ferey commented, in response to the question of whether discriminatory issues could be dealt with through the employment law, "…that this could be an option, but his concern would be that some people would not be protected as the Employment Law only deals with employment issues."[71]

7.7.3. In terms of the effect that the levels of compensation set out within the Draft Law may have in the voluntary sector, during consultation with Mr Ferey "Compensation levels were discussed and it was agreed that people in quasi employment should have the same levels of protection. It was questioned whether the same level of compensation should apply, and it was noted that a charity for example, may not be able to cope with a 10,000 pound fine. The Chief Executive hoped that the Tribunal would take this into consideration. His view was that, if a charity was taken to a Tribunal, being named and shamed would be enough of a punishment, and it would also highlight the need for some restructuring procedurally within the organisation."[72]

7.7.4. However, Mr Pinel, when asked whether he considered the organisations with which he was involved appreciated that the law encompassed the areas of voluntary work/voluntary workers/voluntary organisations/voluntary bureaus, and as such they/their members may be subject to complaints of racial discrimination giving rise to a potential compensation order by the Tribunal of up to £10,000, stated that "he did not consider that the vast majority of those organisations that he worked with would be aware of this, and agreed that the level of the maximum fine would "wipe out" the majority of such organisations were they to be subject to it."[73] He continued and "…expressed concern that fear of failure to comply with the terms of the Draft Law may act as a deterrent to people from becoming or continuing to be involved with voluntary organisations, and that this would

[71] Appendix 1, page 82
[72] Appendix 1, page 82
[73] Appendix 1, page 105

be detrimental to the community as a whole. By way of example of the extent to which unpaid voluntary workers assisted the Island, Mr Pinel stated that the results of the last census conducted in Jersey revealed that there were 10,000 informal carers in the Island of which some 25% worked for 4 or more hours per day, as well as hundreds of members of the numerous other voluntary organisations, which operated in the health related sector."[74]

7.7.5. Whilst it is noted that under the terms of Article 42(1)(b) the maximum level of compensation which may be awarded under the Draft Law in circumstances where there is no financial loss is limited to £5,000, in the context of the voluntary sector, and in light of the views of the commentators quoted above, we consider that a fine even at this level, or below, may still have a dramatic impact on the finances of a small voluntary organisation or its members, and may still produce the associated effects that were contemplated in terms of acting as a deterrent to people becoming or continuing to be involved with voluntary organisations.

7.8. The effect on other areas prohibited within the Draft Law

7.8.1. Comment in this area is hampered by the fact that there is far less information available concerning it, the main focus of third party comments on the effects of the Draft Law having arisen in the sphere of paid employment.

7.8.2. Mr Witherington commented that "How the system would cope with non-employment issues such as charities was questionable. It was agreed that the punishment should not necessarily be a monetary sum, and a warning in the first instance via a notice would be appropriate. In order for this to be carried out effectively, the Director agreed that there should be a contact point and it was suggested that the Enforcement Officers based at Social Security may be able to do this."[75] It is submitted that the question of whether it is appropriate for non-profit/voluntary organisations to be subjected to the same level of financial penalty for breach of the Draft Law should be subject to further investigation and consideration, although ultimately the question is a political one.

7.8.3. In terms of the effect on clubs, during consultation between Parslows and Mr Newman/the Policy Principal "Parslows highlighted that the Draft Law provided for clubs in Article 25, which prohibits discrimination by those managing clubs with regard, for example, to

[74] Appendix 1, page 105
[75] Appendix 1, page 85

applications for membership and to the terms and conditions of membership. When asked whether there had been any public consultation, the Policy Principal confirmed that no public consultation had been undertaken with clubs in the Minister's 2012 consultation, but public consultation had been undertaken on the Draft Law (which included this provision) in 2006 and in 2008."[76]

7.8.4. Turning to the effect of the Draft Law concerning goods, facilities and services, which are addressed by Article 22 of the Draft Law, during consultation with Mr Newman "Parslows also highlighted that the Draft Law prohibits discrimination in the provision of goods, facilities or services to the public or a section of the public. Mr Newman explained that examples of this tended to be around disability, for example, not providing ramps to shops or disallowing guide dogs into premises."[77]

7.8.5. The Draft Law also encompasses the sphere of Education, and in this regard, when speaking with Mr Newman "Parslows raised a hypothetical example whereby a Polish child was enrolled into a school in Jersey. If the Discrimination Law was to come into force, it was questioned what responsibility the school would have to ensure it was not discriminating against the Polish child by providing lessons only in English. Mr Newman stressed that he was not an expert on education law but that as far as Discrimination Law was concerned, a policy of only providing only lessons in English might be indirect discrimination - disproportionately disadvantaging Polish speakers – However, it may be a proportionate means of achieving a legitimate aim, e.g. providing lessons to only two Polish speaking children and 150 English speaking children. It was also advised that the law provides for certain exceptions where an act that might otherwise amount to prohibited discrimination would not be treated as such under the Draft Law (Schedule 2)."[78]

7.8.6. In regard to the question of whether other unintended consequences may flow from the introduction of the Draft Law, when in consultation with Mr Newman "Parslows questioned whether other Minister's had considered whether the Draft Law would impact on legislation within their remit. It was unclear whether any audits had been carried out, however, the Draft Law had been considered by the Council of Minister's and Chief Officers before it was lodged.

It was noted that in a previous meeting, the Health, Social Security and Housing Panel had raised the issue of fostering and adoption. It was noted that the matter had been discussed

[76] Appendix 1, page 74
[77] Appendix 1, page 74
[78] Appendix 1, page 74

with the Fostering and Adoption Team and the Department was satisfied that there was existing legislative authority providing the necessary exemption to behavior that could otherwise be considered discriminatory in fostering and adoption services."[79]

7.8.7. **The effect on the administrative/judicial bodies: JACS, The Employment and Discrimination Tribunal, The Royal Court**.

7.8.8. Many commentators for the various professional, trade and employers bodies who were consulted expressed concern that the bodies, which would have responsibility under the Draft Law, may not have the requisite level of resources to cope with the level of additional work that would result from its introduction. In that regard Mr Newman stated that "It was noted that an employment related complaint would be referred to the Jersey Advisory and Conciliation Service in the first instance for conciliation. The Policy Principal explained that three quarters of complaints were able to be conciliated without the need for Tribunal. The Citizen's Advice Bureau will deal with complaints that do not fall within the employment arena and it was explained that CAB would also be providing guidance for non-employment issues. If conciliation/mediation is not successful, the Employment Tribunal would be involved."[80]"Parslows questioned whether the implementation of the Draft Law would affect JACS resources and the Policy Principal advised that the JACS were well prepared to deal with any extra work arising from protection against race discrimination. Since the Draft Law had been a long time in coming, JACS had been preparing for Discrimination Law since 2007 when it had been held with the Home Affairs Department."[81]

7.8.9. Moreover, in terms of the increased demands being placed on the Jersey Employment and Discrimination Tribunal which was to be established, in relation to the UK position Mr Newman commented "…that, on average, there were 5,000 race discrimination complaints a year going to Tribunal, two-thirds of which would settle, and many of the remaining complaints would be unsuccessful because discrimination complaints are hard to prove."[82]

7.8.10. By way of a yardstick in terms of the impact in practice of the introduction of anti-Discrimination Law, the experience of Guernsey was looked at since its introduction of the Ordinance (which addressed sex rather than race discrimination), in relation to which Mrs

[79] Appendix 1, page 74
[80] Appendix 1, page 82
[81] Appendix 1, page 74
[82] Appendix 1, page 74

Airley "stated that 23 claims had been lodged before the Tribunal on the ground of sex discrimination (all bar 3 alongside a claim for unfair dismissal) since the commencement of the Ordinance. The majority had been settled through the conciliation process with just seven being referred to a Tribunal for determination. Of those, four were found in favour of the applicant (three on the ground of discrimination and one purely on the ground of unfair dismissal)."[83]

7.8.11. To set those figures in context, she stated that the Employment Tribunal would deal with between approximately 50 to 70 unfair dismissal claims in a year. Mrs Airley did, however, note that the basis upon which claims could be brought in Guernsey was relatively restricted, and did not include contractual claims or claims in relation to holidays.

7.8.12. By way of comparison, the Jersey Employment Tribunal Annual Report for 2011/12 records that during that period the Jersey Employment Tribunal received 178 complaints, in relation to which the Tribunal sat on 85 occasions: 55 full hearings and 30 interim hearings.

7.8.13. A further indication of the level of work which may arise (in the area of paid employment at least) if the Draft Law is introduced is provided by the JACS Annual report for 2012, which records that in that year it received 9,720 enquiries in total, of which 5,035 were employee enquiries and 4,685 employer enquiries, of which 2,286 were from employers employing less than 50 staff, 49% from those employing less than 10 staff.[84] The Report also records that there were 893 attendees at 51 workshops, training courses and seminars.[85] These figures, which relate only to the work conducted by JACS and do not record the level of training and support to employers provided by the many law firms and independent human resources advisers that operate in Jersey, may be taken to support the view that the cost of compliance by employers with the Employment Law in Jersey is significant, and by analogy support the proposition that the cost of compliance with the Draft Law for employers may also be significant.

7.8.14. However, the experience of Guernsey after it introduced its Sex Discrimination Ordinance is that the level of the increased work for the Tribunal and JACS may not be as high as has been anticipated: "Mr Austin asked Mrs Airley whether Guernsey had noted a surge in claims brought on the basis of discrimination when the new Ordinance was brought into force, and she stated that had not been the case, and that in her experience the discrimination element of claims being brought before the Guernsey tribunal was typically

[83] Appendix 1, page 101
[84] JACS Annual report for 2012, page 4
[85] JACS Annual report for 2012, page 4

low key. In her experience the biggest issue had been the rise in enquiries concerning discrimination prior to the law coming into force. She considered this formed part of an education process, with enquiries increasing in relation to sex discrimination issues, but it was not a situation of the 'floodgates having been opened' by the new legislation."[86]

7.8.15. In terms of the effect of the introduction of the Draft Law on the Royal Court, it was noted by a number of commentators that there had been very few appeals from the Employment Tribunal to the Royal Court, and from this it was imputed that this would also be the case in relation to appeals arising under the Draft Law. This was certainly the experience of Guernsey: "Mrs Airley stated that there had been a relatively low number of appeals, however, she noted that it was frequently difficult to find a point of law upon which an appeal could be brought."[87]

7.8.16. In contrast, Mr Thomas commented that "It was noted that, currently, not many appeals from the Tribunal go to the Royal Court but this could change if the Draft Law is approved."[88]

7.8.17. In terms of the ability of the Tribunal itself to cope with the increased workload "The Assistant Judicial Greffier explained that there would be an increase in claims if the Draft Law was approved. It was noted that the Tribunal had been planning for increases and was looking at staffing levels and appointing additional Panel members. There was currently a Chairman and Deputy Chairman, but a second Deputy Chairman with discrimination experience would be appointed in the near future."[89]

7.8.18. "The Assistant Judicial Greffier agreed that the Royal Court Appeal process was expensive and the decision to introduce an EAT would depend on the perception of what level the Tribunal sits. She advised that an EAT may be appropriate but there would be funding and resources issues."[90]

7.8.19. In terms of JACS ability to cope with the increased workload, Mr Witherington "…explained that JACS were limited to three employees with part-time administrative support. After discussing the matter with the Social Security Department it has been agreed that this would be increased to four. The Director said that it was important to note that JACS

[86] Appendix 1, page 101
[87] Appendix 1, page 101
[88] Appendix 1, page 78
[89] Appendix 1, page 99
[90] Appendix 1, page 99

would only see the true impact of the law once it had been implemented and the need to reassess resources levels may be required in the future."[91]

7.8.20. The Assistant Judicial Greffier explained that JACS had been preparing since 2007 and that it was her understanding that they would be able to cope with additional cases.[92]

7.8.21. Mr Thomas stated that "It was noted that the implementation of the Draft Law would require JACS to undertake more training and therefore may present an additional resources issue. It was also explained that currently, there is a tension about JACS role as an advisory and reconciliation service. For example, in situations where the Tribunal refers parties to an employment dispute to JACS for conciliation, it is quite possible (as has often been the case) that the applicant (employee) in the matter had sought legal advice from the service at an earlier stage in the proceedings (i.e. as to the possible merits of his/her claim). Mr Thomas and Mr Austin-Vautier felt that a conflict is created here between JACS' role as an advisory service and its role as a forum for conciliation."[93]

7.8.22. Mr Thomas "noted that on page 14 of the Draft Law, it states that one additional part-time administrative post will be required (from 2015) to deal with the additional Tribunal workload (it is envisaged that the Draft Law will come into force before then, in 2014). Mr Thomas said that additional workload should not be underestimated, and that in his experience from advising and/or representing parties to tribunal proceedings in connection with the Employment Law, people had to wait 6 – 12 months if their claim was to go before the Tribunal. Arguably, unless the correct resources are supplied, these timescales will increase. Mr Thomas explained that the UK approach in relation to unfair dismissal was that issues should only take 16 weeks from start to finish and that straightforward cases could be heard by a Chairman sitting alone."[94]

7.8.23. "JACS was described by IoD as being vitally important and it was hoped that it had been given sufficient resources to cope with any influx in cases. IoD considered that JACS had a crucial role to play and needed to be properly resourced to do this. Much of the successful operation of Jersey's employment law turned on the ability of the JACS team to assist parties with claims and disputes, including the most complex employment matters."[95]

[91] Appendix 1, page 85
[92] Appendix 1, page 99
[93] Appendix 1, page 78
[94] Appendix 1, page 78
[95] Appendix 1, page 89

8. The choice of race as the first protected characteristic

8.1. In his Report accompanying the Draft Law[96] the Minister states that he expects protection from discrimination is likely to be proposed in the following order;

1. Race
2. Sex
3. Age
4. Disability

8.2. The Minister's decision to introduce Race as the first protected characteristic is explained by him within his report that accompanies the Draft Law. In the following terms: "It is considered that introducing protection against discrimination on the grounds of race does not entail the same complexity as sex, age or disability discrimination". He further states, later in the report, that "The proposed phases take into consideration the priorities determined by the States: the need to reflect the proportion or number of people likely to be affected by the particular protection: the anticipated cost implications of compliance and the importance of co-ordinating the work with other States' policies as far as possible. For example, protection against age discrimination would be prepared in co-ordination with changes to the States pension age and protection against sex discrimination would be prepared in conjunction with family-friendly legislation".

8.3. In terms of complexity/the need to coordinate with States policy in other areas, we consider that the introduction of race as the first protected characteristic would, in broad terms, be likely to be more straightforward than age or sex. There is insufficient information to assess the comparative impact of the introduction of disability discrimination. In terms of the comparative anticipated costs of compliance in relation to each of the protected characteristics, there is again insufficient information to be able to reach any meaningful conclusion in that respect. We consider the number of people affected by the introduction of each protected characteristic by reference to the statistical evidence referred to below.

8.4. The Minister's report refers to various statistical evidence of discrimination within Jersey, which is prefaced by the following comment by him: "In the absence of legislation that prohibits discriminatory acts from taking place, it is difficult to assess the prevalence of

[96] Draft Discrimination (Jersey) Law 201-, page 11

unacceptable discriminatory acts. Without legal benchmark against which behavioural standards can be assessed and with no recourse to justice or compensation, it is probable that acts of discrimination do not currently come to light. However, there is some evidence that discrimination occurs in Jersey."

8.5. Turning to the statistical information available in that respect, the Jersey Annual Social Survey 2012 ("JASS"), reported the following:

"A quarter (25%) of Islanders reported at least one occasion of discrimination over the course of the previous 12 months."[97]

8.6. In relation to the question of race/nationality, the JASS report recorded that:

"One in twenty (6%) of those born in Jersey or elsewhere in the British Isles reported being discriminated against in Jersey on the grounds of race/nationality in the previous 12 month. However, a much higher proportion of those born in Portugal or Madeira (37%), Poland (28%) or other European country (21%) reported having been discriminated against in Jersey on grounds of race or nationality in the previous 12 months."[98]

"Similarly, three-fifths (63%) of those who reported having been discriminated on grounds of their race or nationality in the previous 12 months were 'very' or 'fairly' worried that they would be again in the following 12 months, compared to just 3% of those who had not been."[99]

8.7. In contrast, the report records that (of those who reported that they had been discriminated against): 9% of adults reported that they had been discriminated against on grounds of age, 9% of women and 2% of men reported having been discriminated against on the grounds of gender, and 5% reported having been discriminated against on grounds of disability.

8.8. Findings in regard to disability are not set out within the Minister's Report.

8.9. A report published the Jersey Community Relations Trust ("JCRT") which conducted a survey amongst the members of the Jersey Employers' Network on Disability ("JEND") in

[97] JASS 2012 Report, page 21
[98] JASS 2012 Report, page 22
[99] JASS 2012 Report, page 23

April and May 2011 found, on the basis of the responses received by it, that the preferred order for introduction of the protected attributes being considered by the Minister, was, in descending order of preference of those attributes or constituent elements of them, as follows: gender, disability, race, nationality, age.

8.10. The location of where the discrimination took place is set out at page 22 of the JASS Report, which records the top 4 locations as being: at work (36%), states departments or parishes (27%), applying for a job (23%) and buying goods or services (19%). On that basis 2 of the top 4 areas within which discrimination occurred were clearly linked to work or employment.

8.11. The JASS report[100] further records the level of concern about discrimination of the respondents in relation to a number of specified areas of discrimination, with the top 4 areas of concern (on the basis of the top two the categories set out in the report of "very worried" and "fairly worried" about discrimination) being, in descending order of concern, age (9% fairly worried), pregnancy and maternity (7% fairly worried), race and nationality (5% fairly worried), and health or a disability (5% fairly worried).

8.12. The statistics set out within the Minister's Report are susceptible to criticism on the basis that they are subjective in nature, potentially reflecting the respondent's concerns that they have/may be discriminated against rather than being demonstrative of actual discrimination which has taken or is taking place.

8.13. The statistics compiled by the Citizens Advice Bureau for 2012 record 46 issues relating to discrimination, but there is no sub-categorisation of those complaints into the areas of the 4 protected characteristics that the Minister proposes to introduce, so the statistics provide no direct assistance concerning which characteristic, on the basis of prevalence, should be introduced first.

8.14. Likewise, the statistics compiled by the JCRT which are referred to in the Minister's Report, record that 82% of the organisations which answered thought that there was a need for discrimination legislation within Jersey, and that 70% would support such introduction, are again subjective in nature. Nevertheless, when asked what areas (from a list of attributes provided) the respondents believed that the law should cover, in relation to the 4 protected characteristics (or constituent elements of them) that the Minister has stated he is considering introducing, the responses, in descending order, were as follows: age (84%), gender (83%), nationality (83%), race (81%) and disability (79%).

[100] At page 23

8.15. It is noted within the conclusion and recommendations to the JCRT survey that "The limits of this survey due to the size of sample and time scale are recognised", and that "It would be useful to repeat the survey on a larger scale, which would be more representative of Jersey's sectors.".

8.16. The statistics contained within the JACS Annual Report 2012 record the number of clients concerned about bullying or harassment was 260, and notes that "Whilst bullying or harassment is not necessarily linked to discrimination, in many cases it appears to be linked to an employee's race, sex, age or disability. In addition to these 260 complaints of bullying, we recorded a further 47 client contracts were the employee specifically claimed they were discriminated against: 9 issues were recorded as race discrimination, 10 as sex discrimination and the remaining 28 were recorded as "general" which includes discrimination on other grounds, including age, disability and religion." The Draft Law provides protection against victimisation and harassment under the provisions of Articles 27 and 28 respectively, but in the absence of clearer data concerning the underlying causes of the complaints of bullying that JACS records it provides no clear evidence that, on the basis of prevalence, race discrimination should be introduced first.

8.17. The Jersey Bullying Survey 2010 carried out by the JCRT found that the most common place where people experienced bullying was in the workplace (56%), and that the person most commonly involved in bullying was a work colleague (34.9%) followed by a work manager (34.6%), whilst the most common reason for bullying was identified as "ability/disability" rather than race or colour. In terms of developing a strategic plan for addressing bullying in Jersey, the report concluded, *inter alia*, that "An aim would be to see a Discrimination Law introduced in Jersey. This would be of particular benefit to those who wanted a method of recourse where all other avenues had failed." In conclusion, although the report identifies areas of bullying that may be addressed by the introduction of the Draft Law since they may fall into the categories of victimisation or harassment which are addressed by it, the report does not provide clear justification for the decision to introduce race as the first protected characteristic, and it is arguable that, in the context of the issues addressed by the report, that disability should be introduced first on the basis that "ability/disability" is identified within the report as the primary cause of bullying.

8.18. The validity of the statistical information used by the Minister to demonstrate that discrimination is occurring within Jersey such that anti-discriminatory legislation is necessary to combat it, is undermined by the subjective and general nature of that

statistical information. For example, without further investigation of the statistic that 9% of adults in Jersey reported having been discriminated against on grounds of nationality within the proceeding 12 month period it is impossible to determine whether such perceived discrimination would in fact be addressed by the Draft Law or would fall into the category of General Exceptions to Prohibited Acts set out within Schedule 2, part 1 of the Draft Law:

"GENERAL EXCEPTIONS TO PROHIBITED ACTS
1 Act done under legislative or judicial authority
(1) An act of discrimination is not prohibited by this Law if it is done necessarily for the purpose of complying with –
(a) any enactment;
(b) any condition or requirement lawfully imposed pursuant to any enactment; or
(c) any order of a court or tribunal.
(2) In this paragraph "enactment" includes an enactment of the United Kingdom having effect in Jersey."

8.19. For example, whilst it is noted that the statistics compiled by JASS that are set out above record that 9% of adults reported that they had been discriminated against on grounds of nationality in the previous 12 months, and that 37% of those born in Portugal or Madeira, 28% of those born in Poland, 21% of those born in another European country and 6% of those born in Jersey or elsewhere in the British Isles reported having been discriminated against in Jersey on grounds of race or nationality in the previous 12 months, which would appear to suggest that those born in another European country are being subjected to discrimination in Jersey by virtue of that fact, in the absence of further information concerning the reason for that belief one cannot determine whether it has arisen due to one of the exceptions to prohibited acts, such as, for example, the Housing (General Provisions) (Jersey) Regulations 1970, which restrict the ability to buy or rent property in Jersey subject to certain qualifying provisions, and which may accordingly cause the perception that those born in another European Country are being discriminated against on that basis.

8.20. In terms of the choice to introduce race as the first protected characteristic, Mr Pinel stated that "…it was difficult to answer for all of the organisations involved, since they had differing aims and memberships, but that from the perspective of the organisations dealing with health issues he considered that their view would be that the first protected characteristic to be addressed should be disability rather than race, since that area involved the greatest number (of people) and need in terms of legislative protection."[101]

8.21. The evidential basis for the introduction of the Draft Law has been subject to significant criticism from a number of the forums representing employers. For example, at the meeting conducted by Parslows for the Scrutiny Panel with members of the Jersey Chamber of Commerce, Chartered Management Institute, Jersey Hospitality Association, Jersey Construction Council and Chartered Institute of Personnel and Development, it was stated that: "Whilst there were concerns regarding the Draft Law dealing specifically with race, the other characteristics which were planned to be lodged via regulations were also highlighted as a concern. The organisations explained that it was unclear whether there had been any true evidence available to base the Discrimination Law on. It was noted that a meeting had taken place with the Minister for Social Security, and the organisations had challenged what evidence was available that this problem exists, and that the Draft Law would alleviate the alleged problems. At the time of the meeting, the Jersey Annual Social Survey (JASS) had not been published, but since then the evidence contained in the survey had been quoted as a justification for the introduction of the legislation. It was explained that there was a belief that the way these findings were being interpreted were flawed because it did not distinguish between legal and illegal discrimination. Therefore, the justification for using this research from JASS was flawed and therefore valid research should be carried out to assess the problem of illegal discrimination in Jersey. It was understood that there had been no attempt to gauge further research, apart from the JASS.

It was questioned whether discrimination legislation was the right solution to the problem, particularly without knowing the extent of discrimination issues in Jersey."[102]

8.22. Likewise, the Institute of Directors commented in relation to the question of whether it had been appropriate to base the Draft Law on the UK Equality Act: "The IoD explained that it would have been more appropriate to establish what the problem with

[101] Appendix 1, page 105
[102] Appendix 1, page 95

discrimination was in Jersey before basing the law on legislation from the UK where there were different issues and resources."[103]

8.23. Within the Minister's response to concerns expressed to him by the CIPD, he states "You invite me to provide evidence to demonstrate that a problem exists and you suggest that the test of whether discrimination legislation is successful is whether it solves the problem of inequality in society. I do not believe that the law will, in itself, prevent discrimination or eliminate inequality. The legislation is intended to provide legal protection where a person has, for example, been refused a job, turned away from a restaurant or prevented from renting a house because of their race. In failing to prohibit discrimination of this sort, Jersey falls short of widely recognised international standards and I believe that we must put this right."

8.24. Mr Thomas, when questioned on race being the first characteristic, "…commented that employers would need to become accustomed to the mechanics of discrimination legislation. He agreed that it seemed sensible to start with race before other characteristics were brought forward, such as sex discrimination. It was noted that statutory protection in relation to sex discrimination involved consideration of potentially very complicated matters such as equal pay."[104]

8.25. By letter to The Minister dated 22 October 2012, the Jersey Chamber of Commerce and Industry Incorporated responded to the consultation by the Minister concerning the Draft Law by stating, amongst other observations:

"Before any further legislation is brought forward or any other employment legislation, the Minister should expect his department to be able to produce the following evidence. If it cannot be produced then the legislation is clearly not fit for purpose and should not be introduced:

- Clear evidence that the problem exists;
- Evidence from other jurisdictions that the proposed legislation (which in this case is very similar to a number of other jurisdictions) will solve the problem;
- Evidence of the 'unexpected consequences' of introducing such legislation. In particular that it will not cause more harm to the group that it purports to protect; and
- Evidence of the cost to business and the States, compared to the value.

[103] Appendix 1, page 89
[104] Appendix 1, page 78

This is a clear fact based process, and seems an entirely reasonable expectation on the part of the business community."

8.26. Comments in virtually identical terms were sent to the Minister in a letter from the Chartered Institute of Personal and Development dated 2 November 2012, and a letter from the Institute of Directors dated 6 December 2012 sent to Mr Sean Pritchard, Director of Policy and Strategy Development, Economic Development Department.

8.27. In view of the foregoing we consider that there is currently insufficient evidence of the scale and extent of discrimination in Jersey to enable any firm conclusion to be reached either on the decision to introduce race discrimination as the first protected characteristic, or indeed to justify the introduction of anti-discrimination legislation purely on that basis. This should not be misinterpreted as an assertion that the problem of discrimination does not exist in Jersey, but simply that further research is required in order to objectively and conclusively determine that question.

9. Conclusions

9.1. **The Draft Law**

9.1.1. Draft Law is closely based on these provisions of the UK Equality Act which address race discrimination. The advantages of this are that, in a small jurisdiction like Jersey which will generate a relatively low volume of case law, the ability to look at UK case law assists in the interpretation of the legislation, assisting both the Tribunal and those before it, and enabling a greater measure of certainly as to the likely outcome of cases than would otherwise be possible until a sufficient body of case law had been built up in Jersey, which may take a significant period of time.

9.1.2. It is perceived that the provisions of Article 2 of the Draft Law may give rise to uncertainty as to their territorial effect in terms of whether a prohibited act occurring outside the Island may, in certain situations, give rise to a breach of the Draft Law. Consideration should be given to amendment of Article 2 of the Draft Law to avoid this uncertainty.

9.1.3. The concept of a 'hypothetical comparator" which arises in relation to Articles 6 and 7 of the Draft Law may be difficult to comprehend, but is also present in the Equality Act and anti-discrimination legislation in Guernsey and the Isle of Man. The concept may be considered fundamental to the effective functioning of the Draft Law, and due to the assistance that will be available from JACS if the Draft Law is brought into effect it is not considered that this issue will present an undue impediment to the public understanding of the effect of Draft Law.

9.1.4. It has been suggested that Article 12 of the Draft Law would benefit from being broadened to encompass foreign law as well as Jersey law partnerships which operate within Jersey. In view of the international nature of many businesses that trade within Jersey further consideration of this suggestion appears appropriate.

9.1.5. It has further been suggested that the functionality of the Draft Law would be usefully augmented by the insertion of an Article addressing the burden of proof. We concur with that suggestion.

9.1.6. The Draft Law provides for the automatic consideration of conciliation once a complaint of discrimination is lodged. Due to the success of JACS in resolving complaints under the Employment (Jersey) Law 2003 by way of conciliation, and the corresponding reduction in

the number of complaints that progress to a hearing before the Tribunal as a consequence, we consider the automatic consideration of conciliation to be appropriate.

9.1.7. The Draft Law does not currently provide the Tribunal with jurisdiction to award costs against an unsuccessful party. The question of whether such jurisdiction should be conferred upon the Tribunal notably split commentators on the Draft Law, representatives of professional, trade and employers groups generally supporting the introduction of such a jurisdiction on the basis that it would deter unmeritorious claims being lodged and cause complainants to more carefully consider their position before issuing/pursing a claim. Other parties including JACS and the CAB expressed reservations about the Tribunal exercising such a power on the basis that it may deter genuine complaints being lodged due to fear of the costs involved where such a claim to nevertheless be unsuccessful. The question ultimately resolves into a balancing act between encouraging utilisation of the Draft Law on the one hand and preventing its abuse on the other. The determination of where that balance lies is a political decision.

9.1.8. The level of compensation provided for under the Draft Law is subject to a maximum limit of £10,000. The effect of compensation being fixed at this level was generally accepted by a number of the commentators on the Draft Law to be appropriate in the sphere of paid employment, although concern was expressed in relation to the effect that an award at such a level may have on the smaller employer, particularly in view of the current difficult economic climate. Greater concern was expressed in relation to the effect of such an award in relation to the voluntary sector and other non-profit making areas covered by the Draft Law, where it was considered that an award at that, or indeed a much lesser level, would be devastating if not fatal, and alternative sanctions were proposed in that respect, including the issuance of non-discrimination notices. This raises the question of whether taking a different approach to the sanctions which may be imposed on profit and non-profit making sectors in relation to the same discriminatory acts is appropriate. Ultimately this is a political question.

9.1.9. The Draft Law makes provision for appeals on points of law to be brought to the Royal Court. The Royal Court retains a general jurisdiction to award costs. It was considered on this basis that the cost of bringing such an appeal deterred parties from proceeding to bring appeals, and the very low number of appeals that have been brought before the Royal Court from the decisions of the Jersey Employment Tribunal was cited as an example of this.

9.1.10. The definition of race by reference to national origins, including being of Jersey origin, was criticized by some commentators, who proposed that it would be more appropriate to widen such definition to include being of Channel Island origin rather than specifically referring to one Channel Island.

9.2. **Comparison with similar legislative provisions**

9.2.1. The Draft Law was considered by reference to anti-discrimination legislation enacted in Guernsey and the Isle of Man, which were chosen as being broadly comparable jurisdictions to Jersey in terms of population size and economic situation.

9.2.2. Guernsey has no race discrimination legislation, but enacted an Ordinance to address sex discrimination in 2005. The approach taken by that Ordinance was narrower than that proposed under the Draft Law, being restricted to the employment sphere. Due to this restriction it avoids a number of the criticisms that have been made of the Draft Law, particularly that it may have unduly severe/unforeseen consequences in relation to the other areas that it covers. However, this restriction necessarily also means that the Ordinance is not as comprehensive in its application as the Draft Law. The Guernsey Ordinance also provides for breaches of it to be addressed not just by way of compensation orders but also by non-discrimination notices, which give rise to criminal sanction in the event of non-compliance. Certain commentators on the Draft Law have expressed the opinion that it would be of benefit for the option to issue non-discrimination notices to be provided under the Draft Law, particularly as an alternative to financial sanction in relation to breaches of the Draft Law committed by non-profit making/voluntary organisations, although the option to impose criminal sanctions for non-compliance by those same areas was a cause of concern for certain commentators on the Draft Law. Those issues are ultimately political decisions.

9.2.3. In comparison with both Guernsey and Jersey the Isle of Man has a comprehensive range of discrimination legislation in place, and is apparently currently working on introducing a piece of legislation to codify such discrimination legislation. The level of compensation in relation to race discrimination under the legislation which the Isle of Man has enacted is set at a far higher level than that proposed within the Draft Law, and moreover permits the bringing of a claim in tort based on racial discrimination.

9.2.4. Despite these differences, it was noteworthy that there was a generally striking similarity between the discrimination legislation enacted by the Isle of Man, Guernsey and the UK,

which appears to have arisen due to the relevant legislation in those jurisdictions having been based on UK discrimination legislation.

9.3. **The anticipated impact of the Draft Law by reference to various commentators on it**

9.3.1. It was acknowledged by a number of commentators that the introduction of discrimination legislation is an attempt at "social engineering". Considering the Draft Law in that context, it was noted by a number of commentators that the introduction of discrimination legislation in other jurisdictions had failed to address discrimination, and that there was accordingly no evidence that such legislation would work in Jersey. The question of the effectiveness of discrimination legislation remains the subject of academic debate, and no opinion is offered in relation to its effectiveness in Jersey for that reason.

9.3.2. Regarding the anticipated effect of the Draft Law in the sphere of paid work in Jersey, concern was raised as to its cost for employers, and noted that such cost, in terms of training and Human Resources costs, would be incurred regardless of the scale of the problem of race discrimination within Jersey that may actually require to be addressed.

9.3.3. The work required to ensure compliance with the Draft Law was considered by various professional, business and employers groups to be a distraction from the focus of core business, and concern was raised that it would restrict grown within the economy as a consequence.

9.3.4. Furthermore, those same groups expressed concern that it was inappropriate to introduce the Draft Law during the current recession.

9.3.5. Moreover, it was considered that the Draft Law would cause employers to be more likely to avoid engaging permanent members of staff, which was considered to be detrimental to society as a whole.

9.3.6. Concern was expressed that the Draft Law may be used by certain employees as a tactical means of either attempting to extract a compensatory payment from their employers in circumstances where they had no genuine grounds for a claim, or be "tacked on" to a claim under the Employment (Jersey) Law 2003 in order to provide a stronger negotiating platform from which to attempt to achieve a settlement.

9.3.7. Concern was equally expressed that the Draft Law may equally lead to a high level of claims of race discrimination motivated by financial gain. The experience related by the CAB and Guernsey Tribunal suggested that this would not be the case, and that most claimants were instead motivated to pursue a claim by a sense of injustice. This view is

additionally supported by Mr Newman's report on the Employment Law dated March 2013.

9.3.8. The results of UK research into these areas suggests that employers often overestimate the additional burden that such legislation will cause for them, that their concerns are frequently driven by anxiety that they will not be compliant with the relevant legislation, and that effective provision of information can alleviate these concerns, which tend to reduce once the initial 'bedding in' period following the introduction of new legislation has passed.

9.3.9. In the area of voluntary work/organisations, concerns were expressed both that the introduction of the Draft Law may deter work in this sector, and that the level of financial penalty which may be imposed would be disproportionate to the resources of most organisations, and may 'wipe them out' in the event that an award was made against them.

9.3.10. In terms of the perceived effect of the Draft Law in other areas, the view was expressed that there had been a lack of recent consultation in relation to the Draft Law, that non-financial sanctions for breach of the Draft Law would be appropriate, particularly for inadvertent/unintentional breach, and that the Draft Law may have unintended effects, although it was confirmed that this had been considered.

9.3.11. Turning to the perceived effect on those bodies who would be directly involved with the administration of the Draft Law if it was introduced, concerns were expressed that both JACS and the Employment and Discrimination Tribunal which was to be established under the provisions of the Draft Law would not have the resources to cope with the increased workload that this would place on them. Representatives of both organisations confirmed that they had considered their resourcing in anticipation of the Draft Law being brought into force, and were satisfied that the concerns that had been raised would not translate into practical problems. It was not considered that a large number of appeals to the Royal Court from the Tribunal would arise.

9.4. **The choice of race as the first protected characteristic to be introduced**

9.4.1. The statistical basis for both the choice of race as the first protected characteristic and the necessity for the introduction of the Draft Law at all were heavily criticised by a number of the professional, business and employers groups who commented on the Draft Law.

9.4.2. It was considered that further investigation was required in order to provide objective evidence that Jersey experienced a problem of race discrimination which warranted the introduction of a piece of legislation of the comprehensiveness and complexity of the Draft Law, particularly since, once introduced, employers would then be effectively compelled to allocate significant resources in order to ensure not only that they were compliant with the Draft Law, but that they could demonstrate such compliance and that appropriate training had been provided by them to their employees in order to protect themselves as far as practicable from the danger of vicarious liability should an allegation be made that one of their employees had committed a discriminatory act.

Appendix 1

Draft Discrimination (Jersey) Law 201-
Thursday 7th March 2013

Meeting – **Mr Darren Newman, Expert Advisor to the Social Security Department**
Kate Morel, Policy Principal, Social Security Department
Advocate Carl Parslow, Parslows Lawyers
Christopher Austin, Associate, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer

A meeting took place in the Blampied room, States Building between the Health, Social Security and Housing Panel's advisors and representatives of the Social Security Department. It was noted that Parslows Lawyers had been commissioned by the Panel to undertake a review of the Draft Discrimination (Jersey) Law. Mr Darren Newman is an independent employment law consultant, writer and trainer based in the UK. It was noted that he had been providing technical advice to the Social Security Department throughout the drafting process.

Parslows explained that they had reviewed the correspondence received by the Department during consultation on the Draft Law. It seemed that the draft legislation was emotive within the local population and some interesting points had been made from certain groups. Mr Newman explained that the discrimination legislation needed to join up with other legislation and interlink together. It was noted the Draft Law had been closely based on the UK Equality Act which replaced previous anti-Discrimination Laws in order to make it easier to understand.

A further discussion into the UK system followed and it was explained that in 1975 the UK had brought in the Sex Discrimination Act, and in 1976, the UK added the Race Relations Act, which was brought in to protect people from being discriminated against on the basis of race, colour, nationality and ethnicity. Mr Newman explained that bearing in mind the UK system, there was a precedent for developing one characteristic of the Law at a time. The UK protects 9 characteristics in total.

Mr Newman explained the main differences between the draft Jersey Law and UK Act were:

- Scope – that the draft Jersey Law only deals with race
- The remedy is capped at £10,000 compensation under the Draft Jersey Law whereas the UK is currently uncapped. It was explained that discrimination compensation in the UK had previously been capped (to provide a less formal system and to minimise the burden on employers) but in the early 1990s the Court of Justice of the European Union ruled that this was unlawful (based upon a Directive that does not apply to Jersey). It was noted that in recent years low value multiple claims seemed to be more prevalent, but there was no clear evidence that the removal of the cap in itself had led to more appeals.
- Housing exemptions are different within the draft Jersey law but the main concepts are defined the same between UK and Jersey.

Different types of discrimination were discussed including direct (less favourable treatment because of protected characteristic) and indirect (a provision, criterion or practice which causes disproportionate disadvantage). It was agreed that there was a risk that discrimination could be used as a tactic relating to unfair dismissal cases, but the impact of this would be difficult to measure.

Parslows questioned the impact discrimination legislation would have on small businesses and heard that the Jersey Advisory and Conciliation Service (JACS) had been providing training on the

Discrimination Law (free to delegates during 2013 and 2014) and would provide written guidelines when the law has been adopted by the States.

It was noted that, although JACS would provide training to businesses, it was unclear how the service would ensure businesses undertake the training. Businesses might only ask JACS for advice once a case has become apparent. Parslows questioned how businesses could be encouraged to front lead the service and whether there would be a mechanism to disseminate education about discrimination widely.

Mr Newman explained that the way the Discrimination Law was phased-in would be important. If the Draft Law was to be approved by the States, it was envisaged that the law would be implemented by quarter three of 2014 at the earliest.

It was noted that an employment related complaint would be referred to the Jersey Advisory and Conciliation Service in the first instance for conciliation. The Policy Principal explained that three quarters of complaints were able to be conciliated without the need for Tribunal. The Citizen's Advice Bureau will deal with complaints that do not fall within the employment arena and it was explained that CAB would also be providing guidance for non-employment issues. If conciliation/mediation is not successful, the Employment Tribunal would be involved.

Parslows questioned whether the implementation of the Draft Law would affect JACS resources and the Policy Principal advised that the JACS were well prepared to deal with any extra work arising from protection against race discrimination. Since the Draft Law had been a long time in coming, JACS had been preparing for Discrimination Law since 2007 when it had been held with the Home Affairs Department.

Statistical data on UK claims was discussed and it was noted that, on average, there were 5,000 race discrimination complaints a year going to Tribunal, two-thirds of which would settle, and many of the remaining complaints would be unsuccessful because discrimination complaints are hard to prove.

Mr Newman explained that race discrimination legislation required the least amount of adjustment for the employer. Developing the other characteristics is more complicated because other factors have to be considered. For example, sex discrimination would require consideration of maternity and pregnancy and age discrimination encompasses matters such as retirement and succession planning.

A discussion regarding the language followed and Mr Newman explained that the law would never stop an employer employing the best person for the job. A language requirement, such as a requirement to speak fluent English, would potentially amount to indirect discrimination – but would not be unlawful if the requirement to speak a particular language was a genuine and proportionate requirement for the role.

Parslows raised a hypothetical example whereby a Polish child was enrolled into a school in Jersey. If the Discrimination Law was to come into force, it was questioned what responsibility the school would have to ensure it was not discriminating against the Polish child by providing lessons only in English. Mr Newman stressed that he was not an expert on education law but that as far as Discrimination Law was concerned, a policy of only providing only lessons in English might be indirect discrimination - disproportionately disadvantaging Polish speakers – However, it may be a proportionate means of achieving a legitimate aim, e.g. providing lessons to only two Polish speaking children and 150 English speaking children. It was also advised that the law provides for certain exceptions where an act that might otherwise amount to prohibited discrimination would not be treated as such under the Draft Law (Schedule 2).

Parslows asked whether the public would be advised about what was envisaged to be included in codes of practice before the law actually came into force. The Policy Principal advised that there is currently no intention to develop codes of practice on any particular issues. Mr Newman explained

that codes of practice were not always a good idea. They could be seen as imposing further requirements on employers which might be seen as burdensome or bureaucratic. All that the law required of employers was that they do not discriminate on the grounds of race. There was no positive duty that had to be complied with.

If the Draft Law was to be approved, when asked whether it was expected that there would be an increase in claims through the employment tribunal, Mr Newman agreed that there would be more claims. Whether there was anything in the Draft Law to join up an unfair dismissal claim and discrimination claim was also discussed. It was noted that, in Guernsey, in order to hear complaints of unfair dismissal and sex discrimination, a piece of legislation was introduced that established Guernsey's Employment and Discrimination Tribunal. Mr. Newman explained that this would be covered under the employment law Order making powers (Schedule 3(1)(12)).

It was explained that Tribunal procedures are to be set out in Orders in future and that the Judicial Greffe was currently assisting in developing the areas that will be covered.

It was noted that it would be easy for an employee to bring a claim to the Tribunal, and there would be onus on the employer to respond. It was agreed therefore, that claiming for discrimination cases was open to abuse, but it would be impossible to measure how much it is abused. Mr Newman explained that the balance had to be right. For most individuals, bringing a claim alleging discrimination would not be easy – it would be very upsetting and stressful. It would always be possible to criticise a law on the grounds that there was a risk of unmeritorious claims but the only way to avoid the risk of them altogether was not to introduce a Discrimination Law at all.

Vexatious litigants were discussed further and Parslows suggested that the Tribunal should have the power to award costs. It was noted that the Minister for Social Security has the power to make an Order giving the Tribunal the power to award costs. The Policy Principal advised that in 2011 the Employment Forum consulted and recommended to the Minister that the Tribunal should not have the power to award costs and the Minister accepted the recommendation at that time.

The Policy Principal explained that the Minister for Social Security had been keen to make the Draft Law as simple as possible. Mr Newman advised that previous drafts of the law had given the Tribunal the power to direct an employer (by issuing non-discrimination notices), but this had made the Law very complicated and introduced a criminal penalty and was therefore omitted.

Advertisements were briefly discussed and it was noted that the Department does not monitor adverts placed in the Jersey Evening Post (JEP) for acts of discrimination, but that any adverts placed with the Social Security Department were checked. It was agreed, however, that the JEP and other media are up to speed on anti-discrimination advertising following the introduction of sex discrimination legislation in Guernsey in 2005.

Parslows had examined the Jersey Annual Social Survey 2012 and it was noted that a quarter of Islanders had reported at least one occasion of discrimination over the previous 12 months.

Parslows highlighted that the Draft Law provided for clubs in Article 25, which prohibits discrimination by those managing clubs with regard, for example, to applications for membership and to the terms and conditions of membership. When asked whether there had been any public consultation, the Policy Principal confirmed that no public consultation had been undertaken with clubs in the Minister's 2012 consultation, but public consultation had been undertaken on the Draft Law (which included this provision) in 2006 and in 2008.

Parslows also highlighted that the Draft Law prohibits discrimination in the provision of goods, facilities or services to the public or a section of the public. Mr Newman explained that examples of this tended to be around disability, for example, not providing ramps to shops or disallowing guide dogs into premises.

Parslows questioned whether other Minister's had considered whether the Draft Law would impact on legislation within their remit. It was unclear whether any audits had been carried out, however, the Draft Law had been considered by the Council of Minister's and Chief Officers before it was lodged.

It was noted that in a previous meeting, the Health, Social Security and Housing Panel had raised the issue of fostering and adoption. It was noted that the matter had been discussed with the Fostering and Adoption Team and the Department was satisfied that there was existing legislative authority providing the necessary exemption to behaviour that could otherwise be considered discriminatory in fostering and adoption services.

When asked what effect the UK Law had had on the relationship between employers and employees, Mr Newman explained that it had been transformed.

Draft Discrimination (Jersey) Law 201-
Monday 11th March 2013

Meeting – Will Austin-Vautier, Jersey Employment Lawyers Association (Bedell Cristin)
Huw Thomas, Jersey Employment Lawyers Association (Carey Olsen)
Advocate Carl Parslow, Parslows Lawyers
Christopher Austin, Associate, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer

A meeting took place in the first floor meeting room, Morier House between the Health, Social Security and Housing Panel's advisors and members of the Jersey Employment Lawyers Association. It was noted that Parslows Lawyers had been commissioned by the Panel to undertake a review of the Draft Discrimination (Jersey) Law (the "Draft Law"). It was noted that the purpose of the meeting was to extract views on the Draft Law from external organisations/associations and that it was appropriate to get legal input.

Mr Thomas agreed that Jersey needed some form of discrimination regulation, however, was not certain whether a full scale law was appropriate. He agreed that Jersey could implement some form of equality regulation in other ways such as a uniform code of practice. He was uncertain, however, whether the States would adopt such a code. Other jurisdictions were identified such as the Cayman Islands, Isle of Man and Europe and it was noted that most have some form of equality legislation.

Mr Thomas explained that the Draft Law does not necessarily need to be based on the UK's Equality Act and that there were some advantages and disadvantages of importing basics from the UK into Jersey legislation. Mr Thomas explained that a benefit was that you can draw a lot of evidence and case work from the UK.

Mr Thomas explained that the Minister for Social Security had identified within the notes to the Draft Law that there would not be an administrative burden on employers once the Draft Law had been implemented. Mr Thomas considered that this may be optimistic. It was agreed that this may be the case for the implementation of the race characteristic, but Mr Thomas expected there to be administrative burden on employers once the other characteristics such as sex were to come into force. A discussion followed regarding what procedures employers had already in place to deal with discrimination, and it was noted that the larger organisations were more likely to have codes of practice already implemented compared with small to medium size organisations. Mr Thomas explained that some employers would not have the resources to deal with matters such as staff training, which would need to be undertaken in preparation for the Draft Law coming into force, and the additional administrative burden that may result also.

Parslows questioned whether a Discrimination Law would affect Jersey competitively and whether it might discourage businesses to come to the Island. Mr Thomas's opinion was that it would not have an effect to that extent but it would be beneficial for some form of consultation to take place to see how much of a difference the implementation of the law had made to the business community. Mr Thomas referred to research in the UK (which has much more employment protection) which suggested that employers were not necessarily deterred by employment regulation.

From Mr Thomas's experience there had been some discrimination related cases in recent years, and implementation of the law would make it likely that there would be more cases as there always tends to be a crescendo of cases when a new law comes into force.

The cap on compensation was discussed and it was Mr Thomas's opinion that the cap at 10,000 was likely to be appropriate (see further comment below on this point). Guernsey was mentioned

and it was noted that when its Tribunal finds in favour of the Applicant, it awards a sum equal to three months' pay. Mr Thomas explained it was unlikely that a person would make a complaint for the sake of three months' pay and therefore one must question whether there is a risk that the law would not be addressing its original purpose.

Mr Thomas explained that the benefit of implementing a Discrimination Law was that it would make employers address issues in the workplace, and his experience in the UK was that race legislation had reformed workplaces. When questioned on race being the first characteristic, Mr Thomas commented that employers would need to become accustomed to the mechanics of discrimination legislation. He agreed that it seemed sensible to start with race before other characteristics were brought forward, such as sex discrimination. It was noted that statutory protection in relation to sex discrimination involved consideration of potentially very complicated matters such as equal pay. Mr Thomas explained that, as and when regulations are introduced in Jersey in relation to sex discrimination, as part of the consultation exercise it may be useful to consider Guernsey's experience, which already had sex discrimination legislation.

Both Mr Thomas and Mr Austin-Vautier raised concerns about the existing employment law framework in Jersey, to include the Employment (Jersey) Law 2003 (the "Employment Law"), and some of the key components of that framework, such as JACS and the Jersey Employment Tribunal (to include their respective roles, functions and procedures). Both agreed that a general review of Jersey's employment law framework is undertaken before the Draft Law is approved, to check that it is sufficient and appropriate for the Island before further employment-related legislation is added to the statute book. It was noted that the Employment Law and Draft Law were required to be read in parallel with each other, so a review would be beneficial. It was agreed that the Draft Law should not be drafted in isolation to the Employment Law. In this regard, Mr Thomas noted that where appropriate, and to achieve consistency, it would be sensible for definitions included in the Employment Law to be used in the Draft Law, for example.

Mr Thomas explained that the Employment Law had contributed to the creation of a Human Resource/advisory industry in Jersey. It was agreed that this had put more pressure on the Jersey Advisory and Conciliation Service (JACS).

A discussion regarding JACS followed and Mr Thomas suggested that a review of JACS' role and/or function might be worthwhile. Mr Thomas commented that there was a perception that the service was leaning towards a "pro-employee" stance. It was noted that the implementation of the Draft Law would require JACS to undertake more training and therefore may present an additional resources issue. It was also explained that currently, there is a tension about JACS role as an advisory and reconciliation service. For example, in situations where the Tribunal refers parties to an employment dispute to JACS for conciliation, it is quite possible (as has often been the case) that the applicant (employee) in the matter had sought legal advice from the service at an earlier stage in the proceedings (i.e. as to the possible merits of his/her claim). Mr Thomas and Mr Austin-Vautier felt that a conflict is created here between JACS' role as an advisory service and its role as a forum for conciliation.

It was noted that JACS was a relatively low cost organisation compared to the UK Advisory, Conciliation and Arbitration Service (ACAS). It would be important that JACS had the training and resources to deal with any influx of people seeking advice.

Mr Thomas explained that it was arguable whether JACS would be able to deal with the discrimination claim process and that a plan should be actioned before the Draft Law came into force. When questioned whether it was likely whether an unfair dismissal claim would be bolted onto a discrimination claim, Mr Thomas advised that it was likely this would occur. Guernsey was mentioned and it was noted that it had an Employment and Discrimination Tribunal. Mr Thomas alluded that the joining-up of claims should perhaps be included in a set of Tribunal regulations.

It was noted that within the Draft Law, compensation was based on an economic loss model. It was noted that compensation under the Employment Law was banded (with reference to the

applicant's weekly wage and their length of service). It was questioned whether it should be based on a loss base approach going forward. When questioned whether Jersey should introduce some form of loss regime, Mr Thomas explained that this should certainly be considered – the aim should be consistency of approach. It was noted that this point went back to the need for a wholesale review of Jersey employment law.

It was noted that many larger businesses in Jersey have the resources (financial and manpower) to ensure that their HR systems and procedures are legally compliant. Many have (head) offices in jurisdictions that possess more established/a broader range of employment-related laws and regulations. Accordingly, many of these businesses are already familiar with the types of "best practice" requirements contained within Jersey's employment law framework. It was further commented that the majority of businesses in Jersey are small to medium size. Mr Thomas explained that there would be a greater requirement for the small to medium size businesses to seek access to a Lawyer.

It was noted that, currently, not many appeals from the Tribunal go to the Royal Court but this could change if the Draft Law is approved. It was also noted that a dedicated appeals Tribunal would be beneficial. Mr Thomas explained that the Tribunal should consider recording the decisions so that the decision making process would be more transparent. He said that the Royal Court had commented on this particular issue in an appeal from the Jersey Employment Tribunal heard in the recent past.[105]

Parslows questioned whether there were any ambiguities in the Draft Law and it was noted:

- **Article 2 provides for the territorial extent of the law. The Draft Law would apply to all acts of discrimination done <u>in Jersey</u> –** it was noted that in the employment context it was unclear that if, for example, you were employed by a Jersey company and went to Guernsey (i.e. on business) and an act of discrimination took place whether you would be able to make a claim. This article also raised uncertainty for people employed in a multinational company.
- **Article 6 defines direct discrimination for the purposes of the law –** it was noted that this area would need statutory guidance. If the definition was to be adopted, it would seem that the explanatory notes for Articles 6 and 7 were not including hypothetical comparators.
- **Burden of proof –** this was also identified as an ambiguous area. It was noted that a burden of proof provision that was included in a previous version of the Draft Law has been removed. It was also noted that, under the Equality Act 2010, the test amounts to a "reverse burden of proof" (complainant to put forward prima facie case with the burden then switching to respondent to prove that no discrimination occurred, for example). Mr Thomas expressed the view that the discrimination concepts within the Draft Law (based on the Equality Act 2010 as they were) do not lend themselves well to analysis based solely on a balance of probabilities and that the drawing of inferences by tribunals in the UK was fundamental to the way in which they dealt with such issues.
- **The definition of race in Schedule 1 –** it was highlighted that paragraph 2 in Schedule 1 states “For the purpose of this Law, “national origins” includes being of Jersey origin”. Mr Thomas explained that how national origin was defined in the Draft Law was interesting and in his opinion, Guernsey or Channel Islands as a whole should be included. Mr Thomas also advised that this section would be better to be included in the statutory guidance.
- **All complaints will be referred for conciliation or mediation, if both parties agree that the complaint relates to employment, the Secretary to the Tribunal will refer it to JACS for conciliation –** Mr Thomas questioned whether this part of the Draft Law should be rephrased and that binding people to conciliation may not be beneficial. It was also questioned whether there was any scope for Judge led conciliation in camera. Sharing the

[105] *Luxicabs v Baal* [2011] JRC072 at para. 24

Tribunal Chairman with Guernsey was also highlighted as a possibility, and this raised the interesting question of whether the Employment Law between the two Islands should be aligned.

- **Additional manpower –** it was noted that on page 14 of the Draft Law, it states that one additional part-time administrative post will be required (from 2015) to deal with the additional Tribunal workload (it is envisaged that the Draft Law will come into force before then, in 2014). Mr Thomas said that additional workload should not be underestimated, and that in his experience from advising and/or representing parties to tribunal proceedings in connection with the Employment Law, people had to wait 6 – 12 months if their claim was to go before the Tribunal. Arguably, unless the correct resources are supplied, these timescales will increase. Mr Thomas explained that the UK approach in relation to unfair dismissal was that issues should only take 16 weeks from start to finish and that straightforward cases could be heard by a Chairman sitting alone.
- **Article 12 prohibits discriminatory treatment in the formation of a partnership, in the appointment of partners and in the course of the partnership –** a minor concern was that this did not provide for foreign law partnerships.
- **Part 4 and 5 provides for voluntary work –** Mr Thomas questioned whether this part of the Draft Law should be included, and whether voluntary organisations should be exempt to begin with.

Mr Thomas explained that his overall thoughts on the Draft Law were that it was a little rushed, and this was highlighted further by reading the explanatory notes. The basic mechanics of the draft were sensible. It was also noted that the provisions were drawn from the Equality Act 2010. When questioned whether there would be any adverse consequences of the Draft Law, Mr Thomas explained introducing more complexity into the employment relationship was always a risk in terms of whether employers would be willing to employee additional staff. An advantage of the law might be that it would encourage a culture where employers would be more inclined to put procedures in place. It was Mr Thomas's opinion that there are other ways of preventing discrimination which could be tried before a law is implemented.

Mr Thomas questioned whether small businesses/organisations should be exempt until they are better prepared to deal with the law in terms of resources. It was suggested that the law could be exempt for the first year for any business/organisation which employs less than 12 people. The reason for this was that small businesses/organisations were more likely to infringe the law when it first comes into force. As mentioned earlier in the meeting, it is more likely that they do not have the expertise or resources by comparison to larger organisations. It was also noted that many small/medium sized Jersey businesses employ staff from ethnic minorities and, in some cases, minority groups constitute a notable proportion of the business' workforce (i.e. those operating in the agriculture and hospitality industries). Arguably, therefore, it is possible that many Jersey businesses employing groups/individuals to whom race regulations might be of most relevance are of a size (and resource/expertise) least able to meet the procedural and administrative obligations that the Draft Law will introduce once in force.

Parslows questioned when, in Mr Thomas's experience, people required legal advice and whether it was before a discriminative matter had been raised, or whether it was once it had occurred. Mr Thomas explained that employers usually sought expertise before rather than later i.e. preventative as opposed to reactive. Mr Thomas advised that more people had been asking about the Discrimination Law since it was lodged.

Draft Discrimination (Jersey) Law 201-
Wednesday 13th March 2013

Meeting – Malcolm Ferey, Chief Executive, Citizen's Advice Bureau
Advocate Carl Parslow, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer

A meeting took place in the first floor meeting room, Morier House between the Health, Social Security and Housing Panel's advisor and the Chief Executive of the Citizen's Advice Bureau (CAB). Advocate Parslow explained that Parslows Lawyers had been commissioned by the Panel to undertake a review of the Draft Discrimination (Jersey) Law and the purpose of the meeting was to hear the views of external parties.

The Chief Executive advised that part of his role was to provide oversight to the Bureau and he explained that CAB receives cases of discrimination complaints but it was difficult to determine what characteristic the complaints fell under. He advised that, anecdotally, race was the main area of perceived discrimination CAB encounter.

It was noted that the only resources CAB had was community mediation to resolve any disputes because nothing had been enshrined in law. In general terms, the Chief Executive welcome the Draft Law and explained that people should be protected against discrimination.

More people had been asking CAB about the legislation since it has been announced in the media, and the Chief Executive advised that more people would be made aware of discrimination though the Law being implemented itself and the media.

Advocate Parslow questioned whether a law based on the Equality Act was necessary, or whether a law could be developed which was more akin to the Jersey system. The Chief Executive explained that the Guernsey government had introduced sex discrimination and the main driver for this had been employment.

It was questioned whether discrimination cases could be dealt with by unfair dismissal through the Employment Law which could act as an alternative to an individual Law on discrimination. The Chief Executive agreed that this could be an option, but his concern would be that some people would not be protected as the Employment Law only deals with employment issues. Advocate Parslow highlighted that the Draft Law's remit was predominantly limited to employment cases. The Chief Executive identified that the Draft Law, with the first characteristic being race, was an enabling law for further characteristics to be added in due course.

The Chief Executive advised that his previous role was as an Enforcement Officer within the Social Security Department and he had had direct experience of the Employment Law when it was first implemented. When questioned whether the Employment Law was fit for purpose, the Chief Executive advised that, in his opinion, the law did not have any holes/gaps. If there was evidence that the law was not appropriate, the Chief Executive agreed that this would need to be addressed before the Discrimination Law was implemented.

It was the Chief Executive's understanding that race had been chosen as the first characteristic because employers would have to do the least amount of work to comply. He agreed that as an umbrella law, race being the first tranche was sensible.

The Chief Executive advised that CAB would provide assistance to employers/employees and the general public. As the Bureau employs voluntary staff who are both Portuguese and Polish, it was envisaged that education about Draft Law would reach the wider ethnic minority communities as good connections had been established.

Advocate Parslow questioned whether it was the appropriate time to implement a Discrimination Law considering the economic climate and the perception that it would add more “red tape”. The Chief Executive explained that the main feature of such a law is protecting people and giving them the right not to be discriminated against. It would ensure that the correct policies and procedures were in place.

The Chief Executive agreed that the Discrimination Law was a form of social engineering. It was hoped that awareness would be raised to employers/employees and the wider general public before the law was implemented. It was noted that Public Relations/media would assist with this.

In terms of CAB, it was explained that it has close connections with the Social Security Department (Kate Morel, Policy Principal through the Employment Forum). Staff from CAB also attend training courses and it was advised that if staff required refresher courses, the Social Security Department would assist with this. It was noted that there would be cost attached to training staff, but the Chief Executive advised that this would be manageable even if cases/referrals were to double once the law had been implemented.

Advocate Parslow questioned how advice from CAB is monitored and what checks and balances were in place. The Chief Executive explained that the Deputy Manager of the Bureau self audits and checks advice at random. Every year there is an annual liaison visit from the Bureau’s parent organisation in the UK to ensure it is fit for purpose and once every three years there is an organisation audit. CAB also commission a local law firm to audit advice being given.

It was agreed that there would more than likely be an increase in referrals to CAB. The Chief Executive recalled that there had been a few cases in the media when the Employment Law was first enforced, and it was likely that the same scenario would occur with the Discrimination Law. It was agreed that an option could be for the Tribunal to issue a notice to employers in the first instance. The Chief Executive explained that it was important that enforcement was flexible when the Employment Law first came into force, as it is much about education as it is about enforcement.

It was agreed that unfair dismissal claims and discrimination claims are of equal importance. It was identified that an employer may want to engage professional help if they felt the need. The Chief Executive advised that implementation of the law would result in an increase to costs for employers, but, in his opinion, this would be fairly minimal. He explained that there is always an element of whether costs will increase for employers when new laws are discussed i.e. data protection/freedom of information.

The Chief Executive explained that the Jersey Advisory and Conciliation Service (JACS) offer a lot of services including blanket codes of practice and procedures to help businesses establish a complaint employment framework.

It was the Chief Executive’s opinion that the 10,000 cap on compensation was right, and from his experience, the money side is usually a secondary consideration for most people and that seeking an apology is the main priority. When questioned on how the damages will be monitored, the Chief Executive agreed that guidelines would need to be developed for levels of compensation.

The Chief Executive agreed that voluntary workers should be protected and was pleased this had been included in the Draft Law. The Chief Executive advised that, as far as he was concerned, there was nothing for cause for concern in the Draft Law.

It was noted that the Tribunal refers down to JACS for conciliation in the first instance and this would perhaps result in a delay of a case being dealt with by the Tribunal. Anecdotally, it was noted that cases going to Tribunal could take 6 – 12 months. The Chief Executive advised that most cases are settled out of Tribunal because employees do not want their case going out into the public domain. There is always a risk that, if a claim was put out into the public domain, employees would find it difficult to get employed. Jersey is particularly susceptible as it is a small

community. The Chief Executive agreed that something should be done to speed up the process, and perhaps some cases could be fast tracked to the Tribunal.

The Chief Executive agreed that if there were issues with the Tribunal, these should be addressed before the Discrimination Law was implemented. It was noted that, issues with the Tribunal or Employment Law should not be a reason for not implementing the Discrimination Law.

Protection for the employer was discussed, and it was noted that there was a general perception that the Tribunal was more concerned about employee rights as opposed to employer rights. The Chief Executive agreed that safeguards should be in place to protect the employer against vexatious claims.

Compensation levels were discussed and it was agreed that people in quasi employment should have the same levels of protection. It was questioned whether the same level of compensation should apply, and it was noted that a charity for example, may not be able to cope with a £10,000 pound fine. The Chief Executive hoped that the Tribunal would take this into consideration. His view was that, if a charity was taken to a Tribunal, being named and shamed would be enough of a punishment, and it would also highlight the need for some restructuring procedurally within the organisation.

Regarding the definition of employee in the Employment Law, the Chief Executive's view was that it was best kept broad, and did not think it needed to be changed.

Draft Discrimination (Jersey) Law 201-
Thursday 14th March 2013

Meeting – David Witherington, Director, Jersey Advisory and Conciliation Service
Advocate Carl Parslow, Parslows Lawyers
Mr Christopher Austin, Associate, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer

A meeting took place in the Le Capelain room, States Building between the Health, Social Security and Housing Panel's advisors and the Director of the Jersey Advisory and Conciliation Service. It was explained that Parslows Lawyers had been commissioned by the Panel to undertake a review of the Draft Discrimination (Jersey) Law and it was noted that Parslows were gathering evidence to assist it with the review.

The Director agreed that a Discrimination Law was required in Jersey, and this had been identified in the JACS annual reports for a number of years. He advised that JACS had recorded approximately 47 cases of discrimination in 2012, as well as 260 cases of bullying and harassment cases some of which were related to discrimination.

The Director explained that most people did not know how to respond to an act of discrimination, and JACS advise, in the first instance, to follow the employer's procedures. In some cases, the Director contacts the employer to bring the case to their attention. It was his view that Chief Executives or Managers would take a "dim" view of such acts if it was brought to their attention. The Director explained that mostly, the larger firms preferred to deal with cases internally.

Parslows highlighted that the Draft Law had been based on the UK's Equality Act and it was questioned whether cases of discrimination would be added on to claims of unfair dismissal. The Director agreed that existing claims would be counter linked to discrimination, and it was a possibility that people would use this strategically which would be a cause for concern for employers. The Director explained that it would be JACS responsibility to investigate this.

The qualifying period was discussed in relation to unfair dismissal and the Director expressed that if this were to increase, more people would be likely to complain about discrimination.

Parslows questioned whether it was the right time to bring in such legislation taking into consideration the economic climate, but the Director explained that this was not a reason not to face up to discrimination issues. His view was that there is an obligation in Jersey to implement discrimination legislation, and he could not identify any other alternative.

The Director explained that training on the law was key to ensure that innocent mistakes are not made once the Law is enforced. The fact that the Discrimination Law had been in the pipeline since 2006 was identified as an important issue as JACS had been delivering training since then.

The Director recalled that when the Employment Law was first implemented, JACS ran training sessions for businesses in the evenings, but the attendance had been disappointing. He advised that the same would be carried out if the Discrimination Law was approved, but he expected that there would be the same level of attendance. It was noted that the larger firms were more likely to undertake training rather than small businesses. This was concerning because it is more likely that the smaller businesses will infringe the Law.

The lead-in period of the law, if approved, would be key to ensure that businesses were not overwhelmed by the full impact of the Law. The Director agreed that employers should be encouraged to improve its procedures before it is sent to trial when the law is first implemented.

It was agreed that the Discrimination Law itself is more complex than the Employment Law because of the indirect discrimination aspects of the Law. The Director acknowledged that the law should be a learning curve at first.

The Director's general view of the Law is that it is necessary in order for the other characteristics of discrimination to be introduced including sex, disability and age. The Director advised that addressing maternity leave should be a priority.

Parslows questioned the Director's views of race being the first characteristic, and he said that with the ethnic population of Jersey, race was very relevant. He also identified, however, that sex discrimination was more prevalent, but equally more difficult to introduce, therefore, race as a starting point was sensible.

Parslows questioned the possibility of incorporating the Discrimination Law into the Employment Law, but the Director explained that there was merit in having a distinct, stand-alone law. Parslows explained that there was an "urban myth" that the Law would deal with every situation of race discrimination, including people on the street being discriminative. The Director advised that JACS would assist in conquering this belief but it would be an interesting point to get people to understand. His view was that race discrimination would help people get into the right mindset about discrimination.

The Director explained that JACS were limited to three employees with part-time administrative support. After discussing the matter with the Social Security Department it has been agreed that this would be increased to four. The Director said that it was important to note that JACS would only see the true impact of the Law once it had been implemented and the need to reassess resources levels may be required in the future.

A discussion into the Tribunal followed and it was noted that some cases had taken 12 months to process therefore it would seem the Tribunal was pressured. The Director explained that the Tribunal's resources were limited as it had only two Chairs. It was agreed that processing employment complaints through the Tribunal may exacerbate what is currently provided. Parslows therefore questioned whether there was a requirement for the Employment Law to be addressed before the Discrimination Law was implemented. The Director advised that this was unnecessary as this process had already started and was being streamlined due to various complaints.

It was identified that all employment cases would be referred to JACS for conciliation unless the parties indicated that this was not required. Parslows questioned whether this should be less definitive but the Director agreed that employment cases should be referred to JACS.

How the system would cope with non-employment issues such as charities was questionable. It was agreed that the punishment should not necessarily be a monetary sum, and a warning in the first instance via a notice would be appropriate. In order for this to be carried out effectively, the Director agreed that there should be a contact point and it was suggested that the Enforcement Officers based at Social Security may be able to do this.

It was agreed that joint working with Jersey and the Guernsey Employment Appeal Tribunal should be utilised and there should be the scope to use Guernsey adjudicators. It was noted that there was a low number of cases (4 or 5) of appeals and that it was an important factor that people are able to appeal.

The cost regime in a Tribunal was discussed and it was agreed that employers should be protected, especially in the context of vexatious claims. The notion that employees can take their employer to Tribunal and have nothing to lose was identified as a poor aspect of the Law.

The Director advised that, in his opinion, there would be no need for employers to seek legal advice to represent them, particularly if they had good H.R resources within their organisation. The Tribunal's use of Direction and Interim Hearings was helpful to the parties involved in a claim. After

further discussion it was noted that it would be a difficult balance for the employer to achieve – financing a lawyer or accepting a £3,000 pound compensation fine.

The Director's view of the Draft Law was that it would enhance Jersey's international reputation. He advised that the International Labour Organisation had questioned Jersey on dealing with its commitment on international obligations. The absence of maternity and related legislation was an important gap to note in Jersey's infrastructure.

The Director advised that JACS had been working with the Social Security Department during the drafting of the law. It was agreed that the comments from JACS would be passed onto Parslows.

In principle, the Director agreed that codes of practice in advance of the Law being implemented was a good idea, but the Community Relations Trust had six principles that are not necessarily adhered to, so it was questioned whether issuing codes would be beneficial. Codes in assisting businesses could be helpful, but they could also be counterproductive.

A discussion regarding the £10,000 pound cap was discussed, and it was the Director's view that this was the right sum bearing in mind the cap contained in the Employment Law and petty debts court. The Director did suggest, however, that the sum should be reconsidered in the future with the view for it to be increased. Parslows highlighted that the Employment Law had a sliding scale for levels of compensation, and the Director agreed that a similar scale should be introduced to the Discrimination Law. It was noted that exploring the criteria for compensation levels would not only assist JACS in settlements but also lawyers, the claimant and the Tribunal.

Parslows questioned the Director on who were the most likely to make a claim of discrimination. The Director advised that, in his experience, professions would be disinclined to make a claim and it was more likely that the lower levels, i.e. administers or manual workers would put a claim forward. But in relation to manual workers, it was noted that the building industry was quite small and people's reputations were a factor.

The Director explained that the media was an issue because they tended to report an issue before a decision on a case had been made. It was questioned whether the press should be limited to report after a decision has been made to ensure that they are reporting the facts as opposed to allegations.

Parslows questioned whether JACS had a conflict with advising both the employer and employee. The Director advised that there was no conflict as procedures were in place to ensure that someone was not or had not advised both parties in relation to Tribunal conciliation cases. The Director said that he was aware of the perception that JACS is a biased service but reassured that JACS was and would remain an impartial body.

A discussion regarding the definition of employer/employee in the Employment Law followed and the Director thought that having a definition was good because it allowed for a clearly defined concept. He did note the difficulties with the definition including seasonal workers/self-employed/Non-Executive Directors and sub-contractors. An example given was that the States of Jersey employs a large number of people working through recruitment agencies. If an act of discrimination was to take place in a department there would be issues about who the employer was – the States of Jersey or the recruitment agency.

It was noted that the Minister for Social Security had described the law as simplistic, but the Director's view that it was more complex and there should be a degree of caution when it is introduced. The following were highlighted as issues within the Draft Law:

- It was noted that in Guernsey ordinance there is a standard of proof, and it was questioned whether Jersey should have the same

- **Article 6 defines direct discrimination for the purposes of the law –** the hypothetical comparator aspects were complicated and hard to understand
- **Article 2 provides for the territorial extent of the law. The Draft Law would apply to all acts of discrimination done in Jersey –** what the process would be if an employer was working for an international company and an act of discrimination took place in another jurisdiction
- **Article 12 prohibits discriminatory treatment in the formation of a partnership, in the appointment of partners and in the course of the partnership –** the definition of partnerships was unclear.

Draft Discrimination (Jersey) Law 201-
Monday 18th March 2013

Meeting – Jason Laity, Chair, Jersey Institute of Directors
Vicky Milner, Member, Jersey Institute of Directors
Advocate Carl Parslow, Parslows Lawyers
Mr Christopher Austin, Associate, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer
Mr S. Le Cornu, work placement student

A meeting took place in the Le Capelain room, States Building between the Health, Social Security and Housing Panel's advisors and the Chair and a Member of the Institute of Directors (IoD). It was explained that Parslows Lawyers had been appointed by the Panel to undertake a review of the Draft Discrimination (Jersey) Law and it was noted that Parslows were gathering evidence to assist it with the review. Parslows advised that it was aware of the IoD's response which had been sent to the Director of Policy and Strategy Development of the Economic Development Department regarding the Draft Law (IoD letter dated 6 December 2012).

The IoD's letter was discussed and paragraph 4 on page 3 was highlighted: "*Great care had to be used when implementing social legislation to ensure that it does not unduly impede businesses' ability to operate properly and effectively, introducing obstructive layers of red tape that do not resolve the problems they were intended to address while creating new problems*".

It was the IoD's view that introducing the Discrimination Law would increase the burden of statutory requirements which businesses already have to comply with, adding another layer of red tape for businesses, in a climate in which unemployment is high. It was noted that the Chief Minister had been advocating that businesses advertise jobs and employ people, but the introduction of the Discrimination Law would be difficult for businesses to welcome especially in the current economic climate. If businesses are being encouraged to employ more people, adding another layer of red tape was described as "counter-intuitive".

It was noted that many or most larger businesses in Jersey would already have some form of non-discrimination, equal opportunities or anti-bullying policy. The smaller businesses on the other hand, would be less likely to have such policies – and it was explained that many of them had very basic employment contracts. It was Advocate Milner's experience that some of the smaller businesses had employment contracts which either pre-dated the Employment Law or had never been updated since it came into force in 2005. It was noted that it was not currently a statutory requirement to have a disciplinary policy. [Article 3 of the employment law simply requires that if there are any terms or conditions relating to disciplinary procedures these must be set out in relevant employment documentation. The JACS Code of Practice on "Disciplinary and Grievance Practice and Procedures" is currently the subject of a separate consultation.]

Advocate Milner expressed the view that inappropriate discrimination was unacceptable. Such discrimination did occur in Jersey, in her experience, as it did all over the world. However to introduce Discrimination Law would have ramifications: it was not evident that it would resolve the issues it was meant to address and it might introduce additional problems. A discussion regarding Employment Law claims followed and it was noted that even though some claims are valid, there are also claims which are unmeritorious or confused. It was noted that potentially anyone could bring forward a claim of discrimination (at least under the proposed race discrimination legislation). In most cases employers were effectively compelled to defend claims lodged in the Tribunal, regardless of whether or not they had merit, as if a claim was not defended judgment would be entered for the claimant.

Parslows asked whether there should be a fee to bring forward a claim. It was Advocate Milner's view that, although she would not want it to deter meritorious claims, a fee to lodge a claim could

focus people's minds. It was noted that there was a power in the Employment Law for there to be a costs regime. (See Article 91(4)(g).)

In response to a question from Parslows about whether a costs regime should be introduced, Advocate Milner noted that consultation had previously been undertaken on this issue but agreed that it was worth reviewing whether the Tribunal should have the power to issue costs. She considered that it might not be appropriate for such a power to be automatic - costs might only be awarded in certain circumstances. Parslows suggested that this might be akin to the costs regime in family law cases. Advocate Milner referred to a recent case, *In the matter of Pearce* [2012]JRC217. The employer had refused to co-operate with the Tribunal. Offensive emails had been sent to the Tribunal by the employer, and Advocate Milner explained that the employer eventually appealed through the Royal Court. At present there was uncertainty as to the Royal Court's ability to issue costs in Tribunal appeal matters and this was unhelpful.

Parslows asked why there were so few appeal cases. Advocate Milner said that it was her understanding that this was purely down to the high cost of bringing appeals, the low value of most Tribunal claims and the fact that there was no costs regime: at present it made little financial sense to try to appeal a Tribunal decision as it was likely to mean throwing good money after bad.

When Advocate Milner was asked by Parslows whether the employment law should be reviewed and consolidated, she agreed that the law should be reviewed. She noted that there had been seven changes to the main Employment Law itself over a relatively short time span (as well as changes to related and subordinate legislation) and there had been some concerns about the Tribunal among employers. It was suggested that a review of the Law should be undertaken to assess how the Tribunal was working before something else such as the Discrimination Law was introduced. Advocate Milner explained that the Tribunal is currently working with minimal oversight (because there were so few appeals) which was a further reason why the Employment Law should be reviewed. It was noted that there had been an initial understanding among members of the original Employment Forum that the Employment Law was going to be reviewed after 3 years, but this had never occurred.

Advocate Milner suggested that the implementation of any employment legislation (including but not limited to Discrimination Law) was a form of social engineering. There was nothing wrong with this but it was very important that such legislation was appropriate to the society in which it was being implemented, had been assessed as likely to resolve the issue it was being introduced to address, was proportionate and would be more beneficial than harmful.

Parslows asked whether not adopting the Discrimination Law would affect Jersey's international obligations and would harm its reputation overseas. It was Mr Laity's view that it would not make any difference given the current economic climate and changes to business-related legislation in places like the UK. Advocate Milner questioned whether any Discrimination Law for Jersey was required in the proposed form [i.e. in the form of the current Draft Discrimination (Jersey) Law 201- lodged au Greffe on 15 January 2013], as opposed to some less prescriptive, more positive approach being taken to change attitudes and behaviour.

Parslows questioned whether there should be an Employment Appeals Tribunal. Advocate Milner accepted that there was quite a widely-held view that Jersey should have one, particularly as people felt that this would be a cheaper process than the current system of appeals going to the Royal Court. She commented though that while there were complaints about the cost of bringing an appeal in the Royal Court [as well as the limited grounds of appeal to the Royal Court and the limitations on the Royal Court's ability to overturn Tribunal judgments], she had not heard any criticism of the Royal Court's judgments in Tribunal appeals. Further, in the event that a party instructed a lawyer in an appeal to an EAT at this time there appeared to be no guarantee that the process would necessarily be cheaper than a Royal Court appeal. In the circumstances Advocate Milner's view was that at this time it was unclear whether it would be beneficial. In her view though, if there was to be an EAT it should certainly be pan-Island to justify the running costs.

Overall, in her view the suggestion of an EAT was a very interesting one which required further research.

Advocate Milner noted that in the Employment Tribunal Regulations 2005 there was a limited power for review of Tribunal decisions by the Tribunal itself. (See Regulations 5, 9 and 14.) Advocate Milner suggested that it might be helpful if there was a wider power enabling the Tribunal to review its own decisions, particularly procedural or interim decisions. Any party can already also apply for an Interim Hearing (Regulation 3) and this does allow parties to go back to have the position reviewed if there are problems arising from an interim decision. Confirmation that the parties could apply to the Tribunal for review of a decision might be helpful, with the matter being addressed in writing or at a further hearing, at the Tribunal's discretion. It would not be anticipated that this would apply to any final decision, save in respect of clear and obvious mistakes in judgments (as to the calculation of an award, for example). Of course arguably this could lead to uncertainty and an increased number of hearings.

[Note: The status of the Regulations and the Employment Tribunal Procedures is somewhat unclear. These should be reviewed, together with the Tribunal User Guide, when the Employment Law is reviewed. The Regulations have been changed since they were first published but no information about the changes – e.g. about the date of change – is included on the published Regulations.]

Parslows asked whether it had been appropriate to base the Draft Discrimination Law on the UK Equality Act. The IoD explained that it would have been more appropriate to establish what the problem of discrimination was in Jersey before basing the Law on legislation from the UK where there were different issues and resources. While the Minister may have taken the view that the Draft Jersey Discrimination Law was more concise and simpler than the UK Act, it was the IoD's view that the Draft Discrimination Law would not be simple to apply in practice. Other options should have been explored before a Law was drafted, for example codes of practice could have been introduced through the Jersey Advisory and Conciliation Service (JACS) or there could have been a "kite mark" system awarded to businesses which complied with best practice. Another option could have been to amend Article 3 of the Employment Law to state that businesses must have a discrimination policy and that it would be an offense (under Article 9) if a business did not comply.

The IoD's overall view of the Discrimination Law was that it understood why it had been developed, but it questioned whether it was right for this law to be implemented at this time. It appeared that very little independent research had been undertaken to find out about cases of discrimination, and it was unclear whether any formal, independent research had been conducted since the commitment was made to introduce Discrimination Law in the 1990s. It was also suggested that the Discrimination Law could get very complicated in the future.

Parslows asked whether the IoD thought that employers would instruct lawyers to assist them with claims. The IoD explained that it was certainly likely that employers would instruct someone to assist them with claims (whether lawyers or other advisers). Employers would be very likely to want to settle discrimination cases for fear of reputational damage – all of the risk would be with employers and this had a significant associated financial burden.

Advocate Milner explained that, as a lawyer, once the law came in whenever the facts supported an allegation of discrimination she would advise her clients to add discrimination to an unfair dismissal claim as it was generally likely to be in their best interests to do so. She noted that clearly this was subject to a lawyer's general duties to the Court/Tribunal. Tribunal claims were often encouraged by those advising applicants because they could be lodged for free and it promoted settlement offers.

Parslows asked whether there was a risk that employers would not hire any more employees, and the IoD agreed that this was a risk flowing from the increasing burden of legislation on businesses.

Small to medium size businesses in particular would think long and hard before employing additional employees because of the increasing costs and risks of taking on employees.

Advocate Milner explained that there was a risk that introducing laws such as non-discrimination legislation may have the opposite effect from what was intended. For example, in the UK many employers will say that they deliberately avoid employing women of child-bearing age through fear of the costs associated with family friendly legislation. There is also a risk that discrimination legislation simply drives discriminatory conduct under-ground and makes it more subtle without changing attitudes. In addition, Advocate Milner queried whether publicity about such legislation and cases could generate an environment in which people from specified groups start to feel more vulnerable and start to associate normal (but perhaps rude or inappropriate) behaviour with behaviour which is targeted at them because of their racial or other characteristics. [It was not suggested that the IoD had itself conducted any formal research on these issues. The IoD simply felt that when introducing legislation which bore with it significant potential ramifications it was important that the legislators had conducted full and meticulous research first, in order to reduce the likelihood of negative unexpected consequences.]

A discussion regarding the £10,000 cap on compensation followed. [This is the maximum sum that the Tribunal will be able to award should the draft Discrimination Law be implemented in its current form.] It was considered by the IoD that this level was arguably about right for Jersey as a starting point bearing in mind factors such as the lack of supervision of the Tribunal, that this is significant new legislation and the current financial jurisdiction of the Petty Debts Court as a comparator. It was suggested that the proposed cap could be reviewed in the future, once the Law has been around for a while. Tariff levels were highlighted as a possibility by Parslows. Advocate Milner thought that this might be too prescriptive (but had not seen any commentary on this).

Parslows questioned whether the IoD would support an enforcement notice system, noting that the non-discrimination notices provision has now been removed from the latest draft of the Law. The IoD suggested that if there was a lighter touch approach, dealing with discrimination via the Employment Law, some enforcement could have been covered through Articles 3 and 9 of the Employment Law (see above). The IoD also commented that it is questionable whether enough is being done to enforce existing provisions of the Employment Law – enforcement powers are there but there seems to be little or no public information about measures that are taken by Social Security in this regard and it would be helpful to know more about the current system before significant further legislative changes. Were the measures already in place under the Employment Law working? It was important to know this before embarking on additional legislation, which would put further burdens on the existing resources.

The IoD highlighted that the media was an issue – in the past cases have sometimes been reported on during the early course of a hearing and before judgment has been given, with a one-sided view of the case then being presented in the press. "Trial by media" may be a significant issue for businesses once the Discrimination Law comes in – no business would want to be the first business labelled a "discriminator" or "racist" by the Tribunal. Although having Tribunal cases in camera would combat this, it was agreed that justice needed to be seen to be done. Parslows asked whether the IoD considered that there could be a system in which the parties could opt for whether or not a matter would be public? The IoD had not given this prior consideration but felt that this was probably not appropriate, given the very high level of importance which is given to openness in our legal system – few matters will always be heard in private.

The IoD explained that there will be a cost to businesses from the implementation of the proposed Draft Discrimination Law, although it is not aware that any assessment of such costs has been conducted. Businesses would need to develop internal policies, arrange training and deal with any complaints or claims that were raised under or in respect of matters covered by the new Law. IoD noted that the Minister for Social Security had stated in the proposition that "*The Minister is confident that responsible employers will not have to devote time and money to comply with the Law*". The IoD disagreed with this statement. The IoD explained that employers would be forced to invest time and money: in attending training sessions, reviewing and amending employment

documentation and dealing with any claims lodged under the Law, whether or not such claims had any merit – employers could not pick or choose whether they dealt with claims that were lodged in the Tribunal.

Services offered by JACS were discussed. The IoD suggested that some smaller businesses may perhaps find it difficult to attend training sessions or implement longer-term changes following training because of a lack of resources. JACS was described by IoD as being vitally important and it was hoped that it had been given sufficient resources to cope with any influx in cases. IoD considered that JACS had a crucial role to play and needed to be properly resourced to do this. Much of the successful operation of Jersey's Employment Law turned on the ability of the JACS team to assist parties with claims and disputes, including the most complex employment matters. The Discrimination Law stated (at Article 38) that all employment-related complaints would be referred to JACS "if the complainant and respondent so agree". The IoD agreed that this was appropriate, being in line with current practice in the Tribunal and given that the JACS team were successful in resolving a high proportion of claims once a claim has been lodged but before the matter proceeded down the formal Tribunal route.

The IoD explained that there was perhaps a perception amongst some businesses that JACS was not wholly impartial. Such a perception was unhelpful in matters concerning the good management of Jersey's Employment Law. IoD thought that such a perception may have arisen because often employees had spoken to JACS first before the employer was made aware of a claim. This meant that when the employer spoke to JACS the employer would (rightly or wrongly) draw the view that JACS was "on the side of" the employee. Advocate Milner had heard some employers say that they would like JACS to have the ability to take more action to resolve disputes earlier on – but this was likely to be subject to resourcing constraints. In terms of perceptions of JACS, if there was a larger JACS team IoD wondered whether possibly JACS could be split into two (one strand advisory and the other conciliation) to combat misconceptions about JACS' stance in employment disputes and to ensure that their impartiality is clearer.

A discussion regarding indirect discrimination followed. It was agreed that understanding the concept of indirect discrimination and the situations in which allegations of indirect discrimination might arise was not straight forward and could cause difficulties.

Research regarding cases of discrimination in Jersey was discussed. The IoD was concerned that insufficient impartial research had been conducted. While the IoD thought that the approach taken by the Jersey Annual Social Survey was comparatively neutral the part of the survey which addressed discrimination was arguably quite limited and superficial, making it hard to draw meaningful or useful conclusions from this survey. Research conducted by the Jersey Community Relations Trust was considered to be somewhat subjective and the recommendation of its 2010 bullying survey that a Discrimination Law should be introduced appeared questionable on the basis of the other findings of that 2010 survey.

[The IoD would have understood a Discrimination Law being introduced to address specific problems in Jersey, following coherent, impartial and scientific analysis of the relevant issues and fact-based reporting on how these issues should be addressed in the light of the evidence. The reporting referred to in the Draft Discrimination Law proposition was not considered to provide the clear, impartial evidence of a specific need which would be addressed by the Law and which Law was proportionate and appropriate in the light of that specific need.]

The IoD supported the idea of a transitional period once the law had been implemented. It was agreed that this would be practical to assist employers and to give the Social Security Department and JACS adequate time to make people aware of the Law.

Parslows asked Advocate Milner for her thoughts on the Draft Law and the following was noted:

- The question of liability of an employer for an act done by an employee "in the course of his or her employment" could be challenging, particularly in relation to acts or omissions of employees outside of the workplace.
- Scope of the definition of employer/employee in Article 1A of the Employment Law and Article 1(1) of the Discrimination Law - Advocate Milner advised that she would consider this further and correspond with the Scrutiny Officer.
- The definition of the term "contract worker" might perhaps be open to misinterpretation – Advocate Milner questioned whether the term "agency worker" might perhaps be clearer, although all such terms can be somewhat ambiguous.
- Parslows noted that within the Guernsey Ordinance the burden of proof is specifically addressed and asked whether this would be helpful in the Jersey legislation. Advocate Milner said that it might be helpful and she would consider this further.
- The question of whether charities should be subject to the Discrimination Law was discussed. This was not a point that the IoD had previously been asked to address but their initial view was that it was not obviously appropriate to make charities exempt from the provisions of the Law. Not all charities lack resources. If there is a need for protection from discrimination it is unclear why workers within charities should be in a different position from workers within non-charitable organisations and businesses.
- Article 6 defines direct discrimination - Advocate Milner advised that she would consider the question of comparators further and correspond with the Scrutiny Officer.
- Noting that there had been various drafts of the Discrimination Law, Advocate Milner confirmed that she agreed with some of the changes that had been made, in particular, with the amended period for lodging a discrimination claim which was now consistent with the Employment Law.

The concluding views on whether a Discrimination Law was appropriate for Jersey were that it should be a proportionate response to a problem, having assessed all of the potential ramifications of introducing such a Law. The IoD noted their response to a JCRT question about delays to the implementation of the Discrimination Law in 2010.

[In 2010 IoD said the following in their response to the JCRT, which remained their position in 2013:

> "The IOD supports the introduction of appropriate, proportionate and simple non-discrimination measures. Codes of conduct, which can be taken into account by the Tribunal and/or the Royal Court when assessing matters such as unfair dismissal and breach of contract claims, may be appropriate in the first instance."]

The IoD would have liked to see a more cautious, phased approach. While Advocate Milner acknowledged that undoubtedly there was discrimination in Jersey the question was whether the problem was of such a scale that it warranted this particular legislation – was this a proportionate response?

The IoD suggested that the burden on the Tribunal should also be taken into consideration. The IoD noted challenges already faced by the Tribunal. The IoD anticipated that there would be an increase in the total number of claims lodged in the Tribunal when the new Law was implemented, particularly in the first six months or year. It was also suggested that claims of unfair dismissal might become more complicated because discrimination claims would be included. It was questioned whether the Tribunal had sufficient resources to be able to cope with an increase in cases without there being increased delays. In Advocate Milner's experience a claim could take at least six months to get from the point a claim is lodged with the Tribunal (by the applicant lodging a JET1 form) to a final hearing.

Reviewed by VSM for IoD 26/03/13

Draft Discrimination (Jersey) Law 201-
Friday 22nd March 2013

Meeting – **Kelly Flageul, Jersey Chamber of Commerce**
Richard Plaster, Jersey Chamber of Commerce
Gerald Voisin, Jersey Chamber of Commerce
Sue May, Chartered Management Institute
Gerald Fletcher, Jersey Hospitality Association
Phil James, Jersey Construction Council
Lorna Pestana, Chartered Institute of Personnel and Development
Advocate Carl Parslow, Parslows Lawyers
Christopher Austin, Associate, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer

A meeting took place in the Blampied room, States Building between the Health, Social Security and Housing Panel's advisors, Parslows Lawyers and a number of representatives from organisations such as the Chamber of Commerce, Chartered Management Institute, Jersey Hospitality Association, Jersey Construction Council and the Chartered Institute of Personnel and Development ("the organisations"). It was explained that Parslows Lawyers had been appointed by the Panel to undertake a review of the Draft Discrimination (Jersey) Law and it was noted that Parslows were gathering evidence to assist it with the review. Parslows advised that it was undertaking an objective review of the Draft Law. The organisations expressed their disappointment that the meeting was not held with any States Members present.

The organisations explained that they were concerned about how the Draft Law had been consulted on because they were aware that the trade associations had not been asked to participate during the consultation phase. The Chamber of Commerce explained that they had approached the Social Security Department themselves, but were aware that some trade associations had not been approached. It was the Chambers view that this presented a trust issue and, as a result, they would question who the Draft Law was going to protect.

The organisations explained that they were concerned about the States Law drafting process in general. In relation to the Discrimination Law, the organisations said that they were concerned about the Law drafting because it had been different to one that many organisations had been consulted upon previously. Furthermore, given the different economy, the organisations explained that it seemed strange that Jersey was planning to introduce new Laws that would affect business more than any others in the current climate, especially when every other government was trying to relax rules to help stimulate economic growth.

Whilst there were concerns regarding the Draft Law dealing specifically with race, the other characteristics which were planned to be lodged via regulations were also highlighted as a concern. The organisations explained that it was unclear whether there had been any true evidence available to base the Discrimination Law on. It was noted that a meeting had taken place with the Minister for Social Security, and the organisations had challenged what evidence was available that this problem exists, and that the Draft Law would alleviate the alleged problems. At the time of the meeting, the Jersey Annual Social Survey (JASS) had not been published, but since then the evidence contained in the survey had been quoted as a justification for the introduction of the legislation. It was explained that there was a belief that the way these findings were being interpreted were flawed because it did not distinguish between legal and illegal discrimination. Therefore, the justification for using this research from JASS was flawed and therefore valid research should be carried out to assess the problem of illegal discrimination in Jersey. It was understood that there had been no attempt to gauge further research, apart from the JASS.

It was questioned whether discrimination legislation was the right solution to the problem, particularly without knowing the extent of discrimination issues in Jersey. Parslows explained that some had said Jersey should implement the Draft Law due to International Obligations. The organisations said this was questionable because the International Obligations had been ratified in 1969 and the wording of the Treaty did not compel Jersey to have specific discrimination legislation rather that Jersey is required to take measures, of which legislation should be a last resort.

A discussion regarding the UK legislation followed and the Chamber of Commerce explained that the evidence showed that it had failed. An Equality and Human Rights Commission report had reviewed the UK Equality Act and had concluded that gaps still exist, despite there being legislation.

It was explained that attitudes to discrimination had changed over the years and that this was not as a result of legislation. It was questioned whether it was appropriate for a small jurisdiction such as Jersey to have Discrimination Law. It was highlighted that legislation is only one option and that there are other ways to deter discrimination. Parslows advised that some had said amending Article 3 of the Employment Law would be an option. The organisations agreed that this could be an option as well as codes of practice and kite-marks, but all should be looked at before embarking on a legislative regime.

The Jersey Community Relations Trust (JCRT) was discussed and the organisations agreed that it could be used to promote anti-discrimination practices. It was suggested that the Social Security Department should utilise the JCRT to deal with discrimination.

The Jersey Hospitality Association (JHA) in particular questioned the appropriateness of the Draft Law. The JHA explained that it represents smaller to medium sized businesses and that, administratively, to comply with the Draft Law would be difficult for some employers, especially in the current economic climate. The Employment Law was highlighted by the JHA as a major contributor of taking business managers out of customer-facing roles and into more administrative roles, significantly increasing red-tape.

A discussion regarding the Employment Law followed, and it was agreed that this should be reviewed to assess whether it was working. It was noted that the Employment Law had unintended consequences, and there was a concern that if the Discrimination Law was approved, it would also have unintended consequences. It was agreed that the Employment Law had the right intentions i.e. protecting the employee, but since its inception, employers had found other ways to comply with the Law which were less of a burden, for example employing through agencies. It was explained that lessons should be learnt from the introduction of the Employment Law. These should be identified and used in subsequent legislative processes, otherwise the same errors will occur.

The Chartered Institute of Personnel and Development (CIPD) explained that it had carried out a survey into the Employment Law. It was noted that 29% of respondents answered yes to the question: “Would the introduction of race and discrimination legislation prevent you from recruiting new staff?”

It was noted that some employers such as those within the construction industry had no formal recruitment process and would sometimes employ people word-of-mouth. It was agreed that indirect discrimination would be the biggest concern for many employers if the Draft Law was approved.

Parslows asked whether employees would use the Discrimination Law as a tactic to make claims. The organisations agreed with this statement and explained that there were already serial litigants who use the Employment Law. It was highly likely that employees would add discrimination onto an unfair dismissal claim, as had been seen in other jurisdictions, and the organisations were concerned that some employers would not have the expertise or resources to deal with a claim.

Parslows asked for views on whether a cost regime should be brought in. The organisations agreed that this would be beneficial and some said that it would be likely that employers would represent themselves because they would not be able to afford legal expertise. It was noted that in one commentator's experience, the Tribunal had taken a dim view of a lawyer being present at a trial. From the Chamber's members' perspective, the Tribunal is biased towards employees.

It was suggested that the Tribunal should be reviewed (as well as the Employment Law) before any further legislation was introduced. The timing of claims going to the Tribunal was about 12 months and this was considered by the organisations as unacceptable. Furthermore, if the Discrimination Law was implemented, the amount of time for a claim to go the Tribunal would increase as well as the Tribunal's workload.

Parslows asked whether there was a need for an Employment Appeals Tribunal (EAT). The organisations agreed there was a need for an EAT because there had been concerns about some judgements made by the Tribunal. The gap from Tribunal to an appeal before the Royal Court was considered too big and that there should be something in between such as an EAT. Any appeals process should be a straightforward process.

The organisations reinforced the point that the scale of the problem of discrimination in Jersey was unknown, and that the Draft Law had been based on flawed data. It was explained that legislation should only be imposed on society as a last resort. Codes of practice were highlighted as a possibility because they would offer good guidance and be less of a burden on employers to implement. There was also scope in the Employment Law to address discrimination issues, and the Chamber advised that an employer could make a constructive unfair dismissal claim through the Employment Law, and therefore questioned the necessity of a stand-alone Discrimination Law.

Most businesses already had anti-discrimination policy, but it was thought that some of the smaller businesses would be less likely to have some form of equality policy in place. If the Draft Law was to come into force, it was thought that Jersey would be less of an attraction to business because of the barriers that come with such legislation. The risk of bringing in the Discrimination Law was that it would make Jersey less competitive because it would have a similar legislative structure of Europe.

The cost of implementing the Discrimination Law was discussed and it was noted that more Tribunal members would need to be sourced as well as resources such as training services provided by the Jersey Advisory and Conciliation Service (JACS). It was noted that some employers may not attend the training because some will resist the Law as it will be viewed as adding more red-tape. The knock-on effect of introducing the Draft Law would be that the economy would be less effective because employers would spend too much time concentrating on compliance.

The Chamber explained that educating people was vitally important, and it was their view that a Law would not change people's attitudes but educating them would. It was explained that by bringing in any legislation, some employers would find alternative ways to conduct their businesses.

Parslows asked whether the organisations had any concerns about the Draft Law itself. It was explained that direct discrimination was well known, but indirect discrimination was more difficult to understand. Therefore, training staff would be very important if the Draft Law was approved.

The organisations did not agree that the law was simple, as had been described by the Minister for Social Security. If the Draft Law was implemented, the organisations agreed that some form of notice for employers (similar to Health and Safety) would be beneficial. It was also suggested that notice provision could be carried out via a code of practice.

It was explained that red-tape had increased over the years and that the Economic Development Department had planned to undertake a review of red-tape in Jersey but this appeared to have

been stalled. The business community had already had to deal with a number of legislation changes in recent years including tax changes, social security costs, redundancy and new migration law. Bearing this in mind, the organisations agreed that the Discrimination Law should not be introduced in its current form.

A discussion regarding JACS followed and it was noted that it had been set up as a conciliation service. The organisations agreed that it was appropriate that claims should be referred to JACS for conciliation because the Tribunal should be a last resort. The organisations expressed that there may be funding issues for JACS and the Tribunal to cope with an influx of claims should the Draft Law be approved. It was suggested whether there was any scope to expand JACS services (similar to the proposal in the UK where ACAS conciliation may have to be used before any tribunal proceedings can be issued) and this should be explored before any new legislation is introduced.

Draft Discrimination (Jersey) Law 201-
Friday 22nd March 2013

Meeting – Caroline Coleman, Assistant Judicial Greffier
Advocate Carl Parslow, Parslows Lawyers
Also present:
Miss K. Boydens, Scrutiny Officer

A meeting took place in the Le Capelain room, States Building between the Health, Social Security and Housing Panel's advisor, Advocate Parslow and Caroline Coleman, Assistant Judicial Greffier from the Judicial Greffe. It was explained that Parslows Lawyers had been appointed by the Panel to undertake a review of the Draft Discrimination (Jersey) Law and it was noted that during the previous meetings with various commentators, some views had been expressed about the Tribunal which Advocate Parslow wanted to explore.

The Assistant Judicial Greffier explained that there would be an increase in claims if the Draft Law was approved. It was noted that the Tribunal had been planning for increases and was looking at staffing levels and appointing additional Panel members. There was currently a Chairman and Deputy Chairman, but a second Deputy Chairman with discrimination experience would be appointed in the near future. Advocate Parslow asked whether the additional Deputy Chairman would be sourced from the UK and the Assistant Judicial Greffier said this was unlikely unless there was no-one available locally.

The Assistant Judicial Greffier explained that she had been in post for just over 12 months and had looked at the overall process and implemented new procedures to try and improve the waiting period from making a claim and bringing it to the Tribunal. She advised that it had been improved to 6 months and that she would continually be reviewing procedures. She explained that there was a requirement for new procedures to go though Ministerial Orders. She also advised that the Tribunal's I.T. system was being updated and improved, and that now that the Tribunal Service was part of the Judicial Greffe it was being linked to the State network.

The Assistant Judicial Greffier explained that all cases were reviewed by the Chairman or Deputy Chairman and if it was thought that a case was unmeritorious, it would be rejected.

Advocate Parslow asked whether there should be cost regime, but the Assistant Judicial Greffier explained that she was not qualified to answer as the Tribunal deals with the implementation of Law as it stands.

Advocate Parslow asked whether there should be a notice regime and explained that this was omitted from a previous draft of the Law because it was thought to be criminalising the employer. The Assistant Judicial Greffier advised that this was not part of her remit as administrator of the Tribunal.

A discussion into the Jersey Advisory and Conciliation Service (JACS) followed, and the Assistant Judicial Greffier explained that JACS provided an extremely important service to those persons wishing to make a complaint against their employer. She explained that the Tribunal works closely with JACS and that frequently, JACS help to settle cases before they go to the Tribunal.

Advocate Parslow asked whether JACS would be able to cope with an influx of cases, and the Assistant Judicial Greffier explained that JACS had been preparing since 2007 and that it was her understanding that they would be able to cope with additional cases.

Advocate Parslow asked whether there was any scope to introduce an Employment Appeals Tribunal, as opposed to the Royal Court Appeal process. The Assistant Judicial Greffier agreed that the Royal Court Appeal process was expensive and the decision to introduce an EAT would

depend on the perception of what level the Tribunal sits. She advised that an EAT may be appropriate but there would be funding and resources issues.

The perception that the Tribunal was biased towards employees was discussed, and the Assistant Judicial Greffier advised that the Employment Law was a Law to protect employees rights and that the Minister for Social Security would have to carry out work to try and quash the perception.

Advocate Parslow asked for the Assistant Judicial Greffier's views on quasi-employment, and she advised that she had not looked into that part of the Law. Her initial thoughts were that whether discrimination took place in work or in a club; they were both of equal importance.

Advocate Parslow asked whether a payment scheme to file a complaint should be introduced. The Assistant Judicial Greffier explained that as far as she was aware this was not under consideration and any comment she gave would be her own opinion and not that of the Tribunal.

The Assistant Judicial Greffier explained that she would take the following matters to the Chairman of the Tribunal:

- Cost regime
- Notice regime
- Review of Employment Law
- Payment scheme to file a complaint
- Employment and Discrimination Tribunal as in Guernsey ordinance
- In camera process for discriminatory hearings
- Amending Article 3 of the Employment Law and bringing in codes of practice

DRAFT DISCRIMINATION (JERSEY) LAW 201-
Monday 8 April 2013

Telephone attendance – Toni Airley, Principal Employment Relations Officer, Commerce & Employment, States of Guernsey
– Christopher Austin of Parslows

Following on from previous correspondence which had been sent to Mrs Airley by Miss Kellie Boydens, Scrutiny Officer, Mr Austin explained to Mrs Airley that Parslows had been appointed by the Health, Social Security and Housing Panel to produce a report on the Draft Discrimination (Jersey) Law 201- (the "Law"), and that since Guernsey had introduced its own anti-discrimination Discrimination Law in the form of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, we considered it helpful to discuss Guernsey's experiences, as a broadly comparable jurisdiction, may provide useful guidance as to how the new legislation, if adopted, may operate in Jersey as a comparable Jurisdiction.

Mrs Airley started by stating that they had not experienced too many problems since the introduction of the Ordinance in Guernsey, which focused on gender but only in the employment field and not in any other areas.

Mr Austin asked Mrs Airley whether Guernsey had noted a surge in claims brought on the basis of discrimination when the new Ordinance was brought into force, and she stated that had not been the case, and that in her experience the discrimination element of claims being brought before the Guernsey tribunal was typically low key. In her experience the biggest issue had been the rise in enquiries concerning discrimination prior to the law coming into force. She considered this formed part of an education process, with enquiries increasing in relation to sex discrimination issues, but it was not a situation of the 'floodgates having been opened' by the new legislation. Mr Austin asked whether she was able to provide any indication of the number of sex discrimination cases that were annually brought before the Tribunal, and Mrs Airley stated that 23 claims had been lodged before the Tribunal on the ground of sex discrimination (all bar 3 alongside a claim for unfair dismissal) since the commencement of the Ordinance. The majority had been settled through the conciliation process with just seven being referred to a Tribunal for determination. Of those, four were found in favour of the applicant (three on the ground of discrimination and one purely on the ground of unfair dismissal).

To set those figures in context she stated that the Employment Tribunal would deal with between approximately 50 to 70 unfair dismissal claims in a year. Mrs Airley did, however, note that the basis upon which claims could be brought in Guernsey was relatively restricted, and did not include contractual claims or claims in relation to holidays.

Mr Austin stated to Mrs Airley that a number of representatives of various employers groups in Jersey had expressed concern to us during the consultation process in relation to our report, that discrimination claims would be used strategically by employees and would be 'tacked on' to other employment claims to provide a stronger negotiating platform, and enquired whether, in her experience, this had occurred regularly in Guernsey. Mrs Airley stated that was not her experience, and that she felt it was more difficult to tack a discrimination claim onto another claim than may at first appear to be the case, but where that did occur, if the discrimination claim was in fact groundless, that would normally be addressed either as part of the conciliation process or as part of the case management process conducted by the Employment Tribunal prior to the case being heard.

Mrs Airley also stated that where issues arose in relation to terms and conditions which appeared to be discriminatory these tended to get resolved in the collective arena by virtue of the involvement of Unions. Mr Austin noted that the Guernsey Ordinance provided for direct/indirect discrimination and victimisation, and of the three asked Mrs Airley whether she had noted that problems arose from the concept of indirect discrimination, which a number of commentators in Jersey had expressed concern would be difficult for employers to understand.

She stated that it had caused problems in terms of training, during which process she had noted that many employers appeared to have difficulty in getting to grips with the issue of indirectly discriminatory practices, particularly in relation to pay and conditions, with a classic example of this being forms of advertising which were susceptible to claims that they constituted indirect discrimination. For example, where employers advertised part-time and full-time posts in such a way that it was clear that the part-time posts were aimed at women and the full-time posts aimed at men.

Mrs Airley considered that in the vast majority of cases discrimination arose by ignorance rather than intention, and that generally such issues came to her attention as a consequence of enquiries rather than as a consequence of complaints. She also noted that the local media had effectively assumed a 'policing' role in relation to advertisements, and would not accept advertisements which they considered to be discriminatory: to a large extent this resolved the problem by ensuring that discriminatory advertisements did not appear in the first place.

Mr Austin moved on to enquire why the provisions for non-discrimination notices which were provided for under the Guernsey Ordnance did not appear to be being used, it being my understanding that no non-discrimination notices had been issued since the Guernsey Ordinance came into force. Mrs Airley confirmed this was indeed the case, and stated that it was her understanding that only seven such notices had been issued in the UK since the UK's own legislation containing non-discrimination notices came into force. However, she stated that the reason that no non-discrimination notices had been issued in Guernsey was that prior to the issuance of such it was her practice to issue a 'notice to furnish information' letter as a stated preliminary to issuance of a non-discrimination notice, and stated that such letters were issued on average between 7 – 12 times per year, albeit that the issuance of those notices had dropped off significantly in the two years. The non-discrimination notices provision within the Ordinance accordingly operated by way of the advance notice that the issuance of such a notice was under consideration, which in her experience was of itself sufficient to ensure that the problem complained of was resolved without the necessity to issue a notice itself.

Moving on to Codes of Practice, Mrs Airley informed me that no Codes of Practice in relation to the Guernsey Ordnance had been issued. At the time of enactment of the Ordinance it had been decided that the Ordinance itself was sufficient to address the requirements of the legislation, and to date, no issues had been raised to counteract that view.

Moving on to conciliation, Mr Austin asked Mrs Airley whether she found that parties were generally happy to conciliate sex discrimination issues, and whether she considered that any incentive was required in order to encourage parties to conciliate.

Mrs Airley stated that the length of time between the complaint being made and a hearing by the Tribunal generally deterred applicants from refusing to conciliate, and most complaints were resolved by means of conciliation. She stated that there was a six week conciliation period laid down by the Ordinance, however, in practice it was up to the conciliation officer to decide if the conciliation was on-going, and they would very rarely refer a matter back to the Tribunal before that six week period had elapsed. In terms of encouraging the parties to engage in conciliation, most parties were willing to enter the process in the first instance, but where there was reluctance and matters were referred for a hearing without conciliation being explored, the procedure of case management meetings which had been adopted by the Tribunal were effective in assisting the parties to realise that they had entered into a judicial process, and this encouraged them to actively engage in the conciliation process, since most would rather resolve the dispute without going through a full Tribunal hearing.

Mr Austin asked whether delay between lodging a complaint and the date on which it was then heard also affected the desire of the parties to conciliate, and she stated that, in her experience, in Guernsey cases could be brought on for hearing by the Tribunal within a relatively short delay, although the shortest time period between notification of the complaint to the Tribunal and the hearing of the matter was usually 3 to 4 months. However, she considered that the delay could be

a positive factor, since it enabled the parties to temper their view of the matters in the intervening period, which often assisted in allowing them to then actively enter into the conciliation process.

Turning to the form of the Guernsey Ordnance, Mr Austin noted that it appeared to be based on the pre-Equality Act 2010 UK legislation, varied in certain respects for Guernsey. Mrs Airley confirmed this was indeed the case. Mr Austin asked Mrs Airley whether, in her experience, the Guernsey Tribunal was accordingly able to make use of UK authorities when interpreting the Guernsey Ordnance, and she confirmed that the Tribunal did indeed do so, although it used them as guidance rather than following them rigidly. She noted that the Guernsey Tribunal did not have legally qualified members, and as such the ability to refer to English precedents provided helpful guidance in relation to legal issues arising. However, she also using the UK precedents as guidance allowed the Tribunal to consider the matter fully and avoid simply "parachuting in" English rules and precedents that did not work for a small jurisdiction.

In relation to the operation of the Tribunal, Mr Austin noted that the Guernsey Ordnance permitted appeals to the Guernsey Royal Court, and enquired whether that, in her experience, deterred applicants from appealing, since it had been commented in relation to the Jersey Employment Law (which likewise permitted appeals to the Royal Court of Jersey) that potential applicants were deterred by the costs involved. Mrs Airley stated that there had been a relatively low number of appeals, however, she noted that it was frequently difficult to find a point of law upon which an appeal could be brought. It was not possible to say if the potential for costs to be awarded in the Royal Court was a deterrent but it was not a generally matter raised by those considering lodging an appeal.

Continuing on the issue of costs, Mr Austin enquired whether she felt it would be helpful for the Tribunal to have the ability award costs, and she stated in that respect that the Tribunal could award costs but they were limited, that the parties could not claim legal costs, and that usually the most significant element of the costs would be the cost for preparation or presentation of the cash, –which were capped £100, and travel/accommodation costs (not more than actually and reasonably incurred) where applicants had to travel back to Guernsey in order to bring a claim.

She did not consider it would be helpful to have a more extensive costs regime in place, and considered that the reputational risk for employers, and indeed employees, was often the greatest factor for the parties in determining how to deal with claims. She stated that the intention of the States in forming the Tribunal was to provide a "swift, efficient, inexpensive, non-adversarial and non-legalistic" process for determining complaints, and that imposing a costs regime similar to that in the Civil Courts may conflict with this intent as it could prevent potential applicants who had a genuine claim from doing so due to the fear of the cost risks involved.

Mr Austin noted that the Guernsey Ordnance specified the burden of proof, which she stated was often of assistance since the Employment Tribunal was made up of a lay panel, and accordingly the question of who had to prove what within a claim formed a significant focus for the Tribunal, both in the hearing and the prior case management meeting. Mr Austin stated to Mrs Airley that commentators on the Draft Law in Jersey had stated that they considered it would be helpful for the standard of proof to be set out within the legislation, and asked if this issue had arisen in Guernsey. She stated that it had not in her experience arisen, and reiterated that the larger question was generally the burden of proof.

Mr Austin moved on to the level of the award and noted that, in Guernsey, the award appeared to be limited to three months' pay. Mr Austin accordingly asked whether Mrs Airley considered that this cap on the award that the Tribunal was able to make helped or hindered the operation of the Tribunal. Mrs Airley responded that in her experience there were different schools of thought in that respect, some arguing that it dissuaded people from bringing a case because the amount of compensation was not sufficient for them to consider it worth the risk of reputational damage/damaging their relationship with their employers, whilst on the other hand it had been argued that the level of the maximum award was at a level which enabled certain employers to simply use it to "buy off" employees rather than addressing the underlying issues that led to the

complaint. However, when comparing average awards handed down in the UK with the level of awards in Guernsey, there was a distinct similarity, suggesting the levels in Guernsey may not be so out of line as may be suggested by the highly publicised, but rare, extreme awards in the UK. She also stated that she considered that the larger focus for most applicants was an over-riding feeling that what had occurred to them had been unjust, rather than the promise of compensation. She noted that the Guernsey Tribunal had no ability to reduce the level of the award that was made once discrimination was proven.

Mr Austin asked Mrs Airley whether she considered that the cost of complying with the Ordinance has materially increased employers' costs. She stated that she did not consider this to be the case, since the majority of the larger employers would already have anti-discriminatory policies set out in their employment contracts/employment handbooks, and as such should already be training their employees in that regard. The position was less clear cut with smaller employers, although the general perception is that modern society does not actively endorse sex discrimination and therefore most reasonable employers would not need to put in place costly processes or adjustments.

Mr Austin asked Mrs Airley whether she considered that the fear of vicarious liability for discriminatory acts by employees was a factor for employers in taking up or providing training, and she stated that in her experience this did not have a significant impact, although it was often of assistance to employers who were considering how persuade staff to training sessions to point out the issue of vicarious liability as it also allowed them to inform staff of their personal risk to being named as a co-respondent if they acted against the published principles and policies of their organisation.

DRAFT DISCRIMINATION (JERSEY) LAW 201-
Friday 12 April 2013

Telephone attendance – John Pinel, Chief Executive of the Jersey Voluntary and community Partnership
– Christopher Austin of Parslows

Mr Austin explained to Mr Pinel that Parslows had been appointed by the Health, Social Security and Housing Panel to produce a report on the Draft Discrimination (Jersey) Law 201- (the "Law"), and wished to canvass Mr Pinel's view of it from the perspective of the voluntary and community sector.

Mr Austin firstly asked Mr Pinel for his view of the decision by the Minister to introduce Race as the first protected characteristic. Mr Pinel stated that it was difficult to answer for all of the organisations involved, since they had differing aims and memberships, but that from the perspective of the organisations dealing with health issues he considered that their view would be that the first protected characteristic to be addressed should be disability rather than race, since that area involved the greatest number (of people) and need in terms of legislative protection.

Mr Austin moved on to enquire whether Mr Pinel considered the organisations with which he was involved appreciated that the law encompassed the areas of voluntary work/voluntary workers/voluntary organisations/voluntary bureaux, and as such they/their members may be subject to complaints of racial discrimination giving rise to a potential compensation order by the Tribunal of up to £10,000. Mr Pinel stated that he did not consider that the vast majority of those organisations that he worked with would be aware of this, and agreed that the level of the maximum fine would "wipe out" the majority of such organisations were they to be subject to it.

He also expressed concern that fear of failure to comply with the terms of the Draft Law may act as a deterrent to people from becoming or continuing to be involved with voluntary organisations, and that this would be detrimental to the community as a whole. By way of example of the extent to which unpaid voluntary workers assisted the Island, Mr Pinel stated that the results of the last census conducted in Jersey revealed that there were 10,000 informal carers in the Island of which some 25% worked for 4 or more hours per day, as well as hundreds of members of the numerous other voluntary organisations, which operated in the health related sector.

Mr Pinel also stated that there were a number of active groups within the voluntary sector which he considered would be pleased to engage in discussion with the Minister concerning the Draft Law, both in terms of its impact upon them/their members and the decision to introduce race as the first protected characteristic, although he understood that the decision in that respect had been in part informed by the view that this was the least controversial area.

Finally, Mr Pinel made reference to various funding partnership initiatives which were under progression with the States of Jersey and various voluntary groups, concerning which he was aware that the draft funding agreements which had been provided contained the requirement for the partner organisations to ensure that they did not discriminate on grounds of race, sex, age or disability, so noted that such requirements were already arising prior to the legislative provisions being introduced.