STATES OF JERSEY

SEX DISCRIMINATION CONSULTATION: SUMMARY OF RESPONSES

Presented to the States on 19th September 2014
by the Minister for Social Security

STATES GREFFE

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Social Security Department

Summary of Responses

WHITE PAPER – LAW TO PROTECT AGAINST SEX DISCRIMINATION

18th September 2014

SUMMARY OF CONSULTATION DETAILS

The Minister for Social Security ("the Minister") issued a White Paper[1] inviting representations from stakeholders on the proposed scope of protection against discrimination on grounds of sex, prior to the Minister requesting law drafting. The Minister invited comments on a number of policy issues, which were outlined in the White Paper, including the following –

1. How to deal with discrimination and equality in pay systems.

2. What characteristic(s) should be protected?
   - Sex
   - Pregnancy and maternity
   - Sexual orientation
   - Gender re-assignment
   - Marriage and civil partnership

3. What exceptions should apply so that an act is not an act of sex discrimination?
   - Religion
   - Pay during maternity leave
   - Positive discrimination
   - Charities and associations.

The Minister wishes to fully consider any concerns and questions that have arisen during consultation in order that appropriate legislation can be prepared.

Background

The Discrimination (Jersey) Law 2013 ("the Discrimination Law") came into force on 1st September 2014, with race as the first protected characteristic. Further protected characteristics can be introduced by Regulations made under the Law. This enables a consistent and equitable approach to different types of discrimination, and simplifies the complexity that has resulted in other jurisdictions as a consequence of having separate and different Laws.

The Minister proposes to lodge for States debate draft Regulations that would introduce protection against discrimination on grounds of sex and related characteristics.

[1] www.gov.je/Government/Consultations/Pages/SexDiscriminationLawConsultation.aspx

The Minister had committed to conducting further consultation with stakeholders before introducing other protected characteristics; and to ensuring that the legislation is extended in a way that is sympathetic to the difficulties faced by businesses, particularly small businesses. Sex discrimination is likely to be more complex than race discrimination because sex discrimination necessarily involves issues relating to equal pay, pregnancy, maternity and family-friendly rights. These issues were discussed in the Minister's White Paper.

The Minister hopes that draft legislation will be prepared later this year and that sex discrimination Regulations will be lodged for States debate in the first half of 2015. The Minister intends that the sex discrimination Regulations and family-friendly rights[2] (including maternity, parental and adoption leave) would come into force on the same date – 1st September 2015.

OVERVIEW OF CONSULTATION RESPONSES

Consultation method and respondents

A White Paper was issued on 14th March 2014, inviting interested parties to respond by completing the online survey, sending comments by e-mail or post, or by asking to be involved in a focus group.

The Minister received 152 written responses to the consultation. The responses can be categorised into the following respondent types –

Respondent type	**Number**
Employee	56
Employer	14
Trade union/staff association	3
Employer/business association	3
Individual citizens (including retired, self-employed)	30
Other (JCRT, JACS, JCCT, Trans* Jersey, Superintendent Registrar, lawyers)	7
Unspecified	39
TOTAL	**152**

The following 24 respondents agreed that their written comments may be attributed to them by name –

1. Institute of Directors Jersey Branch
2. Unite the Union
3. Jersey Community Relations Trust
4. Jersey Advisory and Conciliation Service (JACS)
5. Jersey Chamber of Commerce
6. Chartered Institute of Personnel and Development, Jersey Group
7. The Jersey Child Care Trust
8. Trans* Jersey

[2] P.109/2014, adopted by the States in July 2014

9. Huw Thomas, Carey Olsen
10. Wendy Lambert
11. Jersey Youth Service users
12. Sue Groves, Superintendent Registrar
13. Linda Sohawon
14. Derek Bernard
15. James Woodhead
16. Deborah Samantha Dors
17. Ian Brandon
18. Lisa Wallser
19. Katherine McAleer
20. Sarah Savage
21. Anna Shipley
22. Tree
23. Nicolas Jouault
24. M.P. Chatterley.

The individuals who had requested to be involved in a focus group discussion had different areas of interest that they wished to discuss, and so the Minister decided that it would be more helpful to offer private meetings to allow those individuals an opportunity to fully express their views. The following respondents met the Minister in July to present their views on the issues raised in the Consultation Paper –

1. Caroline Powell
2. Vic Tanner-Davy (Trans* Jersey)
3. Martin Gavet (Liberate)
4. Ellie Jones (Liberate)
5. Pippa McCarthie (Liberate).

SUMMARY OF RESPONSES

The Minister believes that it should be unlawful to discriminate on the grounds of sex, pregnancy, sexual orientation and gender re-assignment in each of the areas covered by the Discrimination Law. The Minister believes that this protection can be provided without placing an unfair burden on businesses in Jersey, provided that appropriate exceptions are made for specific situations.

The specific issues on which the Minister was seeking views is set out in the preamble to each set of questions and can be found in the White Paper.

The following summary sets out an overview of the responses received to each survey question, including quotes from some of the respondents. It does not set out all of the responses in full. The selected quotes are intended to give an indication of the range of responses that were received to each question, and to allow some of the specific issues raised by respondents to be considered and addressed by the Minister in the 'Outcomes' boxes.

PROTECTED CHARACTERISTICS

SEX DISCRIMINATION

1. **Respondents were asked if discrimination based on sex should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race.**

This was the first question and it received the most responses (149). As a percentage of those who responded to the question, 93% agreed that discrimination based on sex should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race, and 7% disagreed.

A number of respondents commented in support of the proposed approach including the following –

> *"Chamber believes that this would allow for consistency across the laws and would also be the morally and ethically correct thing to do."* (Jersey Chamber of Commerce)

> *"Yes, sex discrimination law in Jersey should be based in the broadly the same circumstances as race discrimination law. There should be separate protected characteristics in relation to sex, pregnancy and maternity and transgender and sexual orientation."* (Unite the Union)

Thirty-three other respondents commented generally in support of introducing protection against sex discrimination, including the following comments –

> *"In order for Jersey to provide protection on the basis of sex in line with other developed nations and to also enable the States to implement long overdue pregnancy and maternity and family friendly legislation."* (Jersey Community Relations Trust)

> *"If Jersey is to be able to hold itself out as a reputable jurisdiction with which to do business, it needs to have basic forms of protection for employees, which fundamentally go to human rights. Discriminatory practises on the grounds of sex are, sadly, part of the fabric of society in the Island and in the business community and it is about time that were addressed."* (Wendy Lambert, employer/lawyer)

> *"Failure to provide similar protection on the grounds of sex as we have for race may result in employers choosing to not employ women on the grounds that maternity/family provisions legislation may be required at some point during their employment."* (JACS)

There were also a number of responses indicating qualified support for this protection, including –

> *"Yes but and it's a big but. It is going to be a nightmare for employers being taken to court on spurious claims. Whereas I am sure there will be legitimate claims those which are not or cannot be proved will cost employers dearly.*

THERE MUST be a clause whereby a claimant takes financial responsibility for an incorrect or unproven claim." (Anonymous)

"Yes so long as it does not interfere with the running of a lawful business. Example I would not like a member of staff wearing a chador." (Anonymous)

"However, what is outlined above is not SEX discrimination but GENDER discrimination. Unless an employer asks to see all his employees naked, they cannot discriminate on the grounds of SEX! Please get this right. Discrimination between men and women is GENDER discrimination. Discrimination between male and female is SEX discrimination." (Anonymous employee)

"The definition of "sex" as a protected characteristic expanded to include persons of a non-binary gender." (Trans* Jersey[3])

A number of respondents commented in opposition to the Minister's proposal that discrimination based on sex should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race, including the following –

"Whilst I have ticked 'No' I have done so only because I believe that there are a number of areas that should be excluded and I therefore cannot accept the 'broadly' view." (Anonymous individual, retired)

"There are certain jobs more suited to a particular gender." (Anonymous)

Outcomes

There is clearly overwhelming support for extending the Discrimination Law to cover sex as a protected characteristic. The Minister notes the concerns that Trans* Jersey has about the language used and he will ensure that the Law is drafted so that the definition of 'sex' is appropriate and wide enough, for example, to include 'gender' rather than being limited to biological sex, and to include persons of a non-binary gender.

It is worth noting that even some of those who answered 'no' to the question were simply concerned that there should be appropriate exceptions made (dealt with in questions 12 to 20 below) or who felt that the UK approach was better (although the particular respects in which the UK approach was better were not explained).

[3] More detail is provided in the summary of responses to questions 8 and 9, which relate to transgender issues.

EQUAL PAY

2. **Respondents were asked if the issue of pay and other terms and conditions should be dealt with as an issue of discrimination (as it is with race) rather than as a separate provision dealing specifically with equal pay (as in the UK).**

Of the 144 responses to this question, 81% of respondents agreed that pay and other terms and conditions should be dealt with as an issue of sex discrimination, and 19% disagreed.

Comments from those respondents who agreed that pay should be dealt with simply as an issue of sex discrimination, rather than as a separate equal pay issue, included the following –

> *"Unite agrees that the issue of pay and other terms and conditions are better dealt with as an issue of discrimination rather than as a separate provision dealing specifically with equal pay. The experience in the UK is that equal pay employment tribunal claims are complicated and lengthy. Avoiding the requirement to establish whether jobs are of equal value would result in a simpler employment tribunal procedure which would be better understood by both employees and employers."* (Unite the Union)

> *"This is a sensible approach and avoids much of the complexity found in UK law. Applying the same rules to race also affords ethically sound protection against detriment on the grounds of race that UK residents currently don't enjoy."* (Anonymous hospitality employer)

> *"Using Guernsey as the comparator to the UK Equality act, dealing with pay and other T&C issues under discrimination seems timelier and cost effective."* (Anonymous employee)

> *"It would be less burdensome and simpler for both employer and employee to deal with pay and terms if dealt with consistently across all the protected characteristics."* (JACS)

A number of respondents agreed with the proposed approach, but had reservations about the level of compensation that would be available in respect of pay related Tribunal claims –

> *"There is no need to overly complicate the issue with separate legislation, my only reservation to this relates to the current extremely low cap of £10,000 on the financial award for breach of the Discrimination Law. If the equal pay award is capped in the same way, this is hardly compensating individuals who succeed in a claim."* (Wendy Lambert, employer/lawyer)

> *"I do not feel that the compensation offered through the Employment and Discrimination Tribunal is enough. Like the UK, claims based on equal pay should result, if successful, in the claimant being entitled to an award of back pay going back up to six years. However, I do appreciate that the process is complicated and lengthy. As such, I am not suggesting we adopt a separate provision dealing with equal pay, but cannot accept the proposal based on the*

compensation values indicated. However, unlike the UK I do not think it is necessary to for claims of 'compensation for injury to feelings' to have an unrestricted cap. In this instance, the compensation figures to be enforced by the Employment and Discrimination Tribunal seem appropriate." (Anonymous employee)

Comments from respondents who felt that pay and other terms and conditions should be dealt with as a separate equal pay issue (as in the UK), rather than a sex discrimination issue, included the following –

"Equal pay should have its own provisions because it specifically deals with terms and conditions and contractual issues providing longer periods of protection. There is no equivalent in other forms of discrimination to gender stereotyping. In the UK spite of c.40 years of EqPA, there are still huge disparities in pay." (Linda Sohawon, Legal Officer, trade union/staff association)

"The UK Equality Act approach is far better. The Minister's suggested approach does not properly address the risk of indirect discrimination and will make it almost impossible for genuine cases to be proved by the claimant. The Minister's approach appears to be window dressing and does not tackle the real, everyday sex discrimination taking place in Jersey." (Anonymous employee)

"Chamber believes the following points need to be considered: The £10,000 could be a deterrent to claiming If there is no EPA, it is not clear what the rules should be. This could create more issues as no specifics/measures are in place Have this as one now, with scope for phasing later The proposed legislation puts the onus on the Employee to prove discrimination. The EPA shifts this to the Employer." (Jersey Chamber of Commerce)

"Equal pay should be adequate to deal with any discrepancy in pay awards – it is what it says on the tin, and so much clearer than if it was to be referred to as a sex discrimination issue." (CIPD Jersey Group)

"The proposal to deal with equal pay issues simply by way of a discrimination claim does not in our view address the likely causes of pay inequality other than in instances of direct or indirect discrimination. It does nothing to address more structural issues in equal pay – in particular it does nothing to encourage employers to identify and address instances of pay inequality. More fundamentally, under the Jersey proposal, there is likely to be no way that a woman will be able to base a claim on the basis that the work which she is undertaking is of equal value to that of a man she will be limited to comparators undertaking work that is either similar or identical to that which she undertakes. Additionally, a single claim for up to £10,000 is unlikely to adequately compensate women for what may be several years of unequal pay – and there is no obvious manner in which employers might be compelled to correct imbalances going forward. The implication of a sex equality clause in our view achieves an appropriate basis for compensation and provides a clear "roadmap" for employers to achieve gender pay equality going forward… The Consultation Document notes that ratifying CEDAW is a key reason for the introduction of sex discrimination legislation in Jersey.

CEDAW provides at Article 11 that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings;" including ensuring (at Article 11(d)): "(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work". It is at least arguable that unless there is provision for an equal pay remedy which permits women to make a claim based on work of equal value, then Jersey will not be compliant with CEDAW." (Huw Thomas, Carey Olsen)[4]

Outcomes

There is clearly a balance to be struck between dealing explicitly with equal pay for work of equal value, and avoiding too much procedural complexity in the Law. Equal value claims in the UK are notoriously difficult to sustain, and can be extremely time-consuming. The concept of equal value is not straightforward and, even where it is established, the employer can still defend a claim by showing a reason for the difference in pay. At that point, the question becomes whether that reason is tainted by either direct or indirect sex discrimination.

Huw Thomas raises an important point about compliance with CEDAW. Under the Minister's proposal, the issue of sex discrimination is the key one; the Law would outlaw sex discrimination in relation to pay. UK and EU case law has consistently pointed out that measures addressing equal pay are actually about eliminating sex discrimination. The Minister's proposal is consistent with that aim.

Whilst £10,000 is some way off the potential sums that can be awarded in the UK where there is no statutory maximum, it is not clear from the responses why up to £10,000 is considered to an adequate remedy where differences in pay are tainted by race discrimination, but not in the case of sex discrimination.

A limit of £10,000 compensation will not provide an adequate remedy against sex discrimination in some cases. For example, a woman who is denied a six-figure bonus at work and believes that this has something to do with sex may be unlikely to damage her career prospects for an award of up to £10,000. However, if the compensation limit were to be lifted substantially, that would have serious ramifications for the Tribunal system. High-value claims are much more time-consuming and legalistic. One case alone can involve a hearing lasting several weeks. The Minister considers that it is better to allow the system to develop with the compensation limit in place, and review the amount when a clear pattern emerges as to how many cases are being brought and how much Tribunal time they are taking up.

[4] See page 5 of the White Paper for more details about CEDAW

3. **Respondents were asked what unintended consequences might result if pay and other terms and conditions are dealt with as an issue of discrimination (as with race) rather than under a separate provision dealing specifically with equal pay.**

Comments from respondents included the following –

> *"Not having an equal pay system could mean that the island does not really address the issue of lower paid "women's work", where there is work undertaken primarily by women that should be treated as equivalent to work undertaken primarily by men but which is under-valued. Historic pay issues may need to be addressed, although this would require careful handling in order to avoid putting undue pressure on employers leading to job losses."* (Institute of Directors Jersey Branch)
>
> *"Our only comment would be – would differences in pay also potentially constitute discrimination under the forthcoming age and disability discrimination laws? The requirement for an employer to demonstrate a 'material factor', or a similar mechanism, might be a useful provision to introduce given that experience and ability are often arguably legitimate reasons for pay differences in a way that sex and race never can be."* (Anonymous hospitality employer)
>
> *"Chamber believes: There could be a large amount of time required to defend claims. Both Employees and Employers do not know what do, what the rules are, which is particularly important in Jersey as 80% of businesses are SMEs, for example: Is payroll kept?, if so for how long? If not kept cannot defend a claim?"* (Jersey Chamber of Commerce)
>
> *"It may be difficult to adequately define pay of equal value without the use of comparators."* (Jersey Community Relations Trust)
>
> *"May be difficult to prove discrimination with no directly comparable posts if, for example, only women happen to be employed in that role. In some circumstances, the lengthy process of establishing comparable but different positions would be worthwhile."* (Anonymous, self-employed)
>
> *"If there is a separate provision, I feel that the States of Jersey would need to review its public sector pay scale, as it would be very difficult for individuals to find comparators as they are currently set up."* (Anonymous employee)
>
> *"Classifying equal pay as an issue of discrimination could be somewhat of a minefield. Equality is a personal interpretation in my opinion and each of us will have our own ideas of how that should look."* (Anonymous employee)
>
> *"It may be harder to prove sex discrimination. Some claims may also reflect both race and sex discriminations where one point may override the other."* (Anonymous employer)

Outcomes

It is unavoidable that discrimination will sometimes be difficult to identify and prove. The issue is how best the Law can be structured so that sex discrimination can be addressed. The concerns of the Jersey Chamber of Commerce demonstrate a need for the rules to be clearly set out, with appropriate guidance to accompany them. However, one reason that employers and employees do not know what the rules currently are is that they have not been drafted yet.

The retention of payroll records is a matter of evidence like any other. The Minister does not intend to bring forward any of the bureaucratic rules on pay reporting or gender pay audits that are being introduced in the UK. A lack of evidence about how employees were paid in the past is as likely to hinder a claimant in establishing their claim as it is to hinder a respondent in defending the claim.

In deciding whether or not discrimination has taken place, the Tribunal is still likely to use comparators where appropriate. However, they will be of evidential value rather than being a technical requirement of the Law. The UK's Equality Act introduced an – as yet untested – provision allowing an equal pay claim to proceed as a discrimination claim where no comparator is available (Section 71). Under the Jersey Law, claimants and respondents will still be able to point to the way in which comparators are treated, to make their case about the presence or absence of discrimination. The better the comparison, the more compelling the evidence will be. However, the Tribunal will not get bogged down in whether the comparator is technically valid or not.

PREGNANCY AND MATERNITY

4. **Respondents were asked if discrimination based on pregnancy and maternity should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race.**

Of the 130 responses to this question, 88% of respondents agreed that discrimination based on pregnancy and maternity should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race, and 12% did not agree.

Comments from those respondents who agreed that 'pregnancy and maternity' should be a protected characteristic included the following –

> *"As the "white paper" states pregnancy and maternity are "unique" to women. The States of Jersey should follow the UK example of having a protected characteristic of pregnancy and maternity. This would provide for legislation that makes it clear to both employees and employers that discriminatory treatment of pregnant women and issues related to their maternity, such as maternity leave and sickness absence due to pregnancy, are covered by the legislation."* (Unite the Union)
>
> *"The right not to suffer a detriment should be at the root of all discrimination issues, and the failure to reduce potential 'detriments' could lead to even fewer women in the higher quartile of jobs, which was raised as a concerning factor during the recent CRT conference held this year."* (JACS)
>
> *"I completely agree: a law against sex discrimination will not be effective if it does not also protect against discrimination based on pregnancy and the direct consequences of pregnancy such as absence from work, or the taking of maternity leave."* (Anonymous employee)
>
> *"As detailed in the white paper, only women can become pregnant so this should not be used a reason not to progress, develop and invest in women due to the time off work they require in order to have a child / children. This is perhaps one of the more difficult elements to improve upon as many employers / managers still see time out of the workplace for maternity purposes as making a choice between work and family, when it should be made possible for women to have both."* (Anonymous employee)

Comments from those respondents who did not agree that 'pregnancy and maternity' should be introduced as a protected characteristic, included the following –

> *"Because pregnancy is a choice whereas race or sexual discrimination is not."* (Anonymous employer)
>
> *"Many employers cannot afford to have pregnant women as employees as they would necessarily require some special treatment."* (Anonymous employee)

> *"Pregnancy and maternity have special status under EU law without the need for a comparator."* (Linda Sohawon, Legal Officer, trade union/staff association)

A number of respondents took this opportunity to comment on the Minister's proposals for family-friendly rights. Some of those comments are set out on page 51. In addition, the Jersey Childcare Trust commented as follows –

> *"It would be helpful if the "protected period" as defined in any law on the topic that takes effect in Jersey, also extends to cover any conditions that might lead to absences of either parent (at any time) that directly relate to the pregnancy or the giving birth experience etc.*" (Jersey Child Care Trust)

Outcomes

There is clearly wide support for a protected characteristic relating to pregnancy and childbirth.

The Jersey Child Care Trust is right to raise the issue of a protected period during which absences related to pregnancy should be given special status. In the UK, the protected period starts when the woman becomes pregnant and ends when her maternity leave ends, or when she returns to work if that is earlier. If the woman does not have the right to maternity leave (e.g. if she is not an employee), the protected period ends 2 weeks after child-birth. It would be impractical to make the protected period open-ended. Unfavorable treatment after that time might still be sex discrimination in any case. The Minister will consider what protected period might be appropriate during the law drafting.

5. Respondents were asked if there are any circumstances in which discrimination based on pregnancy or maternity should be permitted.

Of the 122 responses to this question, 39% of respondents said that there are some circumstances in which discrimination based on pregnancy or maternity should be permitted. Sixty-one percent of the respondents said that there are no such circumstances.

Comments from respondents who said that there are some circumstances in which discrimination based on pregnancy or maternity should be permitted included the following –

> *"The UK position that any less favourable treatment can only constitute direct sex discrimination is not always entirely fair to businesses. We believe that some 'discrimination' may sometimes be a proportionate means of achieving a legitimate aim, e.g. where health and safety concerns override concerns of discrimination; where there is a serious detrimental impact on service/business performance; where there is some kind of genuine requirement for an employee not to be absent on maternity leave (as per the example of an employer recruiting for a temporary contract used in the White*

Paper). It would be sensible for Jersey to specifically provide for claims of indirect sex discrimination." (Anonymous hospitality employer)

"If recruiting someone to fill a post to undertake work on such a project there may be circumstances in which an employer should be allowed to ask someone whether they expect to have to take time off because of an operation, for other medical or family-related reasons and not give someone the job if they confirm that they will have to take such time off. Where the reason for the time off is e.g. pregnancy potentially this would be direct sex discrimination, but it could be legitimate from the perspective of the needs of the business." (Institute of Directors Jersey Branch)

"Employment: recruitment for FTCs in later trimesters. Any short/temporary roles for immediate start in later trimester." (Anonymous employee)

"Employers should not be placed in situations where they must either unfairly discriminate or expose the employee/business to risk – this is lose/lose. The 2/3rd rules regarding FTCs has yet to pose any real issues, however if using an FTC for short-term cover/role an early ending of this (whether for genuine reasons or otherwise) may result in a discrimination claim along with an unfair dismissal one." (JACS)

"Chamber believes the following points should be considered: Size of Employer to drive recruitment process, allowing and exemption if under a certain size Burden – operational and financial Jersey has more small businesses Health and Safety comes first." (Jersey Chamber of Commerce)

"Perhaps in the recruitment process. I think if you know you are pregnant you must be required to declare that situation. It is unfair to employers if they recruit you and then you need leave within a certain time frame." (Anonymous)

"I take issue with persons not disclosing pregnancy at the onset of starting a position. Although they are not legally obliged to disclose a pregnancy, I believe there should be clause to protect the financial interests of the organisation." (Katherine McAleer, trade union/staff association)

Five respondents suggested circumstances relating to the size of the business including the following comment –

"Although perhaps unwise to phrase it as 'permitted discrimination', some allowance needs to be made for small companies as per above – if you employ a team of 3, one goes on maternity leave and you are required to hold their job open, it can cause serious problems!" (Mr. M.P. Chatterley, employer)

Fifteen respondents specifically referred to circumstances relating to health and safety, including the following comments –

"Employers should be permitted to exclude pregnant (or recently pregnant women) from the workplace on health and safety grounds (although this should be carefully limited)." (Huw Thomas, Carey Olsen)

> *"Roles that may carry a higher risk during pregnancy e.g. hazardous environments where chemicals are used, or roles that include heavy lifting that could cause injury – general health and safety concerns."* (JACS)

> *"Health and safety related reasons should override issues of discrimination where pregnant women are concerned."* (CIPD Jersey Group)

Five respondents suggested circumstances relating an employee's ability to do her job, including the following comment –

> *"Where a woman is pregnant and her job entails heavy physical activity, such as being a firefighter, it might be appropriate for her employers to vary her role and her hours for a period during her pregnancy. This might be seen by colleagues as discriminatory (favouring the pregnant employee) but, equally could be seen by the woman, as discriminatory as she is being removed from duties she may enjoy/feel capable of carrying out."* (Anonymous employee)

Comments from respondents who said that there are no circumstances in which discrimination based on pregnancy or maternity should be permitted included the following –

> *"Unite does not believe that there should be any circumstances where an employer can directly discriminate on grounds of pregnancy, maternity leave, or maternity related issues. The States of Jersey should follow the UK example of not allowing an employer to justify direct discrimination on grounds of sex, pregnancy and maternity. The EU Treatment Directive 2006/54 – Article 2 is clear that the pregnancy and maternity are covered by the Equal Treatment Directive 2006. Unite does not believe a provision of not being able to justify discrimination on grounds of pregnancy and maternity would place an unfair burden on employers. This has not been the experience in the UK where employers have benefited by retaining experienced and skilled women workers."* (Unite the Union)

Outcomes

This is one of the more difficult policy decisions, and there are arguments on both sides. If an exception for short employment contracts is included, it should be limited – as the IoD suggests – to cases where an employer is recruiting for a particular project and the employee's likely absence on maternity leave at a crucial time makes it reasonable to refuse her the job. An exception would not be appropriate where there is a long-term or permanent job available because pregnancy and maternity leave are short-term conditions.

The IoD makes a valid point that a particular decision may be justified in common-sense terms, but would technically fall foul of the Law. This often makes employers feel uneasy, and it is important that the business community can support the Law. The size of the business should not in itself be a consideration; what matters is whether the situation is one in which most people would feel that the discrimination would be lawful.

It is proposed that any exception should –

- apply to all businesses
- be confined to recruitment decisions (i.e. not allowing for lower pay or other detriment on the grounds of pregnancy)
- apply where the recruitment is for a fixed term and where the employer does not anticipate the term being renewed when completed
- allow discrimination where an individual applies for a job, but her likely absence on maternity leave means that it is reasonable for the employer to conclude that she is not the best applicant for the job.

This would allow an employer to refuse a fixed-term contract to a pregnant woman only if the employer is acting reasonably in concluding that her absence means that she is not the best candidate. It would not allow an employer to artificially specify that a contract should be for a fixed term in order to exclude pregnant applicants, as the employer would need to believe that there will be no renewal of the contract.

The Law would have to make it clear that the employer would have to reasonably believe that the claimant was pregnant at the time of the selection. It should not be lawful to refuse to recruit a woman because she might be planning to become pregnant.

As noted by JACS and the CIPD Jersey Group, consideration will also need to be given to health and safety issues; for example, where a risk assessment indicates that a pregnant woman should not be allowed to do particular work. Further research may be needed to determine the best way to address this. In such circumstances in the UK, a woman must either be suspended on full pay or given suitable alternative work to do, but the provisions are complicated. However, this situation is relatively rare and usually involves work with hazardous chemicals. It is different from a situation in which the woman is simply unfit to work because of a complication arising from pregnancy.

6. Respondents were asked if there are any businesses or service providers that should have the right, in certain circumstances, to discriminate on the grounds that a woman is breastfeeding a baby.

Of the 126 responses to this question, 14% of respondents said that there are some circumstances in which businesses or service providers should have the right to discriminate on the grounds that a woman is breastfeeding a baby. Eighty-six percent of the respondents said that there are no circumstances in which this should be permitted.

Those respondents who said that there are no circumstances in which businesses or service providers should have the right to discriminate on the grounds that a woman is breastfeeding a baby commented on the importance of breastfeeding and encouraging mothers to breastfeed, including the following comments –

> *"Unite does not support any circumstances where a business, service provider or employer should have the right to discriminate against a woman because she is breastfeeding a baby. This is detrimental to both the health and well-being of the mother and the baby. Employers should be required to provide*

somewhere for pregnant and breastfeeding employees to rest. Where necessary, this should include somewhere for them to lie down. Employers should provide a private, healthy and safe environment for employees to express and store milk. I would recommend referring to the UK's Health and Safety Executive for guidance and best practice in this area." (Unite the Union)

"No, the States of Jersey should be encouraging women to breastfeed, and protecting women who choose to do so. Breastfeeding mothers right to breastfeed should be protected, with employers required to provide space and time for women to breastfeed or express breastmilk, as well as adequate storage facilities for expressed milk." (Anonymous employee)

"No – as long as it is reasonably practical to all. Chamber believes that the following points should be considered: Do not create a legal requirement on employers to provide specific facility. Health and Safety guidance should be followed in relation to reasonable provision so long as it doesn't breach the law." (Jersey Chamber of Commerce)

"None. In my experience most women choose to breastfeed discreetly and breaks should be accommodated where babies are allowed in the workplace although this should not impede the ability to perform the role." (Anonymous employer)

Comments from respondents who said that there are some circumstances in which businesses or service providers should have the right to discriminate on the grounds that a woman is breastfeeding a baby included the following –

"It would seem sensible for the law to specify a maximum period of time in which breastfeeding women are protected, based on medical advice on the benefits to the child, to ensure legal protection cannot continue for an unreasonably long period." (Anonymous hospitality employer)

"ONLY on grounds of health safety – unless suitable (safe) facilities will be a requirement of the legislation." (JACS)

"If a woman choses to breastfeed their baby employers should provide a suitable area for her to express, especially as they could be returning to the workplace two weeks after giving birth. Not providing such an area may have a direct effect on the choice they make to return to the workplace at all after and is a clear barrier to removing the glass ceiling." (Anonymous employer)

"Where it may offend others e.g. public spaces." (Anonymous employer)

"Anywhere food is sold for consumption on the premises or where there may be health and safety issues for both the clientelle, employees or the mother and / or child." (Anonymous citizen)

"Where the breastfeeding woman is on business premises, and the business does not wish her to breastfeed, she should be asked to cease breastfeeding or leave until she has finished. If she refuses, then the business should be entitled to refuse service for the time being." (Anonymous employee)

> *"Our starting point is that a woman should never be discriminated against because she is breastfeeding a baby. However, there are likely to be circumstances in which it could be difficult for a business or service provider to provide the support, resources or flexibility that a breast-feeding mother might require. A small office might not be able to provide a room other than a toilet in which a working mother could privately express milk. A breastfeeding mother might want to feed her child herself at certain times of the day but this might not be compatible with the mother's working hours or the needs of the business. If a business is likely to face penalties if it does not enable breast-feeding arrangements this is going to deter businesses from employing women who might wish to breast-feed and this could be very counter-productive. Businesses, as well as individuals, should know who to turn to for support on these issues – there should be a free, public point of contact."* (Institute of Directors Jersey Branch)

Other relevant comments included the following –

> *"We would note that the UK treats breastfeeding in the workplace as primarily a health and safety issue. In terms of imposing positive duties upon employers, this may be a better mechanism than the inclusion of specific protection under sex discrimination laws. An alternative to appropriate health safety provision may be the imposition of an obligation upon workplaces and commercial premises to make reasonable adjustments to accommodate breastfeeding women."* (Huw Thomas, Carey Olsen)

Outcomes

The Equality Act specifically outlaws discrimination by service providers based on the fact that a customer is breastfeeding a baby and there is no reason why the same rule should not apply in Jersey.

A number of the respondents interpreted the question as relating to rights for employees in the workplace. To summarise the current position, the Employment Forum recommended[5] that special provisions for breastfeeding mothers would be excessive in legislation and noted there is no employment legislation in the UK or Isle of Man giving breastfeeding mothers specific rights in the workplace. The Forum recommended that guidance should outline what should reasonably be provided by an employer, taking into account the recommendations of the World Health Organisation. A Jersey health and safety code of practice exists which obliges employers to risk-assess breastfeeding mothers who work with ionising radiation, the principles of which would be expected to be applied more widely in risky occupations. Any risks relating to pregnancy and breastfeeding would generally be covered in any workplace risk assessment. At the request of the Minister for Health and Social Services, breastfeeding rights in the workplace are likely to be considered as part of the 2016 review of the family-friendly rights.

[5] http://gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20EmploymentForumsReccommendationMaternityPaternityFamilyFriendly%2020091211%20EV.pdf

SEXUAL ORIENTATION

7. **Respondents were asked if discrimination based on sexual orientation should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race.**

Of the 123 responses to this question, 94% agreed that discrimination based on sexual orientation should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race, and 6% disagreed.

Twenty-nine respondents commented generally in support of protection against discrimination on grounds of sexual orientation, including the following comments –

> *"IoD members involved in the consultation discussion were unanimous in agreeing that discrimination on the ground of a person's sexuality should be prohibited. It was felt that a person being heterosexual, lesbian, gay or bisexual should not be relevant to most areas of life (such as work) as it was a private matter for that person."* (Institute of Directors Jersey Branch)
>
> *"The States of Jersey should follow the UK example of having a protected characteristic for sexual orientation and Unite agrees that this should be enacted at the same time as the sex discrimination legislation."* (Unite the Union)
>
> *"Chamber believes that it should be treated as the same."* (Jersey Chamber of Commerce)
>
> *"Yes, as a gay woman I feel the need for this to protect against any potential discrimination. It gives reassurance that services are not going to be denied just because who we share our lives with. Such as rental accommodation protection that the land lord couldn't evict you because they didn't approve of your sexuality."* (Anonymous employee)
>
> *"We would endorse the proposal that sexual orientation discrimination be outlawed. The only note of caution which we would sound is that race discrimination is to be outlawed in September 2014; sex discrimination will then follow in September 2015. The addition of what amounts to another protected characteristic is perhaps expecting a lot of employers to deal with in a very short time frame."* (Huw Thomas, Carey Olsen)
>
> *"Failure to not afford similar/same protection is likely to create divides. Furthermore sex discrimination should not be seen as 'a women's law' as it has been elsewhere. To not address discrimination on the grounds of sexuality at this stage will only create the need to re-visit at some point as it is likely to be inconsistent and out of step with societal expectations."* (JACS)
>
> *"Society has generally moved on from racial discrimination but prejudice against gay people is still socially acceptable to many, not least certain religions. Legislative protection on this point is arguably more vital than the*

> *other protected characteristics because, generally, society recognises the other forms of discrimination are not acceptable (although they do still occur, often on an unconscious/indirect level) – Discrimination on the grounds of sexuality is direct, conscious and visible – the introduction of this law would make a clear statement that this sort of discrimination is not acceptable in Jersey."* (Anonymous employee)

Of those who did not agree that discrimination based on sexual orientation should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race, one respondent commented as follows –

> *"Both hoteliers and their guests are entitled to a high degree of freedom of choice. Hoteliers should be free to restrict their guests in more or less any way they wish, providing the restrictions are clearly stated in any and all advertising materials. Hopefully, hoteliers that apply discriminatory rules will lose the custom of all prospective clients who dislike discrimination, whether it affect them directly or not."* (Derek Bernard, individual)

Outcomes

There is overwhelming support for this proposal. It makes sense to protect sexual orientation at the same time as sex and gender re-assignment, because the issue is straightforward and requires little special drafting. There is no need to introduce it separately. The argument for freedom of choice for service providers is an argument that is contrary to any protection against discrimination.

8. Respondents were asked if there are any businesses or service providers that should have the right, in certain circumstances, to discriminate on the grounds of sexual orientation.

Of the 123 responses to this question, 13% felt that, in certain circumstances, businesses or service providers should have the right to discriminate on the grounds of sexual orientation. Eighty-seven percent disagreed.

A number of respondents commented in support of a right to discriminate on the grounds of sexual orientation in certain circumstances, including the following comments relating to religious circumstances –

> *"IoD does not accept that discrimination on the grounds of sexual orientation is acceptable. However, it takes the view that in some respects a government has to recognise: – an element of freedom of choice (e.g. where there is a conflict between issues relating to sexual orientation and religion, as recognised by the White Paper); and – different generational attitudes/social standards. It was felt that people were entitled to make their own religious choices and it was believed that some religions might be unable to accept a practising homosexual in a certain role. Tolerance was believed to be key, including tolerance for the religious beliefs of others. Having said that,*

extremism in any form was likely to create difficulties and there would have to be a cut-off point somewhere along the line. It was also felt that this was a complex area in relation to care (e.g. nursing care). While none of the IoD members felt that racist or homophobic behaviour was acceptable, it was acknowledged that some people had older family members with strong views that were unacceptable to a younger generation. To an extent a level of pragmatism – as well as tolerance – has to be adopted. Businesses providing carers might need to select carers for patients taking into account the wishes and/or prejudices of the patients." (Institute of Directors Jersey Branch)

"The only exceptions should be churches and equivalent places of religious observance. Even then, the exception should cover only religious services and the employment of clergy (or equivalent); churches should not be permitted to otherwise discriminate either in the provision of services or in the workplace." (Huw Thomas, Carey Olsen)

"Recruitment to a role which is for the purposes of an organised religion. Club and associations that are aimed at providing benefits for members of a particular sex." (CIPD Jersey Group)

"Religious only. And I am not religious but if the faith or belief of an establishment held those views then I don't think it's fair to force them to change the goal posts or have beliefs if the state imposed on them." (Anonymous employee)

"The right of religious organisations to refuse a service on the grounds of sexuality is made clear in European law and extends only to the religious organisation not its adherents. Religious organisations are therefore exempt from claims arising from discrimination on the grounds of sexuality but individuals are not. Any new law in Jersey should follow this model." (Anonymous employee)

Comments from the respondents who did not agree that any businesses or service providers should have a right to discriminate on the grounds of sexual orientation in certain circumstances included the following –

"There should be no circumstances where it is permissible for an employer to justify direct discrimination because of the sexual orientation of a worker. It is possible to include a genuine occupational requirement in the legislation, but Unite would suggest reference is made to R (on the application of Amicus – MSF section) v Secretary of State for Trade and Industry which concluded that the exception for a genuine occupational requirement is very narrow in its scope in relation to religion." (Unite the Union)

"To allow organisations, religious or otherwise, to persecute against sexual orientation is only strengthening prejudices. To do so is unjust and out-dated." (Anonymous employer)

"Service providers should not have the right to discriminate against their customers in any circumstances. Employers should have the right only where there is a genuine occupational requirement, e.g. where a person of a specific

sexual orientation is required for objectively justifiable reasons." (Anonymous hospitality employer)

"If your business provides a service to the public then it should have to abide by the law. If a person has religious objections to gay people then they should either stay out of providing services to the public, keep their objections to themselves, or limit provision of their service to fully accredited members of their religion (until we outlaw religious discrimination too)." (Anonymous employee)

"I cannot think of an example where this would be acceptable. Even in relation to certain groups / charities where it may be that only people of a certain sexual orientation can attend / register, I think it's important to make these available to all as it's often the people not in these groups who require the education." (Anonymous employee)

"Government has a responsibility not only for its individual citizens but also for the associations of its individuals. Thus, government can and should be involved in shaping public opinion. To permit religious groups to discriminate on the grounds of sexual orientation is to tacitly permit others to discriminate on the same grounds. A carve-out for religious beliefs therefore perpetuates the harmful ideologies which the legislation seeks to limit." (Anonymous employee)

"This area of discrimination has no validity. It is only people with controversial opinions and these should not be allowed to affect others. Any kind of exemption is only justifying ignorance and belittling people for something that concerns them and no one else really." (Anonymous employer)

Outcomes

It is clear that there is little support for a widespread exception for businesses or service providers to discriminate on the grounds of sexual orientation. The concerns expressed by the IoD are examples of the sort of behaviour that a Discrimination Law is intended to challenge.

Paragraphs 13 and 14 provide further comments relating to religious-based exceptions.

GENDER RE-ASSIGNMENT

9. Respondents were asked if discrimination based on gender re-assignment should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race.

Of the 124 responses to this question, 88% agreed that discrimination based on gender re-assignment should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race.

Twelve percent of respondents did not agree that discrimination based on gender re-assignment should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race. Their comments included the following –

> *"Chamber believes that the following points should be considered: Time off for procedure – generally this would not be sick leave, unless psychologically disabled. Care should be exercised in respect of the wording in terms of "process complete" as it is unlikely that it is never complete albeit surgery may be."* (Jersey Chamber of Commerce)
>
> *"Wait for people to be comfortable with the idea, many would not be I think."* (Anonymous)
>
> *"I believe is it a choice so that people feel more comfortable with themselves, much like plastic surgery."* (Anonymous employer)
>
> *"Government should keep its social engineering to an absolute minimum. Its focus should be on putting its own house in order by ensuring that those electing gender reassignment are not discriminated against by government."* (Derek Bernard, individual)

Comments in support of protection against discrimination on grounds of gender re-assignment included the following –

> *"With the Gender Reassignment Law already in place in Jersey, there has been a number of birth re-registrations of Jersey-born people who have successfully changed gender."* (Superintendent Registrar, Sue Groves)
>
> *"Transgender people deserve the same protection as everyone else."* (Anonymous employee)
>
> *"I am a transgender woman so I'm a little more involved in this than most but trans people are among the most vulnerable protected characteristic enshrined within UK law, this group has the highest suicide rate of any minority, they have been proven to be discriminated against much more than the 'LG&B' in LGBT. They are also much more likely to be discriminated against in the workplace so it is incredibly important this should be made into law."* (Sarah Savage, employee)

"I was diagnosed with Gender Dysphoria as a result I was twice made redundant from the work place." (Ms Deborah Samantha Dors)

"The States of Jersey should follow the UK example of having a protected characteristic for gender reassignment and this should be enacted at the same time as the sex discrimination legislation. The legislation should make it clear that a person has the protected characteristic of gender reassignment regardless of whether the person has started, or completed, the process of changing gender. Although, agreeing with the consultation that transgender people are vulnerable to harassment, it should be noted that transgender people can experience less overt discrimination in employment in other ways, such as being denied recruitment and promotion." (Unite the Union)

"Jersey has an opportunity to bring in model legislation that advances the current position of trans people within British law. Trans* Jersey offers a solution to the problems it sees as arising from the proposals put forward in the white paper in order that Jersey can implement legislation that encompasses the broad spectrum of human gender identity."* (Trans* Jersey)

Outcomes

There is clearly widespread support for including gender re-assignment as a protected characteristic. There is also a general lack of awareness about transgender issues and the particular challenges faced by transgender people, both in the workplace and in relation to the provision of goods and services.

The Minister is particularly grateful for the very thorough response provided by Trans* Jersey, both in writing and in person. The full written response is available on the Trans* Jersey website[6]. The detailed comments will be taken into account in drafting the Regulations, especially in relation to defining this protected characteristic.

10. Respondents were asked if there are any circumstances in which discrimination based on gender re-assignment should be permitted.

Of the 120 responses to this question, 11% felt that there are certain circumstances in which discrimination on the grounds of gender re-assignment should be permitted. Eighty-nine percent disagreed.

Comments in support of a right to discriminate on the grounds of gender re-assignment in certain circumstances including the following –

"A business with an employee or a client going through transition may face challenges, both in relation to the wishes of the individual concerned and potentially those of others with whom they would engage. A business will have to be allowed to make its own decisions on matters which could arise in relation to: the toilets that someone would be expected to use; in a care

[6] https://transjersey.files.wordpress.com/2014/05/response-to-states.pdf

business deciding which member of staff should work for which patient; in a security business, deciding who should conduct physical searches; or within an office or public-facing environment, deciding how some client contact should best be managed." (Institute of Directors Jersey Branch)

"Yes – employers should have the right only where there is a genuine occupational requirement, e.g. where for objectively justifiable reasons a trans or non-trans male or female is required." (Anonymous hospitality employer)

"When during the period of transition where working in support roles i.e. Women's Refuge etc." (Anonymous employee)

"Some health care workers may not be able to do their job if they have changed sex as the person in their care may necessarily demand either a male/female carer." (Anonymous employee)

Comments opposing a right to discriminate on the grounds of gender re-assignment included the following –

"There should be no circumstances where it is permissible for an employer to justify direct discrimination against a transgender worker. As stated above it is possible to include a genuine occupational requirement in the legislation, with the provision that it should be very narrow in scope. The TUC has excellent guidance on LGBT Equality at Work which would provide useful reference when drafting the legislation and providing guidance to employees and employers." (Unite the Union)

"Most people transitioning will be aware of any issues with shared gender facilities and how people who are not so aware may act, and be mindful if thought it need be. But hopefully most people will not be immediately aware or bothered because it should not be a big issue for people." (Anonymous employee)

"There are no logical circumstances in which this could be relevant apart from prejudice." (Anonymous citizen)

"If you are providing a public service, you have no right to discriminate against anyone. I think you mean gender confirmation, not gender reassignment." (Anonymous employee)

"There seems to be issues surrounding things like toilet / changing facilities during transition periods however I don't think these should be highlighted as exceptions as we need to protect people who are going through this, not make it acceptable to treat them differently. Whether it's transition period or not, people should be treated as the sex they aspire to be." (Anonymous employee)

"Absolutely not. I'm a trans woman and I was lucky enough to be protected by a law like this in the UK when I was fleeing domestic violence. Thanks to the anti-discrimination law I was saved from being street homeless by a place in a Women's Refuge and the support from the people who helped me there. This is

a prime example why a persons assumed gender identity HAS to be respected. I was born male but identified as female and had taken serious steps toward living as female thus I was afforded the same protections as a female under equality laws. There should be no circumstances where discrimination happens." (Sarah Savage, employee)

"There are no circumstances in normal daily life when someone's gender should result in discrimination. As someone who is trans, your consultation wording concerns me. Talking about exceptions to discrimination in "the provision of communal changing facilities or shared accommodation" feeds into a common misconception about trans people. This is exactly the situation in which most trans people encounter discrimination! It absolutely should NOT be exempted." (Anonymous employee)

"There is no requirement to have any exemptions for transgender individuals, other than those provided for the characteristic of "sex". Trans employees should be subject only to the same exemptions for genuine occupational requirements as natal born men, women and those persons of a non-binary gender." (Trans* Jersey)

"Cisgender women, particularly, seem to be concerned that they might be faced with a pre-op transwoman in changing facilities, which might cause them embarrassment or awkwardness. Firstly, it is highly unusual to see someone's genitals in public facilities. Most people, transgender people included, are discreet. Furthermore, the overpowering aim of transgender people is to pass as their preferred gender. They are, therefore, less likely to expose themselves than cisgender individuals." (Trans* Jersey)

Outcomes

These are sensitive and difficult issues. Trans* Jersey makes a valid point about the groundless fear of being confronted with the physical features of a transgender person in a communal changing area or in toilet facilities, and a widespread exception in this area would clearly undermine the protection that the Law is intended to provide.

In particular it is clearly important, for example, that a transwoman at risk of domestic violence is able to use the women's refuge. Further consultation with stakeholders is likely to be required in order to determine whether some limited exceptions are needed, for example in relation to competitive sports.

MARRIAGE AND CIVIL PARTNERSHIP

11. Respondents were asked if discrimination based on marriage and civil partnership should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race.

Of the 111 responses to this question, 84% felt that discrimination based on marriage and civil partnership should be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race, and 16% disagreed.

There were 8 general comments in support of protection against discrimination on grounds of marriage and civil partnership; for example, on the grounds that everyone should be equally protected. The following 2 specific reasons were also given for including marriage and civil partnership as a protected characteristic –

> *"Unite believes that discrimination at work based on marriage and civil partnership should be introduced by the States of Jersey. We do not consider there will be adequate protection provided by the enactment of sex discrimination legislation. We believe it is particularly important in respect of civil partnership which has only recently become law in Jersey. The introduction of this in the UK has not led to a significant number of tribunal cases so we do not believe it will be a burden on employers for the States of Jersey to include a protected characteristic based on marriage and civil partnership."* (Unite the Union)

> *"I don't agree with the Minister that this will be covered by sex discrimination. Jersey is a very old fashioned society. The assumption is: if you are a married woman, you will want children and it's just a matter of time. If it isn't separately dealt with, there is a danger that the tribunal when looking at claims and comparing with the UK case law, will have lawyers endeavouring to exclude the claim on the basis that the Jersey statute, by its omission, intends not to cover discrimination on the ground marital status."* (Wendy Lambert, employer/Lawyer)

A number of respondents commented in support of the Minister's position, that marriage and civil partnership should not be included as a separate protected characteristic, including the following –

> *"I agree that there should be no need to provide for a separate protected characteristic relating to one's civil status but I would want to ensure that it works both ways. There should equally be no disadvantage to single people or to couples who are not married or in a civil partnership. Some couples who come to arrange their weddings with us indicate that they feel their lives in Jersey would be easier – bureaucratically and administratively – if they marry."* (Superintendent Registrar, Sue Groves)

> *"I can't see any practical application for this provision. Discrimination on the grounds of marriage or civil partnership is not a widespread issue in Jersey."* (Anonymous employee)

"I do not feel this is an issue. Being married, being in a civil partnership or being single is NOT, unlike gender or sexual orientation, an inherent characteristic." (Anonymous)

"Changes in society have meant that marriage is no longer the 'defining' statement of family/household and many people choose other paths such as living together, civil partnerships or choosing to remain single, therefore to afford protection specifically for 'marital status' is out of kilter with society, and therefore gives greater protection to one sector in society over another." (JACS)

"The UK provision is a hangover from when women used to be sacked when they got married. It is not an issue now and can be dealt with via protection against gender & orientation discrimination." (Anonymous employee)

"If you are going to protect marriage and civil partnerships specifically, then you need to protect co-habiting couples, which becomes difficult to define. And, then, why should single people not be protected under the law? Marriage is a choice, just like being single is a choice." (Anonymous employee)

"Action against discrimination would be likely to be able to pursued under other parts of the Law." (Anonymous individual)

A number of respondents took the opportunity to comment that marriage and civil partnerships should be treated equally and that same-sex marriage should be available in Jersey for equality reasons.

Outcomes

The Minister stated in the White Paper that he did not think that marriage and civil partnership should be covered as a separate protected characteristic. However, there was overwhelming support in the consultation for the inclusion of this as a separate characteristic (84% in favour). Only 2 comments were provided to explain why this might be necessary (other than a general desire for equality).

The concerns raised about the treatment of married woman are examples of direct sex discrimination. If an employer treats married women differently from married men, then that will be unlawful sex discrimination. There are circumstances in which an employer might be concerned about whether 2 employees are in a relationship as this could give rise to concerns about favouritism or other difficulties. For example, in the Police Force there may be a difficulty with a person making decisions about sending his or her partner into a potentially dangerous situation. What matters, however, is usually the fact and nature of the relationship rather than any concern about marriage *per se*. In making judgments of this kind, it is important that the employer does not make assumptions based on sex. It would clearly be wrong and unlawful to apply one rule to women who are married, and another to men.

It will be important, however, to make provision in the Discrimination Law so that civil partnerships are treated as equal to marriage in the context of discrimination. In other words, it should not be lawful to discriminate against a same-sex couple in a

civil partnership on the grounds that they are not married. A similar provision to Section 23(3) of the Equality Act is likely to be necessary. What is required in the Law will depend to some extent on the outcome of the Chief Minister's current consultation on same-sex marriage.

12. Respondents who agreed that discrimination based on marriage and civil partnership should be unlawful were asked if there are any circumstances in which discrimination based on marriage and civil partnership should be permitted.

Of the 91 responses to this question, 8% agreed that there are certain circumstances in which discrimination on the grounds of marriage and civil partnership should be permitted. Ninety-two percent disagreed.

Three respondents commented in support of a right to discriminate on the grounds of marriage and civil partnership in circumstances relating to religion, one respondent commenting –

> *"The only exceptions should be churches and equivalent places of religious observance. Even then, the exception should cover only religious services and the employment of clergy (or equivalent); churches should not be permitted to otherwise discriminate either in the provision of services or in the workplace."* (Huw Thomas, Carey Olsen)

Comments from other respondents in relation to whether there are certain circumstances in which discrimination on the grounds of marriage and civil partnership should be permitted included the following –

> *"Yes and no. Chamber believes that the UK Equality Act should be followed. ECHR signed up to should sit in that."* (Jersey Chamber of Commerce)

> *"If people in partnership of any kind are employed in positions of authority within the same state department, then discrimination should be permitted as nepotism is itself a form of discrimination and may be counter to the interests of the workforce as a whole. Discrimination in this respect should not be automatic, but any persons with such a common interest should be required by law to declare it and it should be subject to review."* (Anonymous citizen)

> *"It is difficult to envisage a genuine aim that could be achieved through unequal treatment on these grounds."* (Anonymous hospitality employer)

EXCEPTIONS

Exceptions set out the circumstances in which an act will not be treated as a prohibited act of discrimination. The Discrimination Law currently includes 'general' exceptions that will apply to all protected characteristics and exceptions that are specific to certain protected characteristics. The general exceptions relate to –

- Acts done to comply with a Law or an Order of a Court or Tribunal, and
- Acts done to comply with the law of another country.

Exceptions that relate specifically to race discrimination include –

- Selection of people of a specified nationality for national sports teams.
- Clubs and associations where their essential character is to provide benefits to a particular racial group (unless identified by colour).
- Where a person of a particular race is crucial for the job. This is likely to be very rare in the case of race (e.g. out-reach work), but less rare in the case of sex (e.g. jobs requiring intimate care or shared accommodation).

It is proposed to include exceptions similar to those found in the Equality Act that will, for example, allow for single-sex schools.

RELIGION

13. Respondents were asked if an exception should be provided for recruitment to a role which is for the purposes of an organised religion, as is currently provided in the Equality Act.

Of the 112 responses to this question, 30% of respondents agreed that an exception should be provided for recruitment to a role which is for the purposes of an organised religion, and 70% disagreed.

There were some general comments in support of an exception for recruitment to a role which is for the purposes of an organised religion, including the following –

> *"It is possible to include a genuine occupational requirement in the legislation in respect to recruitment to a role which is for the purposes of an organised religion, but as previously stated, Unite would suggest reference is made to R (on the application of Amicus – MSF section) v Secretary of State for Trade and Industry which concluded that the exception for a genuine occupational requirement on the basis of religion is very narrow in its scope."* (Unite the Union)
>
> *"The only exceptions should be churches and equivalent places of religious observance. Even then, the exception should cover only religious services and the employment of clergy (or equivalent); churches should not be permitted to otherwise discriminate either in the provision of services or in the workplace." (Huw Thomas, Carey Olsen)*
>
> *"Teachers or workers working for a religious organisation."* (Anonymous employee)
>
> *"Same sex religious orders; services offered – e.g. hospital/education."* (JACS)
>
> *"As long as it is central to the religion not to accept. employment of religious mentor should be covered as it's central to the religion. But for example a nurse or health care assistant at a religious care home or a teacher in a religious school shouldn't matter about the person's private life/sexuality. Just on ability to do role."* (Anonymous employee)
>
> *"It is clear that there are religions where gender roles are very specific and I do think we need to make allowances for this. I do know of an example in the UK when it was highlighted that there was a high percentage of Muslim women being diagnosed in a certain part of the UK and after researching the issue, it became apparent that they did not feel they could go to a male doctor for gynaecological issues. An advert was then placed for a female, Muslim, Gynaecologist in that area which in turn reduced the amount of cancer diagnosis as women were encouraged and felt comfortable being assessed sooner. Although quite a specific example, I think it would be beneficial to make allowances such as this, should the need arise."* (Anonymous employee)

"Employees of churches should hold the same religion as their employer or have no specific religion otherwise they may not be able to give the correct perspective to church members." (Anonymous employee)

"This works and keeps the religious organisations happy so, although I wish there was no need to exempt anyone, I guess we should follow suit in Jersey." (Anonymous employee)

"The JCCT would expect the Minister to follow England on this matter." (Jersey Child Care Trust)

There were a number of comments opposing an exception for recruitment to a role which is for the purposes of an organised religion, including the following –

"Jersey is a secular government with secular laws and everyone should be subject to them. I expect that concessions will be made for religions but this is fundamentally wrong – it means that what people think and feel (due to their beliefs) is put above who people are (because of the way they are born). Religion is powerful and will use its power to threaten and influence and I expect the Minister and the States will bow to this pressure. But in doing so both must recognise that they are putting religion above secular which is not how our laws and government are set up." (Anonymous employee)

"In a fairly secular society more people could be offended with this discrimination than in favour of it. Although it's a mind-set that will be hard to convince, religious people should not be given the right to discriminate against others. These exemptions just add to sexist, racist and duped attitudes." (Anonymous employer)

"The UK Equality Act also contains provisions for the protection of people from discrimination on the grounds of their religion or belief. Without similar protection in Jersey, any exception would be placing the views and practices of organised religions outside of and above the law of the state." (Anonymous hospitality employer)

"Religion is the principal reason this discrimination currently exists, as an institution it should be provided with no special exceptions." (James Woodhead, employee)

"There should be no exceptions for religion, which is a minority interest that must conform to secular society. Organised religion should be viewed as any other business and any articles of faith contrary to the standards of society should be regarded as anti-social and illegal. Where religion is practised in private, this would not be relevant." (Anonymous citizen)

"I was employed by a company who were Methodist but they made me redundant after 3 years because I "came out". An employee should not be sacked just because he/she has "come out" and for a difference of gender/ sexuality or religious convictions." (Ms Deborah Samantha Dors)

"I suspect this one will get through to appease religious groups but why should religion allow you to treat someone unfairly." (Anonymous employee)

"Religion should not be a vehicle to sustain discrimination." (Anonymous)

Outcomes

The recruitment and appointment of clergy cannot be overlooked, and it is likely that the Law would not want to intervene in a debate about gay priests, for example. For this reason, the Minister would support a narrow exception, as suggested by Unite the Union, for recruitment to a role which is for the purposes of an organised religion. A similar provision to Schedule 9(2) of the Equality Act should be included.

14. Respondents were asked if any other exceptions relating to religion should be provided for acts of discrimination on the grounds of sex.

Of the 100 responses to this question, 96% of respondents said that no other religion-related exceptions should be included for acts of sex discrimination, and 4% said that other religion-related exceptions should be included. One relevant exception was suggested relating to religion –

> *"A mosque or synagogue may wish to segregate male/female attendees."* (Institute of Directors Jersey Branch)

Outcomes

It is acknowledged that some religions organise worship and activities differently for different genders. The Equality Act includes a specific exception in Schedule 3(29) which provides that the segregation of attendees at a place of worship is not an act of sex discrimination. The Minister has considered whether it might be appropriate to include exceptions for religious services that are specifically aimed at one gender, and has concluded that he cannot endorse segregation in worship by providing an exception in the Law.

Segregation on the basis of **race** is less favourable treatment, which means that it is **direct** discrimination that cannot be justified (see Article 6 of the Discrimination Law). Without an equivalent provision for sex discrimination, it would be up to any potential claimant to show that segregation amounted to less favourable treatment. This would be a question for the Tribunal to determine taking into account all of the circumstances of the case.

The Minister notes that a range of religious groups in Jersey were specifically invited to respond to this Consultation, but did not take the opportunity to do so. There will be a further opportunity at the law drafting stage if religious groups wish to explain to the Minister why an exception might be appropriate.

MATERNITY PAY

15. **Respondents were asked if an exception should be provided so that an employer who meets the statutory obligations in relation to maternity leave and pay is not subject to a complaint of sex discrimination if the maternity pay is lower than the amount that would be available to another employee who was on sick leave.**

Of the 98 responses to this question, 72% of respondents said that an exception should not be included in relation to maternity pay, and 28% said that an exception should be made.

The preamble to the question explained that the purpose of the proposed exception is so that an employer who meets any statutory obligations in relation to maternity leave and pay would not be subject to a complaint of sex discrimination if their policy is to provide employees with, for example, a greater contractual entitlement to sick pay, e.g. full pay for up to 26 weeks. The comments indicate that many respondents were concerned about the unfairness of such a position, including –

> *"I cannot see a legitimate reason why maternity leave pay should be less than sick leave (for the period of time the employer choses to pay over and above the statutory requirement of 2 weeks)."* (Anonymous employee)
>
> *"This is disgraceful! Why should a person on sick leave receive more money than a mother on maternity leave? I am outraged by this suggestion, this is absolutely direct discrimination and I am very disappointed by this proposal. It may have an unintended consequence that mothers choose to go on sick leave rather than maternity leave as they would get more money that way."* (Anonymous employee)
>
> *"No. The proposal's omission of any statutory rate of maternity pay gives employers carte blanche to pay women at rates that could effectively force them back into work at the end of the two-week period of full pay. This is not in keeping with the spirit of a law that is meant to protect new mothers from detriment. Our view is that employers should be compelled to at least pay rates equivalent to sick pay, but that a statutory minimum would be preferable."* (Anonymous hospitality employer)
>
> *"A woman on Maternity Leave should not be treated differently by an employer where contractual sick pay is higher than contractual maternity pay. They should be treated equally."* (Linda Sohawon, Legal Officer, trade union/staff association)
>
> *"This would presumably encourage employers to pay a lower (potentially much lower) wage in this type of scenario. It discourages women from taking maternity leave and therefore is discriminatory. If Jersey wants women in the workforce (which is should) it must make it easier for them to do so. Women who become pregnant and want to take maternity leave, who are paid a lower wage during a certain length of this time, will either put off getting pregnant (and this will cause further problems for the health system later) or simply leave the workplace all together unless they are in highly paid jobs making it worth it."* (Anonymous)

> *"Maternity pay should not be lower than any other pay – and withholding pay until an employee has returned for a minimum term should be unlawful."* (Anonymous employee)

A number of respondents commented in support of an exception relating to the level of contractual maternity pay, including the following –

> *"An employer who meets statutory obligations should not run a risk of breaching sex discrimination legislation. An employer should be allowed to recoup contractual maternity pay if an employee leaves within a set period of time, even if that employer would not recoup sick pay – this should be a matter for an employer's discretion."* (Institute of Directors Jersey Branch)

> *"As it would be unfair to compare maternity and sickness and may well end up creating issues. A female employee who is off sick would be paid at the same level as a male employee off sick."* (JACS)

> *"Chamber believes that the following should be considered: The statutory requirement would have been met therefore there should be no claim Sick pay is the same for men and women therefore not a comparator It is maternity not sick leave. The only comparator could be another women in another organisation."* (Jersey Chamber of Commerce)

> *"Maternity isn't sickness and shouldn't be treated as such."* (Wendy Lambert, employer/lawyer)

> *"As long as statutory obligations are met, surely the behaviour of the employer is correct? Maternity is (by definition) NOT the same as an absence of illness. There may be a separate argument that the statutory obligations are inadequate, however!"* (Mr. M.P. Chatterley, employer)

> *"The JCCT wouldn't compare sick and maternity leave. As long as the statutory responsibilities are met by the Employer, then their contractual responsibilities are seen as separate."* (Jersey Child Care Trust)

> *"Yes – although we would generally be of the view that such an exception should be unnecessary; maternity is not a form of sickness and maternity absence should not be equated to sickness absence."* (Huw Thomas, Carey Olsen)

> *"I think if an employer is meeting the statutory obligations as set out in legislation then I'm not sure it is fair to then be subject to a complaint of sex discrimination if different contractual terms apply for sickness. However the lack of SMP raises the question, of how fair it is to possibly have a male employee on sick leave receiving more pay than a female on maternity, this could lead to increased sickness absence rates in females who have given birth, therefore possibly effecting their opportunities for promotion or progression due to high absence levels."* (Anonymous employer)

"It is established in UK case law that pregnancy cannot be compared with sickness (Todd v Eastern Health and Social Services Board, Gillespie v Northern Health and Social Services Board (No. 2). Additionally, pregnant women have special protection and when in receipt of maternity pay cannot be compared with that of a man or woman at work (Clark v Secretary State of Employment). Therefore, it would not be appropriate for the above exception to be included in the legislation because of women's unique position during pregnancy and maternity leave." (Unite the Union)

Outcomes

Whilst the comments indicate that many respondents were concerned about the perceived unfairness of the proposed exception, the underlying principle of the proposal is that maternity cannot be equated with sickness. On that basis, it makes sense to prevent any argument that by failing to provide for maternity pay equivalent to sick pay, an employer is discriminating. Without such a rule, the principle established in the proposals for family-friendly legislation[7], i.e. that maternity leave is unpaid, would be undermined.

[7] P.109/2014, as adopted by the States in July 2014

POSITIVE ACTION

16. Respondents were asked if an exception should be provided to permit positive action where men or women are under-represented in a particular role.

Of the 103 responses to this question, 61% of respondents said that an exception should be included to permit positive action, and 39% said that an exception should not be included.

This and the proposed exception for charities to provide benefits to people who share the same protected characteristic (see question 18), were the only 2 proposed exceptions that more than half of the respondents supported overall. Comments from respondents who supported such an exception included –

> *"The JCRT agrees that it is unlikely that significant progress will be made to address the under representation of women in politics and senior leadership without positive action measures. The Davis report (UK) sets out an aspirational target of 25% of women at Board level within Business which we do not believe is being achieved within Jersey. Additionally, currently the States Assembly has only 23% of women so for these reasons the JCRT recommends positive action provisions are included in the proposed sex discrimination legislation. However, recruitment, selection and promotion in employment should be made on the basis of merit. Selection should not be made via positive discrimination (as set out in your question above). Under UK legislation there is clear distinction between positive action and positive discrimination as set out in section 158 and 159 of the Equality Act 2010 (UK)."* (Jersey Community Relations Trust)
>
> *"I believe for a period of time, Jersey may need to adopt positive action measures (women are vastly under-represented). However, I do not feel that this should be taken lightly and if implemented should only be permitted for a period of time. Positive action remedies need to be reviewed and revised over time."* (Anonymous employee)
>
> *"I don't believe there should be quotas in order to increase representation in certain roles, however we are very far away from equal leadership / executive roles for men and women so I do think that some positive action is needed to bridge the gap. Things like 'women in wealth' or other women's initiatives in the work place should be able to exist and on occasion, the products provided should be available to women only."* (Anonymous employee)
>
> *"Whilst such an exception is superficially attractive, the likelihood of its practical application must be extremely limited. We would take the view that positive action (as opposed to positive discrimination) should be permitted on the same basis as under the UK Equality Act 2010 save in relation to so called "tie-breaker" questions."* (Huw Thomas, Carey Olsen)
>
> *"Unite argues that positive action should form part of Discrimination Law for all protected characteristics and it should not be restricted to gender. "Positive action" in respect of employment is not "positive discrimination", it means action can be taken by an employer to encourage people from under-*

> *represented groups to apply for jobs and promotion. Examples would be Leadership Courses for women at work and advertising jobs in Black, Asian and Ethnic Minority communities. As stated in the "white paper" the UK Equality Act 2010 does allow for someone from an under-representative group to be appointed to a post if they are equally qualified as another candidate for all protected characteristics. In the UK positive action has proven to be successful, for example, the Labour Party has increased the number of women Members of Parliament through women only shortlists. If the legislation is restricted to "positive action" only for gender it will have a very limited impact on making progress on equality in the Channel Islands."* (Unite the Union)

The Institute of Directors Jersey Branch was in favour of positive discrimination but commented –

> *"However there were some reservations about this. A business should be able to select the right person for the job and for the business. There should be no implicit expectation that a business will apply positive discrimination principles where men or woman are under-represented in a particular role. Businesses should be entitled to get on and run their businesses without excessive government interference."*

Comments from respondents who were opposed to an exception that would permit positive action included the following –

> *"People should have a job purely on merit I don't agree with people gaining a job due to lack of a person of a certain sex or colour or sexual orientation, etc., etc."* (Lisa Wallser)

> *"Because candidates should be the best for the job. Positive discrimination is another form of discrimination that perpetuates unfair decision making that as a society we need to move away from and move to judgements based solely on ability."* (Anonymous employee)

> *"No-one wants to go into a job feeling they've just been chosen for their sex or any other irrelevant criteria. E.g. there are plenty of capable women out there who could take on Directorships but people go with who they know so choose from the same pool."* (Anonymous employee)

> *"Positive discrimination is as bad as negative discrimination. You don't beat discrimination by discriminating against a different class of people. Merit should be the only thing that determines selection."* (Anonymous employee)

> *"There shouldn't be any exceptions in appointing to a role other than ensuring the person appointed is suitably qualified and experienced and capable of doing the work required."* (Anonymous employee)

> *"This will just be used as an excuse to continue to discriminate by valuing the skills of one party more highly than the skills of another. It may also result in one party being restricted from attaining the required qualifications to exclude them from the position."* (Anonymous, Managing director of a trust company)

"Calling it "positive action" is very misleading. It is "positive discrimination", which, as the name states, is discrimination nonetheless. If it's OK to discriminate against a group because they are the majority, then a truly worrying double standard is being proposed." (Mr. M.P. Chatterley, employer)

"The other measures within the regulations will help ensure that positive action is not required in addition to the additional protection afforded to both sexes through the regulations. Removing discrimination on grounds of pregnancy and maternity and providing equal pay for equal work will assist in removing the barriers that currently prevent women in particular maintaining careers after time off for family reasons." (Anonymous employee)

"Exceptions within the discrimination law already covers sufficient grounds to consider, i.e. genuine occupational requirement etc. so no real need to add more, particularly for one protected characteristic over another. Furthermore the confusion and pitfalls introducing certain circumstances whereby a discriminatory act can be considered may lead to employers struggling to understand the legislation. This in turn could be seen as an excuse for 'real' discrimination to occur as it could be difficult to disprove otherwise." (JACS)

Outcomes

The difference between positive action and positive discrimination may be regarded as semantics, but the difference in the UK is expressed as follows –

- Positive **discrimination** is recruiting or promoting a person solely because they have a relevant protected characteristic, or setting quotas to promote or recruit a particular number or proportion of people with protected characteristics. Positive discrimination is illegal in most cases.

- Positive **action** means that it is not unlawful to take special measures aimed at alleviating disadvantage or under-representation experienced by those with any of the protected characteristics in order to counteract or reverse the effects of past discrimination. However, any such measures must be a **proportionate way of achieving the relevant aim** and must be used only where a person **reasonably thinks** that people with a particular protected characteristic are under-represented or suffer a disadvantage.

The Equality Act deals with this in Sections 158 and 159 in provisions that have not yet been tested in the case law, and which allow for direct discrimination in recruitment where one group is under-represented. However, the circumstances in which this is allowed are not clear and no cases have as yet emerged.

This is a difficult area and the issues are finely balanced. Without positive action measures, it may not be possible to develop the JCRT campaign referred to in the

White Paper to redress the under-representation of women in positions of influence and to promote the equal participation of women in politics and public life[8]. However, some strong views were expressed against such an exception, and the Minister agrees with many of the respondents in their concern that an exception for positive action is a form of discrimination that perpetuates unfairness, and we should not be encouraging this over recruitment based on merit.

The Minister notes that, if an exception is not included, an employer can still choose the best person for the job, but in a tie-breaker situation between 2 equally good candidates, the employer would need a reason other than the protected characteristic (e.g. sex or race) for selecting their preferred candidate. The Minister will also give further consideration to the suggestion from JACS that an exception relating to genuine occupational requirements may be sufficient.

The Minister has decided that further research will be undertaken to determine what exception, if any, might be appropriate. For example, to permit the targeting of job vacancies or training to an under-represented group to redress imbalance, but not permitting direct discrimination in relation to recruitment decisions. An exception could be made specifically for recruitment to boards of companies, charities or other bodies where the purpose of the discrimination is to ensure a representative balance. For the avoidance of any doubt, it could also be provided that refusing to adopt any of these measures would not in itself count as a an act of discrimination or evidence of discrimination.

17. Respondents were asked if positive action should be permitted only if the person who is selected is as qualified for the role as any other candidate.

Of the 91 responses to this question, 70% of respondents said that positive action should be permitted only if the person who is selected is as qualified for the role as any other candidate. Thirty percent of respondents said that positive action should not only be permitted where the person who is selected is as qualified for the role as any other candidate.

A number of comments were received, as follows, including some specific concerns relating to the difficulties in defining in practical terms what is meant by 'as qualified for the role as any other candidate'.

> *"The definition of 'qualified' needs to be addressed to ensure that the role profile does not prevent otherwise competent and able women from being considered for posts."* (Linda Sohawon, Legal Officer, trade union/staff association)

> *"The concept of "is as qualified" may be difficult to evaluate as on the face of it qualifications may be comparable but is a science degree as good as an arts degree? Is a degree from University of Oxford on parity with a degree from Bournemouth University, etc."* (Anonymous employee)

[8] See page 6 of the White Paper and www.jerseycommunityrelations.org/

"There should be an exception for positive action where men or women are under-represented in a particular role, but this must be based on the UK position and test as proposed by the white paper. General positive action, for example, in the form of providing a mentoring scheme for a certain protected group that is under-represented or targeted advertising, are beneficial and established practices in the UK in supporting equal opportunities and the ability to use a 'tie-breaker' test for candidates of equal merit should be built into the proposed Sex Discrimination (Jersey) Law. However, that in practice it is rare to encounter two candidates with the same experience or qualifications and this is especially so for more senior employees. Candidates will often have different but complementary skills. It is, therefore, important to ensure that organisations within the Jersey context have access to published guidance on how to assess candidates fairly and objectively (i.e. assessment criteria and scores) to avoid any potential claims of direct sex discrimination. I think this is something we will need to look at carefully especially around internal promotions and vacancies." (Anonymous employer)

"There are other ways of making sure that recruitment processes are fair and equitable. Removing personal details such as gender and name from the application form, and linking the two parts of the form via a number, ought to be sufficient to overcome shortlister bias." (Anonymous employee)

"There were mixed views on this issue. It should be a matter for the discretion of the business to decide what the business requires. Sometimes that might be to recruit someone from an under-represented group even if the candidate is less well-qualified than a person from another group. It was felt that the best approach was for a business to encourage applications from underrepresented groups – and therefore positive discrimination in recruitment advertising will need to be permitted." (Institute of Directors Jersey Branch)

Outcomes

These responses demonstrate the difficulty of defining the scope for any positive action provision. Further research is required to determine what positive measures could be encouraged through an exception, if any, without compromising the principle of appointment and promotion on merit.

In relation to the perceived difficulties in defining what 'as qualified for the role as any other candidate' means, the UK Government Equalities Office provides the following guidance for an employer to establish that candidates are of equal merit in meeting the criteria for the specific post (in a tie-breaker situation) but do not have to be identical in their respective merits; employers should establish a set of criteria against which candidates will be assessed. This can take into account anything that is required for the job, including abilities, competencies, professional experience, qualifications, skills and qualities. Employers would have to ensure that the criteria aren't indirectly discriminatory.

18. Respondents were asked if there are any other circumstances in which positive action should be permitted.

Of the 89 responses to this question, 79% of respondents said that there were no other circumstances in which positive action should be permitted. 21% of respondents said that there are other circumstances in which positive action should be permitted.

Comments included –

> *"I disagree with the exclusion of positive action as an exception in relation to race. I actually think this is a little bit short sighted as the demographic of Jersey has changed and will continue to change. Many of the 'minority' nationalities (i.e. Portuguese and Polish) are now fully integrated into Jersey with families and organisations should have the protection to take positive action with regards to race. This is particularly important in public services (i.e. childcare, healthcare and so on), which should be representative of the community it serves. I appreciate that the Race Discrimination (Jersey) Law has now been passed, but if they are going to implement an exception for positive discrimination within a sex discrimination context then should this not also cover race."* (Anonymous employer)
>
> *"We would note that it would seem odd to allow positive action in respect of sex/gender but not for other protected characteristics (in particular race)."* (Huw Thomas, Carey Olsen)
>
> *"In race discrimination."* (Wendy Lambert, employer/lawyer)
>
> *"All other characteristics should have the same exception of positive discrimination (where appropriate), as long as it is reviewed and revised accordingly over time."* (Anonymous employee)
>
> *"To mirror section 158 and 159 of the Equality Act (UK) namely, recruitment and training."* (Jersey Community Relations Trust)
>
> *"As previous, care roles for vulnerable people."* (Anonymous employee)

Outcomes

A reasonable point is made by a number of the respondents that, if positive action is introduced in relation to sex discrimination, it should also apply in relation to race and any other protected characteristics. This could be included by Regulations if needed. Further research would be required to determine whether the same, or a similar exception, should be introduced in relation to any other characteristics.

In preparing the Discrimination Law and the protected characteristic of race, the Minister had decided that positive action provisions should not be included at that time, and that further consideration would be given to positive action when the attributes of sex and disability were being prepared.

CHARITIES

19. Respondents were asked if an exception should be provided for charities to provide benefits only to people who share the same protected characteristic, as is provided in the Equality Act.

Of the 97 responses to this question, 61% of respondents said that an exception should be provided for charities to provide benefits only to people who share the same protected characteristic, and 39% of respondents did not agree with such an exception.

Comments in favour of an exception included –

> *"Charities are often established to support vulnerable/minority groups of people. If an exception was not made it may lead to some of their 'client group' feeling that the work of the charity is undermined. Furthermore support/fundraising for charities may suffer if an exception is not in place."* (JACS)
>
> *"Seems sensible and consistent with UK as many of the charities are operating in both places."* (Anonymous employee)
>
> *"Many charities have constitutions which determine the beneficiaries – therefore they should be permitted to act within the constitution."* (Anonymous employee)
>
> *"The example of the Race for Life is noted, both in terms of who can participate in the event and the charity it raises money for. It may also have relevance to charities that deal with matters such as family planning, rape and abortion counselling."* (Institute of Directors Jersey Branch)
>
> *"Unite agrees that exceptions should be provided for charities, clubs and associations for people who share the same characteristics, an example would be a charity that provides services to women who are subjected to domestic violence."* (Unite the Union)
>
> *"Not a matter for the State to interfere in the private sphere, whether charities or clubs."* (Anonymous employee)
>
> *"Health issues which only effect one sex (e.g. Turner Syndrome etc.)."* (Anonymous)
>
> *"As strange as it is to disallow people to give or participate in a cause, it's down to the founder's discretion. Charities supported or founded by the government should have no exceptions."* (Anonymous employer)

Comments opposing an exception permitting charities to provide benefits only to people who share the same protected characteristic included –

> *"It must not be allowed to be a 'get out of jail free option' for people not to give rights to the whole community. For example a charity that manages*

rental accommodation would not be permitted to discriminate because it is under the charity banner." (Anonymous employee)

"I think it would be beneficial to have the groups open to all but obviously attracting a certain group. Opening to all also increases the awareness of any issues and broadens the mind-set of all involved." (Anonymous employee)

"I also think certain charities that solely focus on one gender such as women's refuge etc. are discriminating against men who experience abuse. I think an acknowledgement that abuse happens to both genders and an acceptance that any abuse is wrong and support for victims and perpetrators in changing behaviour is a more equitable way forward as a society." (Anonymous employee)

Outcomes

While not everyone is in favour of exceptions, it would be an extreme view not to provide for them in this case, and it could lead certain charities to close.

Where a charity is specifically aimed at a particular group because of the nature of the service it provides, then this should be allowed for in the Discrimination Law. An exception would be carefully targeted to ensure that any permitted discrimination was no more than necessary to allow the charity to meet its charitable objectives.

CLUBS AND ASSOCIATIONS

20. Respondents were asked if an exception should be provided for clubs and associations that are aimed at providing benefits for members of a particular sex.

Of the 97 responses to this question, the respondents were almost equally split. Forty-eight percent of respondents said that an exception should be provided for clubs and associations that are aimed at providing benefits for members of a particular sex, and 52% of respondents did not agree with such an exception. Comments in favour of an exception included –

> *"We would take the view that such an exception should be subject to regular review."* (Huw Thomas, Carey Olsen)
>
> *"Only as defined in the White Paper, i.e. where it is the essential character of the club/association that it provides benefits to a particular sex. This should be carefully considered and worded so as not to afford a 'smokescreen' for discrimination by service providers."* (Anonymous hospitality employer)
>
> *"This should apply to single-gender organisations (provided that male-only organisations admit transmen, and women-only organisations admit transwomen), but not to organisations that don't need to be single-gender, such as golf clubs."* (Anonymous employee)
>
> *"As long as it's an established club / association that doesn't seem to be directly set up to discriminate or avoid equality legislation."* (Anonymous employee)

Comments suggesting that an exception relating to clubs and associations that are aimed at providing benefits for members of a particular sex may not be appropriate included –

> *"Arguably it is the closed doors of such organisations that may have fostered sexism/discrimination in the past."* (Institute of Directors Jersey Branch)
>
> *"To 'allow' discrimination through the use of an exception for clubs and associations could potentially be used as a backdoor for people to cover acts of discrimination by arguing that such acts happened in their capacity as a member of the relevant club/association."* (JACS)
>
> *"Some groups will naturally attract more men than women but no one should be barred Also all this is very cis-gendered assuming a binary gender response. Men only, women only – where to trans-gendered people fit in – or someone somewhere on the spectrum."* (Anonymous employee)
>
> *"A man is unlikely to join the WI but he could always benefit from their activities and gain more insight into women if he joined. If a group is naturally predominantly male/female then this isn't a problem. Exclusion is a problem and we should always promote choice. Chances are that men and women enjoy time spent on separate activities but a sense of sexual elitism arises when you have 'men only' clubs."* (Anna Shipley, employee)

"This is difficult, for instance the Women's Refuge is critical in assisting victims of domestic violence although these are predominately female should it preclude men? Of course, the Refuge does assist those male children that are involved." (Anonymous employee)

Outcomes

The Consultation suggested that, where a club or association is specifically aimed at a particular sex because of the nature of the service it provides, then this should be permitted. There is already an exception in the Discrimination Law relating to clubs for members of one race (Schedule 2(14)).

Any exception would have to draw a distinction between a club which by its nature caters for one group, and a club which simply chooses to discriminate by excluding people of a particular group. Discrimination would be confined to membership, for example, a football club for men would be permitted, but a football club that allows women to join but charges women a higher membership fee than men, would not be permitted.

The Minister notes that while respondents were split, there was a surprising strength of opinion that an exception should **not** be provided. This would mean that bodies such as the Women's Institute (WI) would not be permitted to continue to restrict their membership to women only. Whilst the Equality Act permits WI membership to be restricted to women, the exception does not extend to employees of the WI.[9]

The Minister notes that, if an exception is not included in the Law, where a club is not a private club with 24 members or less, it would not be able to turn away potential members based upon their sex. If a club does so, a person may take a complaint to the Tribunal and would have to show that they have been discriminated against.

The Minister agrees with the sentiment expressed by a number of the respondents, including the IoD, that such barriers based upon sex may have fostered or perpetuated sex discrimination in the past. The Minister intends that there should be no exception, subject to considering the implications of the existing exception for clubs for members of one race and the views of affected clubs and associations in finalising the legislation.

[9] www.thewi.org.uk/faqs

OTHER EXCEPTIONS

21. Respondents were asked if there any other circumstances in which an exception should be provided that has not been covered in any of the questions listed above.

Of the 101 responses to this question, 89% of respondents said that there are no other circumstances in which an exception should be provided, and 11% of respondents said that there are other circumstances.

Comments included –

> *"Schools should be allowed to provide single sex education. This should not be at the expense though of promoting equality. Any single sex system should not be allowed to encourage the marginalisation of a group or gender."* (Institute of Directors Jersey Branch)
>
> *"The matter of surrogacy needs to be looked at carefully and there may need to be special provisions applied to this."* (Jersey Child Care Trust)
>
> *"We need to stop being so binary gendered about all of this. We are people. There are no legitimate reasons for barring someone because they are female or look female."* (Anonymous employee)
>
> *"There are other organisations that may need to provide specific services for people covered by a protected characteristic. This may apply in the provision of health and social services and other services provided by the public sector so the States of Jersey should ensure provision for this allowed within the legislation."* (Unite the Union)

Outcomes

It has always been contemplated that there will be an exception for single-sex schools.

In the European Court of Justice (ECJ) cases of CD v ST and Z v A Government Department, the women used surrogate mothers and were refused maternity leave and pay by their employers. The ECJ held that there was no direct sex discrimination because a man who became a father through surrogacy would not receive paid leave either. Indirect sex discrimination did not arise because there was nothing to establish that the refusal of leave put women at a particular disadvantage when compared to men.

We will need to consider whether any aspects of public service provision are sex-specific but not based on legislation. Health in particular may need to accommodate different provision for men and women; for example, a well-man clinic. Insurance and anything else with an actuarial basis may also need to be considered. The Minister will review the Equality Act exceptions that apply in these areas.

OTHER COMMENTS

22. Respondents were asked if they wished to provide any other comments.

Business considerations

"I am someone who thinks it a complete waste of time and money and my main issues are as follows: 1. Codes of Practice should be perfectly adequate, there is no need to introduce yet another layer of employment red tape 2. As a director of 3 companies, one of which is likely to expand substantially over the next few years, we will now be much more likely to use sub-contractors than employ our own workforce because we just might want to recruit English speaking, male, able bodied staff because they are likely to be the most suitable for the work involved. 3. The spectre of the Employment Tribunal and the lawyer's charter it has created will only be enhanced by this additional law. It is no coincidence that a number of law firms now have dedicated employment law areas and are recruiting enthusiastically. It just adds unnecessary costs to a business and if you don't want to pay the legal fees, you might as well not contest a malicious accusation, pay the compensation and get splashed across the JEP for good measure. 4. We are only doing this because of perceived UK/EU pressure and local politicians' ambition to put a tick in a box. In my opinion this is bad for business and bad for jobs." (Ian Brandon, employer)

"While Jersey Business provides support for new businesses and JACS provides employment support to businesses, there may be gaps in terms of support for growing businesses – i.e. established businesses which are now looking to expand and take on more staff, at which point things become significantly more complex. It is felt that there should be a central point for guidance on regulation/legislation for Jersey businesses covering a range of issues including planning, employment, health & safety, data protection, tax, social security payments, etc. The relevant organisations could perhaps be brought together under one website or portal, which directs businesses to the right places to enable them to 'self-serve' and means that they only need to go to a single location to have their questions answered in a 'plain English' format." (Institute of Directors Jersey Branch)

Penalties and compensation[10]

"IoD recognises that "opt outs" in discrimination law, for smaller businesses for example, are problematic: unacceptable discrimination does not become acceptable just because an organisation is struggling financially. However it is also felt that the resources available to an organisation to ensure compliance with a complex legislative framework must be taken into account when an authority is considering penalties to be imposed for breaches." (Institute of Directors Jersey Branch)

[10] For details of the remedies available to the Tribunal, see page 9 of the White Paper.

"The IoD hopes that Social Security will ensure that members of the Tribunal are cognisant of the full extent of their powers under Article 42 and encourage the Tribunal not simply to focus on Article 42(1)(b) when considering remedies. The IoD would also invite Social Security to review Article 42(1). The scope of Article 42(1) could be extended to give the Tribunal the power to make wider recommendations. The Tribunal could be given the ability to make a more general recommendation about how, for example, an organisation should address failings giving rise to a discrimination complaint, not limited to a particular complainant. (It might be recommended that an organisation review its procedures, require certain staff to undergo training or implement a policy.) This could be relevant given that an employee who has suffered discrimination is likely to have left an organisation by the time of a hearing so that Article 42(1)(c) might be of no real use in such circumstances." (Institute of Directors Jersey Branch)

"Unite considers a maximum compensation of £10,000 to be inadequate and will not provide enough of a deterrent to employers to prevent discrimination and harassment at work. Neither would it be enough compensation for employees that are victims of discrimination and harassment. In the most serious cases of discrimination and harassment claimants may not be able to work again due to the impact on their mental health. In the UK there is no cap on compensation for successful discrimination employment tribunal claims. Therefore, we recommend that the States of Jersey should mirror this in the legislation." (Unite the Union)

"I think claims should be allowed for retrospective discrimination, say limited to a max of 10 years. Employers have been getting away with paying female staff less than their male counterparts for years and putting their affairs in order at the last minute, without any back pay is not adequate." (Anonymous, Managing Director of a trust company)

Part-time workers

"The UK has specific legislation to protect discrimination against part-time workers. Women make up a large proportion of part-time workers in Jersey and Unite would recommend that separate legislation should be enacted in respect of part-time workers to mirror the legislation in the UK." (Unite the Union)

"Chamber would like to note that there is no mention of part-time worker: Is there a definition? Should they be dealt with differently? Could it be indirect sex discrimination? Is there a definition of worker? The UK has specific legislation re part-time workers, will Jersey follow?" (Jersey Chamber of Commerce)

Disability discrimination

"Disability discrimination ought to be higher up on the agenda, just because it is a difficult one to deal with it shouldn't be left to last. It is about access, rights to services, being included. As someone who is disabled and gay I feel

the issue of disability discrimination is more of an issue for me personally." (Anonymous employee)

"I think there are more pressing discrimination issues that need addressing first and then this be implemented. Disability discrimination is happening throughout the island at present and as someone who is suffering from this I find the lack of action or consideration from the Minister and his civil servants is not something you would expect from what is supposed to be a wealthy and affluent island." (Nicolas Jouault)

"When will he bring in disability discrimination? Race and sex discrimination are widespread in modern society and this has been fostered by commercial interests and government, so I am not sure if it is too little too late in this instance. All very depressing considering the Ministers own department discriminates against disabled people in that it does little or nothing to assist them." (Nicolas Jouault)

Outcomes

The Minister proposed that the characteristics that will be protected against discrimination should be introduced in stages, starting with race, sex, age and then disability. It is anticipated that Regulations to protect against discrimination on grounds of disability would come into force in 2017.

Family-friendly rights

This question and the questions that related to sex discrimination based on pregnancy and maternity elicited a number of comments in relation to the Minister's proposed family-friendly rights, including –

"The JCRT believes the two week pay proposal with up to 18 weeks leave (which may be unpaid), to be inadequate. The proposal is far short of the UK statutory provision of 6 weeks at 90% of pay, 26 weeks ordinary maternity leave and 26 weeks additional maternity leave with statutory maternity paid for 33 weeks. Additionally, the International Labour Organisation (ILO) sets a standard of maternity protection of a minimum of 12 weeks leave… On this basis the JCRT recommends that the maternity provision be increased to 12 weeks paid leave with States reimbursing employers the full amount of the maternity pay." (Jersey Community Relations Trust)

"The maternity leave suggested in the consultation is very poor compared with the right for women in the UK to have 52 weeks' maternity leave from day one of employment." (Unite the Union)

"Two weeks paid leave is not anything like long enough to provide a baby with what it needs to attach securely for its long term wellbeing. Please consider improving this." (Anonymous employer)

"Maternity leave should be scrapped – it should be called parental leave so that parents can choose how they want to split the time." (Anonymous employee)

"I do not feel that the proposals about paternity are acceptable. I feel they should be the same as maternity. In addition, with same-sex partnerships, I believe that it doesn't have to be the 'child-bearer' who has the maternity entitlement – I believe there should be a 'relationship-allowance' of maternity/ paternity that should be split in any manner that the relationship feels appropriate." (Anonymous employee)

"Talking about Maternity law and pay, aren't we forgetting about Paternity law/pay? Basically if mums have right to maternity leave and pay fathers cannot be discriminated either!" (Anonymous employee)

Outcomes

The Minister's family-friendly proposals were adopted by the States on 18th July 2014[11]. This first stage of family-friendly rights provides fundamental entitlements upon which we can build in the future. The package of proposals provides important new rights to maternity or adoption leave, parental leave and paid time off to attend ante-natal appointments. It also gives employees a right to request flexible working hours to allow them to provide care for a child or another person. The Minister believes that it is vital that we put in place this first stage of new rights in 2015 as a sensible first step that businesses can accommodate, along with protection against sex discrimination and a number of proposed improvements to maternity benefits, before we look to extend the periods of leave in the future. Whilst some people will consider that the proposals should go further, it is important that we have the opportunity to assess the impact and effectiveness of the new rights through further consultation, particularly as any extension of family-friendly rights is likely to bring more significant funding and administrative implications. The Minister has committed to reviewing the legislation one year after it comes into force.

Income Tax

"By default, Jersey tax returns are sent out to the man only, in a hetero married relationship – the man then is expected to file for himself & his wife. The return throughout refers to 'you and your wife' and the result is that married women are, by default, excluded from correspondence concerning their own finances & management of these finances is given over (by default) to men. Even if joint returns remain, the assumption that it will be the man (not the woman) who completes the return for a couple is sexist & discriminatory.

(The civil partnership option at least enables a gay couple to elect who will complete the joint return. No such choice is extended to women.) Enabling

[11] P.109/2014, as adopted by the States in July 2014

women to opt in to receiving/completing their own return is not good enough because the system has been designed for it to be easier to file together, thereby discouraging women from requesting their own returns to file & perpetuating this disempowerment. For a married woman to be excluded from management of her own finances in the year 2014 is shocking." (Anonymous, self-employed)

"A review and amendment of the current provisions of the Jersey Income Tax Law 1961 which sets out that the income of a married woman is deemed to be that of her husband. JCRT believes this current provision is extremely outdated and inappropriate." (Jersey Community Relations Trust)

Outcomes

The Minister notes that, in October 2013, Jersey's Tax Policy Unit released "A feasibility report into the introduction of independent taxation in Jersey"[12] to review how independent taxation could be introduced in Jersey as part of the tax system modernisation programme. 'Independent taxation' refers to the policy of taxing individuals as individuals, regardless of their marital status. In Jersey there is currently a 'default' for married couples to be taxed jointly. While married people have been able to opt for separate assessment, rather than joint assessment, since 2003, the States recognises that there is now a clear need for the tax regime to adapt and evolve so that in the eyes of the State each individual is treated equally for tax purposes. The research demonstrated that while it is possible, it is complicated and will need time to implement properly. The Minister understands that there is a commitment to introduce independent taxation in Jersey and work will continue over the next 2 years, including consultation.

Other issues

"Women are treated unjustly & unfairly at every level in Jersey. Any woman marrying must legally take her husband's name in Jersey. For a woman to retain her maiden name on marriage, a deed poll has to be undertaken (costing £150 in legal costs) and this has to be signed by her husband, giving her permission to change her name back. The fact that, in this day & age, a married woman must obtain her husband's permission to change her name, is shocking & medieval." (Anonymous, self-employed)

"The "white paper" makes no reference to discrimination where someone is treated less favourably than another person because they are thought to have a protected characteristic (discrimination by perception) or because they associate with someone who has a protected characteristic (discrimination by association). The Equality Act 2010 contains these provisions and Unite recommends that the States of Jersey include these provisions in the legislation." (Unite the Union)

[12] R.127/2013

"Clearly a look at the Lieutenant-Governors Immigration directions needs careful considerations when looking at Discrimination on any grounds such as Sex, Age, Nationality, Birth, Race, Finance etc. Will any Sex or Race Law discrimination include Immigration decisions that are based on Sex or Race??" (Anonymous, retired employee)

"One of the aims of trans organisations working in the UK is to allow the "X" marker to be used on passports and birth certificates to denote a person of non-binary gender. Similar legislation has been passed in Argentina, India, Pakistan, Nepal, Germany, New Zealand and Australia. The "X" marker is included in the International Civil Aviation Organisation (ICAO) standard for passports, to which Britain adheres. However, British policy when issuing passports is to disallow "X" as an option. Applicants must select "M" or "F". The calls for Britain to amend its policy regarding "X" markers are growing and are likely to succeed as other countries amend their legislation. When Britain includes the "X" marker, Jersey will more than likely follow suit. By including non-binary gender now in its sex discrimination legislation, Jersey will be ahead of the UK in its inclusion of all sexes/genders and will not have to amend the legislation when the "X" marker is brought in. Furthermore, as a tourist destination, Jersey needs to be aware of what is happening in the outside world. As other countries change their laws to include the "X" marker and those citizens visit Jersey, Jersey needs to have legislation in place that protects tourists with a non-binary gender from discrimination by hoteliers, shops, bars and restaurants."* (Trans* Jersey)

Outcomes

The definition of direct discrimination included in the Discrimination Law, like that provided in the UK Equality Act, is wide enough to cover discrimination based on **perception** (e.g. because a job applicant is perceived to possess a particular protected characteristic, even if the employer is mistaken) and discrimination based on **association** (e.g. a service provider discriminates against a person because of their association with someone with a 'protected characteristic').

No decision has been taken in the UK regarding the 'X' marker as yet. We can review the position over the next six months whilst this legislation is being drafted.

MINISTER'S RESPONSE TO CONSULTATION

The Minister is very grateful to all those who responded during the Consultation. The Minister has considered the comments submitted by each respondent and this process has informed his decisions. The outcomes of this consultation will form a starting point for the preparation of the legislation, which will be an ongoing process over the coming months.

In some cases, the Minister has decided that a certain characteristic should be protected or an exception should be introduced, and he will proceed to request law drafting in those areas. In other areas, the outcome is less clear-cut and the Minister has concluded that further research will be required in order to determine what definition or exception might be appropriate.

There are a number of areas where the Minister would welcome further comments from stakeholders, particularly in relation to single-sex clubs and exceptions relating to religion. The Minister hopes that this summary document will prompt people to consider the issues and to provide comments during the law drafting stage of the process in late 2014 or early 2015, particularly if they have not provided their views during this Consultation.