

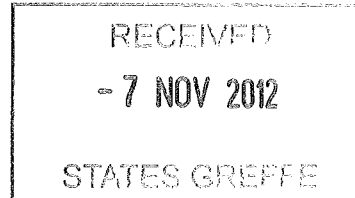
**Social Security Department
Minister**

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States 
of Jersey

Deputy K Moore - Chairman
Health, Social Security and
Housing Scrutiny Panel
Morier House,
Halkett Place
St Helier
JERSEY
JE1 1DD

5 November 2012



Kristina

Dear Deputy Moore

Draft Discrimination (Jersey) Law 201-

Further to my letter of 22 October, I enclose copies of the written comments received during consultation and my letters of response that indicate where I intend to amend the draft Law in response to those comments.

I also enclose, as requested, a précis of the expert advice received from Mr Darren Newman.

You suggested a private briefing on the draft Law and I proposed in my letter of 22 October that it would be convenient if we could meet on 28 or 29 November as Mr Newman was expected to be in Jersey for other meetings. The dates of those meetings have unfortunately changed and I can now offer a pre-States sitting or lunchtime briefing on Tuesday 11 December. If that is not convenient to the Panel, I will be happy to arrange an alternative date.

Yours sincerely

Francis

**Senator Francis Le Gresley
Minister**

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Draft Discrimination (Jersey) Law 201- Précis of expert advice received from Darren Newman

Overview

In the course of preparing the draft Discrimination (Jersey) Law 201- (the 'draft Law') for presentation to the States of Jersey, the Minister for Social Security decided to consult Darren Newman, an independent employment law consultant writer and trainer based in the UK. Mr Newman has a good knowledge of Jersey's employment law having provided training on a number of occasions for the Employment Tribunal and the Employment Forum in recent years. It was felt that Mr Newman's understanding of the context in which the draft Law is being prepared, combined with his expertise in the operation of discrimination law in the UK would enable him to identify areas of the draft Law that might cause unforeseen problems.

Mr Newman was asked to review the draft Law (dated 9 April 2010) that had been primarily prepared during the period 2006 to 2008 under the Minister for Home Affairs. The draft Law had been prepared in the context of the various pieces of discrimination legislation in force in the UK at that time, prior to a review of UK discrimination legislation which led to the introduction of the Equality Act in 2010.

Mr Newman was asked to consider the lessons that could be learned from the UK's review of discrimination legislation and the introduction of the Equality Act 2010. Specifically he was asked to identify technical and practical issues and to identify what further policy decisions would be needed in order to prepare a final draft. In particular, he was asked to consider the draft in the light of various international instruments dealing with discrimination.

Having reviewed the draft in May 2012, Mr Newman raised issues for discussion and drew attention to matters that the Minister may wish to review, summarised below. These issues were explored in a workshop attended by the Minister, the Assistant Minister, the Chairman of the Jersey Employment Tribunal, the Director and the Senior Advisory and Conciliation Officer of the Jersey Advisory and Conciliation Service, the Assistant Judicial Greffier and a number of Social Security officers. As a result, the draft Law was updated. Since that time Mr Newman has been available on an ad-hoc basis to advise on specific issues that have arisen during law drafting and consultation with stakeholders.

Protected Characteristics

One issue to be considered was the order in which protected characteristics should be introduced under the draft Law. Mr Newman pointed out that some characteristics, particularly age, sex and disability, could only be protected after considerable policy development. For example, a law on sex discrimination would need to be carefully aligned with policy on maternity leave and other family-friendly rights. If sex were included as a characteristic before such rights were introduced then there would be a danger that cases

dealing with sex discrimination arising from pregnancy would lead to confusion about what if any entitlement to maternity leave should be given to employees. Having given detailed consideration to the characteristics and some of the practical issues that could arise, the Minister decided to begin with race discrimination, and to extend the law to other characteristics when appropriate.

Defining discrimination

The central concepts in the discrimination law are direct discrimination, indirect discrimination, victimisation and harassment. All four are well established concepts in UK discrimination law. Mr Newman suggested a number of ways in which the definition of each concept in the draft Law could be revised to avoid confusion or ambiguity.

In relation to direct discrimination, he recommended that an approach closer to the Equality Act be adopted. This would clarify that discrimination based on perception would be covered (e.g. it would be discrimination to treat someone less favourably because of a mistaken view that the person was Jewish) and would also avoid some of the difficulties presented by the draft Law which covered not just actual discriminatory conduct, but also proposed conduct.

A similar approach was recommended with indirect discrimination. Mr Newman pointed out that the definition of indirect discrimination had undergone significant amendment in the UK over the years, largely as a result of developments at a European level. Mr Newman identified a number of issues with the April 2010 definition of indirect discrimination, and suggested that a model similar to the Equality Act would allow the Jersey Employment Tribunal to draw upon UK case law should any difficult issues arise.

Mr Newman identified a number of matters for consideration arising from the definitions of victimisation and harassment. He suggested that the level of protection provided by the definition of victimisation be reviewed because the scope of 'protected acts' was too narrow to protect someone assisting another person in preparing a claim. He also pointed out that there was no provision in the draft to remove protection from someone acting in bad faith, but who believed their allegation to be true.

More importantly, both victimisation and harassment were defined in the draft as though they were free-standing claims of general application to the public. This would mean that behaviour would be actionable even if it took place on the street between two members of the public. Mr Newman advised that the draft Law should be amended to ensure that the circumstances in which victimisation and harassment would be actionable are clearly defined.

Mr Newman also drew attention to the provision that would permit positive discrimination wherever the discriminator intended it to address underrepresentation of a particular group. Mr Newman suggested that careful consideration should be given to what, if any, scope for positive action was included in the law.

Remedies and Enforcement

The draft Law proposed a system of enforcement centred on a Discrimination Officer who would act as a filter for claims. Mr Newman pointed out that this would be a controversial role. This role has since been removed from the draft Law. Mr Newman also recommended that there needed to be greater clarity in the procedure whereby a claim was brought before the Tribunal. Mr Newman was concerned by the provision on non-discrimination notices as it gave the Tribunal the power to render criminal any further discriminatory acts on the part of a respondent. He suggested that serious consideration be given to removing this provision which has no equivalent in the UK. It has since been decided that the provisions on non-discrimination notices would not be appropriate for Jersey and they have been removed from the draft Law.

International obligations

Mr Newman was asked in particular to consider the draft Law in the context of various international instruments dealing with discrimination. Mr Newman therefore considered the effect of:

- The International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD)
- The Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW)
- The International Convention on the Rights of Persons with Disabilities (2008) (CRPD)

Mr Newman concluded that the draft Law would be a major step forward in Jersey's compliance with international standards. In particular, the adoption of race as the first protected characteristic would ensure substantial compliance with CERD although full compliance would rest on a variety of other policies and practices in Jersey.

On-going issues

During the process of redrafting, there has been on-going work to ensure that the draft Law is internally consistent and as clear as possible. Mr Newman has continued to advise on issues as they arise. Where differences have been identified between the draft Law and the UK Equality Act, Mr Newman has been able to explain the context and purpose of the Equality Act provisions so that decisions can be taken about whether or not they should be replicated in Jersey. He has also assisted in considering ways in which the particular situation of Jersey can be reflected in the Law, including in relation to national origin, social policies and taking into account the level of bureaucracy and the impact on small businesses.

D(J)L/GJLeL/MAR/01.

15 October 2012

Senator F. du H. Le Gresley
Minister – Social Security
Social Security Department
La Motte Street
St. Helier
JERSEY JE4 8PE

Dear Senator Le Gresley

Re: Draft Discrimination (Jersey) Law 201-

The Council of the Jersey Farmers' Union has taken the opportunity of reviewing the draft Discrimination (Jersey) Law 201- and would like to make the following comments :-

- 1) Selection for Employment - by the very nature of agricultural / horticultural work some strenuous essential tasks have to be undertaken by men as opposed to women who do not have the required strength. This may well be a cause for concern when recruiting staff.
- 2) We understand that this Law will be dealt with piecemeal and relevant Regulations will be introduced covering Race, Sex, Disability and Age discrimination.
- 3) We trust that any inherent bureaucracy and expense both to employers and Government will be kept to a minimum.
- 4) We understand the importance of all businesses reviewing their policies and procedures in relation to this Law and ensuring their members of staff are educated accordingly. We will be reminding our members of their obligations in this respect.

We appreciate being included in your group of stakeholders and look forward to receiving further details of the Law as appropriate.

Yours sincerely

GRAHAM J. LE LAY
PRESIDENT
JERSEY FARMERS' UNION

Social Security Department

Minister

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Mr G. J. Le Lay
President
Jersey Farmers' Union
22 Seale Street
St Helier
JE2 3QG

1 November 2012

Dear Mr Le Lay

Re: Draft Discrimination (Jersey) Law 201-

Thank you for your letter of 15 October regarding the draft Discrimination (Jersey) Law 201-.

To address each of your comments;

- 1) As you have identified, when protection from discrimination on grounds of sex is introduced in the future, there could be an issue in recruitment if only men are considered for certain positions on the basis that women are not strong enough to undertake the required tasks. You may wish to take some advice prior to sex discrimination legislation coming into force, but I would emphasize that the law will not prevent you from choosing the best person for the job.
- 2) The protected characteristics will be introduced in stages; the first being race. Protection against discrimination on grounds of sex, age and disability would follow later, to be introduced in an appropriate manner over a period of years.
- 3) In re-drafting the law, it has been my intention that it should be as simple as possible, with minimal additional bureaucracy, and I believe that we have improved on previous drafts in this respect.
- 4) I appreciate you taking this opportunity to remind your members to prepare for the impending legislation.

I intend to lodge the draft Law later this year, or early next year. Subject to the States adopting the draft in 2013, Privy Council assent would then be sought which is likely to take a further year.

I am very grateful to the Council of the Jersey Farmers' Union for taking the time to review the draft and submit comments.

Yours sincerely

Senator Francis Le Gresley
Minister

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Response of JCRT to Draft Discrimination Law

Article 19

There is no definition of volunteer bureaux.

Article 24(3)

It is not clear why clubs of less than 24 are excluded. The logic behind this exception needs to be explained.

Article 36

The time limit for bringing a complaint is 12 weeks and can only be extended where it is not reasonably practical for the complaint to be presented in the 12 weeks period.

The tribunal should be able to extend time by an additional 12 weeks where in all the circumstances it would be fair to do so. This should cover a situation where a complainant is emotionally unable to lodge a claim within 12 weeks or where a complainant wants to find another job before bringing a claim.

The time for bringing an unfair dismissal claim should be extended to fit in with the discrimination time frame.

Article 40

The cap on compensation of £10,000 is too low. A survey of employers undertaken by the JCRT found that over a third of employers who responded support no cap with damages reflecting the actual loss suffered. Just over 20% of employers supported a cap of £10,000. A third of employers had no view and the others supported a higher cap.

The view of the JCRT is that a cap of £10,000 is too low and will discourage many individuals from bringing a claim, particularly in the employment context where bringing a claim may be thought to affect future employment prospects.

A low cap will also encourage respondents to settle claims rather than preventing or dealing with discriminatory behaviour and practices.

Article 40(4) refers to paragraph (2)(a) – should this be (3)(a)?

JCRT would prefer a higher cap of £50,000, but with the Tribunal having the power to take into account the nature and financial resources of the respondent when awarding damages.

Schedule 1

Schedule 1, Part 1, Regulation 2 – it should be explicit that discrimination on the grounds of birth in Jersey or length of residency in Jersey amounts to

discrimination on the grounds of nationality. Any discrimination on these grounds should be unlawful unless covered by Part 2 of the Schedule.

Schedule 1, Part 2, Regulation 2 – this provision is inappropriate. Discrimination on the grounds of birth or residency should be unlawful unless it is contained within an enactment or falls within another express exception on the law.

Compromise Agreements

The ability to advise on a compromise agreement should be extended to non-Jersey qualified lawyers employed by a firm of Jersey lawyers.

Monitoring

There is no obligation on employers to monitor the racial composition of their work force. While this may be too onerous for small employers, an obligation to monitor should be placed on the public sector. This would not be an onerous obligation, but would simply require the employer to record the racial group and nationality of each employee to the extent that the employee is willing to provide that information.

Positive Discrimination

Positive discrimination – there is nothing in the law that allows organisations or bodies to provide education, training or support to racial groups where there is evidence of under representation. Where there is clear evidence of persistent disadvantage (for example under representation of a particular group within a profession) the ability to target this group with extra support should be possible.

Harassment Law

There may need to be some consideration of how this law will tie in with the Harassment law and the criminal penalties under that law.

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Elena Moran
Chairman
Jersey Community Relations Trust
PO Box 50
St. Helier
JE4 8PA

1 November 2012

Dear Elena

Draft Discrimination (Jersey) Law 201-

Thank you for your email of 16 October regarding the draft Discrimination (Jersey) Law 201-. To address each of the points that you raise;

1. Article 1 provides a definition of volunteer bureaux.
2. A club is not subject to the draft Law if it has up to 24 members and it is a private club. The minimum number of members is intended to distinguish between small private clubs and formal clubs that are sufficiently in the public sphere to warrant protection against discrimination. The UK's Equality Act includes a provision relating to 'associations' that have at least 25 members. Noting that a different number of members may be specified by Order, I am satisfied that the provision should be limited to clubs with more than 24 members at this time.
3. I have requested that, for consistency, the time limit for complaints to be submitted to the Tribunal should be 12 weeks for both discrimination and unfair dismissal complaints. I understand that UK Tribunals may extend the time limit to submit a discrimination complaint by 12 weeks on wider grounds than the grounds for extending the time limit to submit an unfair dismissal complaint. In my view, where there is a combined claim, it would be strange if the Tribunal could extend the time limit for the discrimination element but not for the unfair dismissal element of the claim. I believe that the higher threshold, as drafted, is appropriate for both discrimination and unfair dismissal complaints; within such period as the Tribunal considers reasonable where it was not reasonable practicable for the complaint to be submitted within 12 weeks.
4. According to the Employment Tribunal and Employment Appeal Tribunal statistics for 2011-2012, the median compensation awarded by UK Tribunals

in cases with race discrimination jurisdictions was £5,256 and in 70 percent of cases the compensation was less than £10,000. I am satisfied with the proposed cap on compensation of £10,000 as an appropriate starting point, but accept that it may be subject to review in the future. The cap may be amended by Order.

5. Thank you. The reference to in Article 40(4) to paragraph (2)(a) instead of (3)(a) has been corrected in the latest draft.
6. I agree that it should be explicit that discrimination on the grounds of birth or residency in Jersey should amount to discrimination on the grounds of national origin. Whilst the inclusion of the words 'national origin' suggest that something more is intended than just nationality, I have requested that the Law Draftsman insert some appropriate wording.
7. The exception relating to States policies was created to protect those who act in accordance with the policies of the States and Ministers, rather than to protect the States itself.
8. Given the tight timescale for the preparation of the draft Law, we agreed at the stakeholder meeting to include the existing provisions of the Employment Law relating to compromise agreement and this has been addressed in the latest draft. Further consideration will be given to this provision in future, including extending it to non-Jersey qualified lawyers.
9. I believe that an obligation to monitor the racial composition of the public sector work force would be onerous and introduce an additional expense. My intention is to keep the law simple and to include only those elements that are essential at this time. An obligation to monitor the racial composition of a workforce would not necessarily increase equality. Such an obligation might become more relevant as other protected characteristics are introduced. I note that previous drafts of the Law have not included such an obligation, but provisions could be introduced by Regulation.
10. The provisions in previous drafts of the Law that related to positive discrimination allowed full and overt positive discrimination with no requirement for any measures taken to be proportionate or reasonable, nor any demonstration that measures meet a genuine problem or a real need. In view of my intention to keep the law simple and to include only those elements that are essential, I concluded that positive discrimination provisions should not be included in the draft Law at this time. Further consideration will be given to this as other protected characteristics are added; it is possible to make provisions for positive discrimination by Regulation. Guernsey's sex discrimination Law does not make any provision relating to positive discrimination.
11. Noting that the definitions of harassment in the draft Law and in the Crime (Disorderly Conduct and Harassment) (Jersey) Law, 2008 are not the same, I asked the Law Draftsman to consider if this creates a problem. The Draftsman has confirmed that no amendment to the draft Law is required as the Laws

deal with conduct constituting harassment in different contexts. Conduct constituting harassment in the draft Law is a specified type of conduct that occurs in prescribed circumstances and therefore its scope is narrow. Conduct constituting harassment in the 2008 Law is not confined to circumstances where a person discriminates against another by causing that other person to feel intimidated, for example.

It is my intention that the draft Law will be lodged later this year or early next year. Subject to the States adopting the draft in 2013, Privy Council assent would then be sought which is likely to take a further year.

I am very grateful to representatives of the Trust for taking the time to review the draft and submit comments.

Yours sincerely

Senator Francis Le Gresley
Minister

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Julie Jones

Subject: RE: Draft Discrimination (Jersey) Law 201-

From: Steven Austin-Vautier

Sent: 24 September 2012 12:35

To: Kate Morel

Cc: Karen Slack

Subject: RE: Draft Discrimination (Jersey) Law 201-

Kate,

I have read through the draft law and have two comments:

1. Article 27(1) gives a definition of harassment. In 2008, the States brought in the Crime (Disorderly Conduct and Harassment)(Jersey) Law, 2008 which, at Article 3(1) and (2), also defines what is meant by harassment. They are not expressed entirely the same. You might want to feed back to the draftsman that they would be advised to run a comparison to make sure there isn't a mismatch between the two.
2. In Schedule 1, page 35, the constitution of the Employment Tribunal is given. It caused me to wonder whether the actual 3 members who sit to hear a particular case or not to include anyone who has the same "protected characteristic" as the applicant. You could equally argue that this might be an advantage from the point of view of understanding the Applicants case; however, from the Respondent's point of view, they may object in case there is a possibility of bias. If this is taken as a valid point, it would be better dealt with in subordinate legislation rather than making the provisions in the law too detailed.

Hope this is helpful,

Steven

Social Security Department

Minister

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Steven Austin-Vautier
Chief Officer
Home Affairs Department
11 Royal Square
St Helier
JE2 4WA

1 November 2012

Dear Steven

Draft Discrimination (Jersey) Law 201-

Thank you for your email of 15 October regarding the draft Discrimination (Jersey) Law 201-.

To address the points that you have raised;

1. Noting that the definitions of harassment in the draft Law and in the Crime (Disorderly Conduct and Harassment) (Jersey) Law, 2008 are not the same, I asked the Law Draftsman to consider if this creates a problem. The Draftsman has confirmed that no amendment to the draft Law is required as the Laws deal with conduct constituting harassment in different contexts. Conduct constituting harassment in the draft Law is a specified type of conduct that occurs in prescribed circumstances and therefore its scope is narrow. Conduct constituting harassment in the 2008 Law is not confined to circumstances where a person discriminates against another by causing that other person to feel intimidated, for example.
2. You ask whether a Tribunal member should be excluded from the hearing of a discrimination complaint where that Tribunal member has the same protected characteristic as the complainant. Whilst I understand the reason for your suggestion, it is unlikely to work in practice. For example, in a sex discrimination hearing where the complainant is a woman, the three Tribunal members could only be men. The selection of members by rotation is likely to be more appropriate. The provision has been drafted so that a pool of up to eight members would be appointed to the discrimination panel and members would be chosen to form a panel of three by rotation as far as possible. This is the current practice for hearings under the employment legislation. We hope to be able to appoint eight members with diverse backgrounds and all members will receive the same training.

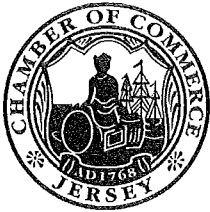
It is my intention that the draft Law will be lodged either later this year or early next year and I intend to allow a long lodging period to give States Members time to consider the draft.

I am very grateful to you for taking the time to review the draft and submit your comments.

Yours sincerely

**Senator Francis Le Gresley
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Senator F Le Gresley
Social Security Department
PO Box 55
Philip Le Feuvre House
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22nd October 2012

Dear Senator Le Gresley

Draft Discrimination (Jersey) Law 2011

Please find below the views of the The Jersey Chamber of Commerce in relation to the consultation on the proposed Discrimination Law.

The following is based on views already expressed to the Minister at a meeting on Friday 19th October.

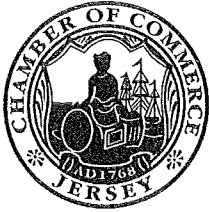
Firstly can we reaffirm the Chamber's view that discrimination for the reasons of race is abhorrent to the general membership of the Chamber of Commerce. However we also recognise that the whole subject of discrimination is extraordinarily complex. Some forms of discrimination are expressly allowed by legislation, with the States of Jersey probably being the most protected body from possible claims. Into this complex mix there is the proposal that discrimination legislation should be introduced, firstly on the basis of race, but with gender, age and disability shortly to follow.

In summary, Chamber believes that: the legislation is unlikely to work; will prove to be expensive; a burden to both employers and the States; and at worst will act against the interests of those it purports to protect. We believe there are better and more effective ways to further the cause of those who may be discriminated against, and we would urge the Minister to carefully consider alternatives before bringing this legislation to the States. We also believe there is an urgent need to review the current workings of the Employment Tribunal and the current Employment Law, especially if the Employment Tribunal is to take a key role in enforcing the proposed Law.

Given the current economic climate, the unemployment figures and the worried business tendency survey outlook, now is not the time to introduce new laws that will result in employers having to spend more time on non productive legislative related tasks. At a time when many employers are virtually on their knees, the department should be doing all it can to reduce the burden from the State.

All other jurisdictions are trying to reduce the burden on employers by relaxing rules not introducing new laws. Why should Jersey be any different?

Before any further legislation is brought forward or any other employment legislation, the Minister



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should expect his department to be able to produce the following evidence. If it cannot be produced, then the legislation is clearly not fit for purpose and should not be introduced:

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

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

If we were to take some of the above questions, there is evidence that this type of legislation has not worked elsewhere, and has actually harmed the interests of those it purports to protect. In addition hundreds of thousands of pounds have been spent in trying to get it right but to no avail. We believe it is incumbent on the Minister to publish the department's evidence that this legislation will work.

This new law is supposed to be a social policy however looking through the legislation, it seems that it will mainly be employers that will be penalised! There are more articles that relate to employment than any other subject area. For non employment related matters the complaint is made to the Tribunal who can send onto conciliation or mediation. For employment matters it is referred to JACS and then the Tribunal who can impose penalties on the employer up to £10,000 and an additional £5,000 for non compliance. We believe this is clear evidence that the employer is being unfairly targeted.

The law allows for extended time limits to bring a claim against an employer, which will lead to greater confusion. We will have 8 weeks for unfair dismissal, 12 weeks for discrimination and 6 months for a redundancy award. Is the law draftsman just trying to catch employers out?

The appeal process appears to be the same as for the Employment Law. There is a strong view that this has not worked effectively, is a difficult route to use and is limited to a 'point of law' and extremely costly.

There is significant disquiet amongst the business community that the current Tribunal process is not working well; with many employers openly stating that they have lost confidence in the Tribunal who appear to favor the applicant. This is a serious state of affairs, which we believe the Minister has to deal with as a matter of urgency and particularly before it is given a greater role and powers. We strongly urge the Minister to implement an urgent review of the workings of the Tribunal.

We believe there is a better way. In particular we would urge the Minister to consider what non-statutory methods he could use to promote non-discrimination. Huge strides have been made to improve the opportunities in society of those from overseas. This has been done without States



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encouragement or action. Imagine what could be done if the States put their resources into promoting opportunities, rather than putting its resources into enforcement legislation of this type.

In conclusion we are sure that discrimination law will not stop discrimination but may stop or deter employment and growth. We believe there is a better and more effective way for these matters to be resolved. It would take imagination and leadership, but the legacy of trying to make improvements for those from overseas is not necessarily best served by enforcing legislation. Instead it is best served by building and supporting a community that celebrates the differences between its population, rather than one which is forced to ignore the differences.

Yours sincerely

PP KELLY FLAGEUL
CHAIRPERSON
HUMAN RESOURCES COMMITTEE

Social Security Department

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Mrs Kelly Flageul
Chairperson, Human Resources Committee
The Jersey Chamber of Commerce and Industry Incorporated
Chamber House
25 Pier Road
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JE1 4HF

5 November 2012

Dear Mrs Flageul

Draft Discrimination (Jersey) Law 201-

Thank you for meeting me with your colleagues on 19 October and for providing written comments on the draft Discrimination Law. I am sorry that you do not support the introduction of this important new right, but I hope that I can allay some of your concerns.

I agree that this legislation is complex. This is the main reason why I intend to propose race as the first protected characteristic; because it does not entail the same complexity as sex, age or disability discrimination. I will consult with stakeholders before introducing Regulations in these other areas and can assure you that I am committed to ensuring that the law is extended in a way which is sympathetic to the difficulties faced by businesses in this difficult time.

I agree that we should not burden business with unnecessary regulation. However Jersey is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which includes a requirement to adopt laws forbidding race discrimination. Other jurisdictions may appear to be reducing regulation, but I am not aware of any who are abandoning fundamental protections such as this. I am confident that responsible employers will not have to devote time and money to complying with the law. If, since our meeting, you have been able to identify any practical difficulties that avoiding race discrimination entails, I will be happy to listen.

You call for evidence to be produced demonstrating that a problem exists and you suggest that the test of whether discrimination legislation is successful is whether it solves the problem of inequality in society. I do not believe that the law will, in itself, prevent discrimination or eliminate inequality. The legislation is intended to provide legal protection where a person has, for example, been refused a job, turned away from a restaurant or prevented from renting a house because of their race. In failing to prohibit discrimination of this sort, Jersey falls short of widely recognised international standards and I believe that we must put this right.

I do not agree that employers will be unfairly penalised in comparison to the other areas covered by the draft Law, such as housing or goods and services. You cannot measure the impact of a law by the number of Articles within it; the area of employment requires additional provisions to deal with different categories of employment. The process for bringing a Tribunal claim, including a referral for conciliation and the potential for compensation of up to £10,000 will apply to claims relating to all of the areas covered by the draft Law.

On the matter of remedies, I note that the additional compensation of up to £5,000 (Article 41) would only be paid in very specific cases where the Tribunal has made a recommendation which the Respondent has then failed to follow in respect of a particular Complainant. Such cases will be very rare and I am concerned that we should not give the impression that more compensation is available than is, in practical terms. I hope to reassure employers and others that there is no windfall to be gained from bringing a discrimination claim whilst ensuring that individuals who are discriminated against are properly protected.

Since our meeting, I have instructed the Law Draftsman to amend the draft Law so that any compensation for failure to follow a recommendation would be subject to the overall cap of £10,000 and the total award in respect of injury to feelings would be capped at £5,000, within the £10,000 overall cap. I believe that with these changes, the Discrimination Law gets the balance right.

I feel strongly that the Employment Tribunal should command the confidence of both employers and employees and I will listen to suggestions about how the system could be improved. However, this should not distract us from implementing an important new right which many would regard as being long overdue. Recognising your comments about the time limits for complaints to be submitted to the Tribunal, I have instructed the Law Draftsman to amend the draft Law so that the same time limit of 12 weeks applies for both complaints of unfair dismissal and discrimination.

Thank you for taking the time to put forward your views. I intend to lodge the draft Law later this year or early next year. Subject to the States adopting the draft in 2013, Privy Council assent would then be sought which is likely to take a further year. Although we are not able to agree on the need for legislation, I am sure that we agree on the need to make the legislation work and to ensure that it is properly understood and implemented.

Yours sincerely

**Senator Francis Le Gresley
Minister**

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SSD 82
05 NOV 2012

2 November 2012

Dear Senator Le Gresley

Draft Discrimination (Jersey) Law Meeting 19 October 2012

Firstly on behalf of the Chartered Institute of Personnel and Development ("CIPD"), Chamber of Commerce and the Institute of Directors, we would like to thank you for meeting with us, and we hope that you found our meeting insightful.

We felt that it would be important to express our joint views in writing following our meeting. One of the points of the legislation, which we can agree on is that, we are all against discrimination; however our commitment to the Island and its future prosperity of its people has driven our responses.

We believe that the Islands' needs, and the economy as a whole should be balanced against the introduction of legislation, of which we are unsure will fix the problem, if one exists.

Evidence that we have a problem and this legislation will work

During our meeting we asked for evidence to establish if this is the right legislation for Jersey and if it is this the right time to introduce such legislation. We invited you to provide us with;

- Evidence that the problem exists?
- Evidence from other jurisdictions that the proposed legislation will solve any alleged problem?
- Evidence of the unexpected consequences of introducing such legislation, will it cause more harm than good?
- Evidence that the cost to business and the States compared to the value derived.

We understand that the Jersey Employment Tribunal ("JET") is currently surveying their users, we would be interested in viewing these results. However we also would like to point out that the results of this survey maybe biased as it was decided to survey those who are already aggrieved, and we ask if you have surveyed any users of Health, Education and Housing in addition to users of the JET.

It was also noted during our meeting that in a recent Jersey Evening Post following a recent press release from Citizen Advice Bureau "law on discrimination must not stop at race", it was interesting to read that they had forty Islanders complain this year that they may have been discriminated against. That is 3% of the unemployed total and 0.07% of the total number of employed people in Jersey. David Witherington confirm that he had 320 cases of potential discrimination (mainly sex and sexual orientation, 20 in relation to race) against a call log of 8,000 complaints – is there really a problem that will be solved by legislation?



Evidence that this legislation does not work

In the UK they have not seen a dramatic rise in equality. Indeed the Equality and Human Rights Commission (after a full research in 2008 and 2009) concluded in a report entitled Fairness and Freedom which stated that;

- Despite an extensive anti discrimination legal regime, huge equality gaps persists;
- They believe that discrimination will still occur because Humans are prejudice against others and no legislation will change that ;
- Finally in short, they have little or no idea whether any major government programme of the past two decades has made Britain more or less equal, but it has spent a fortune trying.

We advised that in the initial regulatory impact assessment (Department for Communities and Local Government: London) they estimated that the benefits of reduced discriminatory practices and greater equality could be significant by increasing the employment of under-privileged groups and deliver a fraction of these potential benefits at £60m per year; however they estimated that a one off familiarisation costs for employers and individuals of £72.22m of which £43m was put aside for small businesses. We understand that costs have been looked at already, but we would like to ask the question – what costs have been set aside for familiarisation and training people on the legislative requirements?

Given that Jersey is made up of predominantly small business (80%), the cost of awards at the tribunal (if implemented) could outweigh the cost of bothering to employ. E.g. a minimum wage worker could get up to £25K, so if small businesses close down, the Island's economy will be even more narrowly based than it is at present, coming to rest entirely on the finance industry and they are looking vulnerable – so where will our diversity come from?

Will the introduction of more legislation promote jobs?

In a time of deep recession, as other jurisdictions try to lift red tape to encourage enterprise, diversification and growth, Jersey moves against the trend and tries to introduce more red tape for employers.

Employers only defence to any allegation of discrimination is the training and development of its employees, therefore it is felt that rather than recruiting, it is predicted that employers will have to invest in their workforce to become compliant.

The larger employers on the Island will of course be prepared for any introduction and absorb the costs of such, however with 80% of Jersey business being small business this will have a huge impact on our economy. At a time when the States need to encourage the single person business to employ a second person, the introduction of more legislation will discourage this enterprise growth.

At a time when both yourself and the Chief Minister are on record saying that getting people back to work is your top priority, we have to ask whether decisions made by the States of Jersey prior to the banking crisis should be questioned, specifically whether they are still appropriate in today's economy?

Employment Law Review

Leading on from our points raised regarding getting people back to work, would it not be prudent to review the current employment legislation to ensure that it is fit for purpose. The employment forum made recommendations prior to the introduction of the employment legislation for a review after 3 years. It is nearly 10 years later and despite various bodies requesting this review it has not happened.

During our meeting we advised that we were currently undertaking a survey of our members in relation to a review on the employment law, and are happy to share the results with the Council of Ministers. We will be meeting on 22 November 2012, 3pm at St Pauls Gate to share these results.



Jersey Employment Tribunal ("JET")

Although we agreed that the right forum for any claims of discrimination should be heard in the JET, we propose that a review of the administration system needs to take place. We raised concerns relating the JET coping with the potential amount of claims to be brought before it, once discrimination comes under its remit. We also raised concerns relating to how the employment law is currently adjudicated, with some judgments contradicting others leaving employers confused.

An independent body should be appointed to undertake a formal review of the JET's operations and seek feedback from the users of the system. The fact that only 3 appeals have ever been taken to the Royal Court is not a result which demonstrates that the JET has done a good job. The fact that Jersey does not have a cost regime, nor an appeals Tribunal means that the cost of an appeal to the Royal Court will be far in excess of the value of the compensation award.

Alternatives

In the alternative, we suggested that attitudes towards discrimination have changed considerably over the last 10 years without any legislation, and instead of introducing legislation which may not work, we would ask that you explore alternatives, one being to establish a body to promote anti discrimination practices, as a suggestion the States could amend the terms of reference for the Community Relations Trust?

By amending their terms of reference to enable them to raise awareness and best practices of anti-discrimination practices. By investing money into their new remit, training and raising awareness for everyone about discrimination. By introducing a "kite mark" scheme for employers to be recognized and demonstrate that they are compliant. The States may get the same result, without penalizing employers. It was even suggested that business would want to pay to have this kite mark!

We believe that if you can win the hearts and minds of Islanders and reward the good behaviour, this maybe more effective than punishing employers with huge financial penalties in a time when there is not a lot of money in the economy.

We discussed the unexpected consequences of well intentioned legislation. The introduction of legislation without the evidence that the problem exist, that it will promote jobs and encourage diversity means that it will have unexpected consequence if the States don't take action now to address the above concerns. Please listen to the business views and don't ignore them. It is easier to introduce legislation than it is to revoke it.

Kind regards

A handwritten signature in cursive script that reads 'H. Gibaut'.

Heidi Gibaut
Policy Advisor

Social Security Department

Minister

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5 November 2012

Dear Mrs Gibaut

Draft Discrimination (Jersey) Law Meeting 19 October 2012

Thank you for meeting me with your colleagues on 19 October and for providing written comments on the draft Discrimination Law. I am sorry that you do not support the introduction of this important new right, but I hope that I can allay some of your concerns.

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

I agree that we should not burden business with unnecessary regulation. However, Jersey is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which includes a requirement to adopt laws forbidding race discrimination. Other jurisdictions may appear to be reducing regulation, but I am not aware of any who are abandoning fundamental protections such as this.

I intend to propose race as the first protected characteristic; because it does not entail the same complexity as sex, age or disability discrimination. I will consult with stakeholders before introducing Regulations in these other areas and can assure you that I am committed to ensuring that the law is extended in a way which is sympathetic to the difficulties faced by businesses in this difficult time.

I am confident that responsible employers will not have to devote time and money in order to avoid discriminating on grounds of race. If, since our meeting, you have been able to identify any practical difficulties that avoiding race discrimination entails, I will be happy to listen. The Jersey Advisory and Conciliation Service has been providing public and in-house training on the principles of discrimination legislation

since 2008 and approximately 900 delegates have taken advantage of this training to date.

I am concerned that we should not give the impression that more compensation is available than is, in practical terms. I hope to reassure employers and others that there is no windfall to be gained from bringing a discrimination claim whilst ensuring that individuals who are discriminated against are properly protected. Since our meeting, I have instructed the Law Draftsman to amend the draft Law so that the total award in respect of injury to feelings would be capped at £5,000, within the £10,000 overall cap. I have also instructed that any additional compensation for failure to follow a recommendation (up to £5,000 under Article 41) would be subject to the overall cap of £10,000. I believe that with these changes, the Discrimination Law gets the balance right.

I am aware that the Jersey Employment Tribunal has recently undertaken a short survey to give an indication of Tribunal workload resulting from combined employment and discrimination complaints. As I understand it, this was intended for internal use and was not intended to provide evidence of any particular problem. If you wish to discuss the survey, I suggest that you contact the Tribunal Registrar.

I feel strongly that the Employment Tribunal should command the confidence of both employers and employees and I will listen to suggestions about how the system could be improved. However, this should not distract us from implementing an important new right which many would regard as being long overdue.

Thank you for taking the time to put forward your views. I intend to lodge the draft Law later this year or early next year. Subject to the States adopting the draft in 2013, Privy Council assent would then be sought which is likely to take a further year. Although we are not able to agree on the need for legislation, I am sure that we agree on the need to make the legislation work and to ensure that it is properly understood and implemented.

Yours sincerely

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