

STATES OF JERSEY



DRAFT DISCRIMINATION (DISABILITY) (JERSEY) REGULATIONS 201- (P.20/2018): COMMENTS

**Presented to the States on 16th March 2018
by the Health and Social Security Scrutiny Panel**

STATES GREFFE

COMMENTS

1. The Draft Discrimination (Disability) (Jersey) Regulations 201- ([P.20/2018](#)) were lodged by the Minister for Social Security on 30th January 2018. If approved, the Regulations will come into force on 1st September 2018.
2. The Minister for Social Security invited comments from stakeholders on the proposed scope of protection against discrimination on grounds of disability. The public [consultation](#) was published on 4th September 2017 and closed on 10th November 2017. The Minister invited comments on the following policy issues –
 - a. The definition of ‘disability’ for the purpose of protection against discrimination.
 - b. Other types of disability discrimination –
 - i. discrimination arising from a disability
 - ii. reasonable adjustments.
 - c. Exceptions so that an act is not an act of disability discrimination.
3. On 23rd January 2018 the Health and Social Security Scrutiny Panel received a briefing on the draft Regulations from the Social Security Department. The outcome of the briefing was that the Panel was generally happy with the Regulations, although during the discussions it was noted that addiction to alcohol, nicotine and any other substance was excluded from the definition of disability –

“Addiction to alcohol, nicotine or any other substance is not a disability, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment”.

4. The consultation response [report](#) set out an overview of the responses received to each survey question. In relation to the issue of addiction, 3 responses were included in the report –

“Since addiction is a medical matter, treated with medical treatment and gaining ground as being seen as a disease why then is it that it is considered to be left out?”

“I’m disappointed to read that addiction and other co-occurring conditions would not be treated as a disability. I understand the need for protecting against harm/criminal activity, but by not including addiction as a disability in any sense, keeps those suffering in a limbo between criminal or mentally ill – both of which ostracise them from society, which is part of the downward spiral and continuous cycle of the illness.”

“The exception of people living with addiction should be removed; addiction to substances is form of mental distress, and addicts experience disability through societal barriers and exclusion, reinforcing their distress. Removing this exception would prevent the risk of people living with addiction from being discriminated against, or being excluded from services that would be beneficial.”

5. In the consultation response report the Minister provided the following response –

While the Minister accepts that addiction can be a mental health issue, the inclusion of all addictions within the concept of disability would cause practical difficulties. Should an employer, for example, be required by law to provide smoking breaks for employees? Must a business be required to admit customers who are under the influence of alcohol or drugs? These are issues that would need to be considered if the concept of disability was extended to include addictions.

It should be remembered that where an addiction forms part of a wider mental health or physical health issue, that issue in its own right is likely to amount to a disability. For example, if dependence on alcohol either arises from or leads to depression, then the individual is likely to be disabled within the meaning of the Regulations. On balance, the Minister is not persuaded that addictions to alcohol, tobacco and non-prescription drugs should fall within the meaning of disability for the purposes of the Discrimination Law.

6. The Panel identified that exempting addiction under the definition of disability could be a potential issue and agreed to look into the matter further. The Panel wrote to key stakeholders and received views from the Chief Executive Officer of Silkworth Charity Group (drug and alcohol rehabilitation charity) and the Drug and Alcohol Service. The Panel also asked for views from members of the Misuse of Drugs Advisory Council and was contacted by the Medical Officer of Health.
7. On 19th February 2018 the Panel met with the Chief Executive Officer (“CEO”) of Silkworth Charity Group. The CEO’s views were that if addiction was not included as a disability, it could deter people from seeking help as they may feel unprotected under the [Discrimination \(Jersey\) Law 2013](#). The CEO also felt that excluding addiction would be counter-intuitive to the work that has been undertaken in recent years to raise awareness of addiction and to remove the stereotypical attitudes towards alcoholics and drug addicts. The CEO’s full submission can be found in **Appendix 1**.
8. The Panel also met with representatives from the Drug and Alcohol Service on 23rd February 2018. The Panel noted that, under the statement concerning addiction, if a person developed an addiction from medically prescribed drugs, it would be considered a disability; however, if a person developed an addiction through psychosocial reasons it would not be considered a disability. The Drug and Alcohol Service felt that the statement itself was discriminatory, because those who develop an addiction through the actions of a doctor would be treated differently to those that develop an addiction from psychosocial reasons. The submission from the Drug and Alcohol Service can be found in **Appendix 2**.
9. On 14th February 2018, the Panel received correspondence from the Medical Officer of Health with her views on the statement on addiction. The Medical Officer noted different approaches in other jurisdictions, which included America and Ireland. It was the Medical Officer’s view that a reasonable approach would be to protect from discrimination individuals who had completed a rehabilitation programme for addiction, as well as those who were on a medically supervised rehabilitation programme (i.e. methadone), whilst excluding those who were

currently illegal drug misusers. The Medical Officer of Health's submission can be found in **Appendix 3**.

10. The Panel received the Minister for Social Security on 1st March 2018 for a Public Hearing. The Minister was accompanied by Officials and the Department's expert adviser, Mr. D. Newman (Employment Lawyer). The Panel questioned the Minister based on the evidence it had received from stakeholders regarding addiction, and asked why the Regulations made an exception for people with addictions –

Employment Lawyer:

I think the first point to make is that the exception that is being proposed in the Regulations is exactly the same exception that we have in the Equality Act and also following on from the Disability Discrimination Act that was introduced in 1995, so it is something that has always been there. When it came to framing the definition of disability within these Regulations, it was simply a question of: "Is that something that we need to replicate or is that something where we need to take a special view?" I do not think, hand on heart, a great deal of attention was paid to it. It was not something that had been flagged up as a particular problem with the U.K. regulations. In my experience as an employment lawyer in the U.K., which goes back to before the Disability Discrimination Act was in, it has never been something that has been highly contested, it is not something that is very widely debated within the U.K. disability framework. People would look at it and they would take a view. I think the reason for that is that in fact this is a narrower exception than it seems to be. I think some people would look at this and think alcoholics, for example, are not disabled or people who are addicted to drugs are not disabled. In fact, most people who have those addictions, to the extent where it seriously affects their life, are likely to have other mental or physical health conditions that would amount to a disability and so there are very few cases – in fact, I have never seen a case – where someone who is claiming they were discriminated against and it was a problem with alcohol has struggled to find that a disability is there. This is only an exception where it is the addiction per se, the actual consumption, the need to consume alcohol or the need to take drugs or smoke that is the disability, where there is no associated physical or mental health condition. It just has not been something that has been very high on a priority list¹.

11. The Panel discussed whether to amend the Regulations to either change the wording of the paragraph concerning addiction or to exclude it completely. In the time available before the debate date, the Panel felt that it had been unable to gather enough evidence to make an informed decision as to whether it should proceed with an amendment to the Regulations, and agreed that it would present Comments to the States Assembly outlining its findings. The Panel believes that more research should have been undertaken on the issue of addiction at the consultation stage, and hopes that the necessary research will now be carried out by the next Minister for Social Security, working with the new Scrutiny Panel appointed after the elections.
12. The Panel would like to thank the Minister and Officers from the Social Security Department for providing a very informative briefing and Hearing, and to stakeholders for taking time to share their views regarding the Regulations.

¹ [Public Hearing with the Minister for Social Security, 1st March 2018, p.3](#)

Submission by the Chief Executive Officer – Silkworth Charity Group

Date: 20th February 2018

Deputy R.J. Renouf
Health and Social Security Scrutiny Panel
Scrutiny Office
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St. Helier
JE1 1DD

“Dear Deputy Renouf

Draft Discrimination (Disability) Jersey Regulations

Thank you for allowing me the opportunity to meet with the panel to share my views with regard to the following proposed definition around addictions in the above regulation:–

Addiction to alcohol, nicotine or any other substance is not a disability, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment.

As a professional working directly with individuals that suffer with the illness of Addiction, I cannot stress enough that inclusion of the above alone will be a huge setback for our society here in Jersey and could potentially have catastrophic effects for those that suffer with this illness together with their families. I must highlight that an alcoholic/Addict does not choose to be dependent on a mood altering substance.

Over recent years, there has been a lot of work carried out within our community to raise the awareness of addiction as an illness and to remove the stereotypical attitudes towards alcoholics and drug addicts. By not including reference to those that suffer with addiction to mood altering substances, the minister is potentially putting a lot of lives of individuals and their families at risk, as excluding this illness is itself discriminating against those that have an illness that maybe many people do not understand.

I am struggling to understand how it is correct to include the provision for medically prescribed drugs but not illegal drugs or alcohol which is legal. The impact of both scenarios is the same where the outcome for many leads to Chemical Dependency, whereby treatment options are sought. Failure to recognise addiction to non-prescriptive drugs and alcohol could ultimately deter people from seeking help as there would be a possibility that they might be discriminated against due to them not being protected by the law. This in itself would undo the years of great work carried out in this sector by both ourselves (Silkworth Charity Group), other voluntary organisations and the statutory Drug & Alcohol Service.

Within the corporate environment here on the island, organisations are seeking guidance on how to manage staff that suffer with this illness and are working towards implementing comprehensive drug and alcohol policies in line with best practice. I once

again highlight that this draft law potentially will set this progressive thinking back many years.

In summary, as a professional working in this field with over ten years' experience treating people that suffer with this illness, I must ask in the best interests of many people within our community, that this regulation does not exclude the many thousands of people within Jersey that suffer with the illness of chemical dependency to mood altering substances. The impact would be catastrophic and would be felt for many years to come.

Thank you once again for allowing me the opportunity to share in person my views on this extremely important and complex matter.

Yours sincerely

CEO – Silkworth Charity Group”

Submission from Drug and Alcohol Service

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8th February 2018

Deputy R.J. Renouf
Chairman
Health and Social Security Scrutiny Panel
Scrutiny Office
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Morier House
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Dear Deputy Renouf

I reply to you [*sic*] letter dated 30th January 2018 requesting a response on the Draft Discrimination (Disability) (Jersey) Regulations.

Addiction to alcohol, nicotine or any other substance is not a disability, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment.

As an Alcohol and Drug Team I can only give opinion on alcohol and drug issues.

I have taken time to discuss this with the team and we find it is perverse that the above statement itself discriminates if a person develops an addiction from the actions of a Doctor it is considered a disability. However, it is not a disability when an individual develops an addiction through psychosocial reasons. Therefore, it feels that individuals who develop addictions from psychosocial reasons are being discriminated against but those whom develop an addiction through the actions of a Doctor would be treated differently and be considered to have a disability.

Drug and Alcohol dependency is defined as a mental disorder within the DSM 5 (Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association) and the ICD 10 (International Statistical Classification of Diseases and Related Health Problems (ICD) a medical classification list by the World Health Organization (WHO).

I agree it is complex and in terms of disability I think consideration should be taken with regards to degree of addiction.

If you wish to discuss further feel free to contact me on the above number.

Yours sincerely

Team Manager”

APPENDIX 3

Submission from the Medical Officer of Health

“With reference to the email below, as a member of the Misuse of Drugs Advisory Council, I have been offered the opportunity to comment to the Scrutiny Panel individually on the questions raised by HSS Scrutiny Panel Chair, Deputy Renouf, in his letter (as attached) addressed to Ms Jane Finlay of the Drug and Alcohol Service.

My comments are as follows:

Regarding the wording in the draft Regulations, under ‘5 Schedule 1 amended, and a new paragraph 8, subsection (7):

(7) Addiction to alcohol, nicotine or any other substance is not a disability, unless the addiction was originally result of the administration of medically prescribed drugs or other medical treatment.

- My comment is that it seems sensible to have a general exclusion (from protection under the new Regs) of **ongoing** addiction. However the ‘unless’ clause, as worded, I found surprising and potentially confusing, particularly the use of the word ‘originally’. It may be intended to refer to individuals on medically prescribed pharmaceutical medicines with addictive properties, including those with a past history of illegal opiate misuse but who are now engaging in a methadone treatment programme, but by using the word ‘originally’ may inadvertently exclude such people from (appropriate) discrimination protection – an individual’s past history should not be a reason for them to be ‘tainted’ indefinitely (e.g., for consideration for employment).

Impairment in the workplace is a separate matter, which (for whatever reason it may be) needs to be considered as a fitness for work / occupational health matter.

I have looked into the approaches taken in some other jurisdictions.

The UK (except Northern Ireland) Equality Act 2010 allows an exception from discrimination protection, of “Addiction to, or dependency on, alcohol, nicotine or any other substance (other *than in consequence of the substance being medically prescribed*)” (my italics). That would cover the people receiving medical treatment for addiction (which itself may have addictive properties), as well as people with many other painful medical conditions (including cancer) for which they are prescribed medication which may have addictive properties (e.g. opiate and opioid analgesics as pain management). Perhaps the clause above in the draft Jersey Regs is intended to have a similar meaning, but I think the UK wording is easier to understand.

It seems to me that it is the US which has a sensible and more logical (as well as clearer) approach in its Americans with Disabilities Act (ADA). The information I have gleaned is from guidance on the Act readily available online. From this I have learned that the ADA does not protect those with an addiction to illegal drugs. It provides that any employee or job applicant who is ‘currently engaging’ in the illegal use of drugs is not a ‘qualified individual with a disability’. However, ‘qualified individuals’ under the ADA include those individuals:

- Who have been successfully rehabilitated and are no longer using illegal drugs, or
- Who are currently participating in a rehabilitation programme and are no longer engaging in the illegal use of drugs, or
- Who are regarded, erroneously, as illegally using drugs.

Former casual users of illegal drugs, who are now no longer using drugs, cannot benefit by being regarded as having a disability: only when the past addiction was recognised as an impairment, and a treatment programme provided, and either completed or ongoing.

All of that seems very reasonable to me, appropriately protecting from discrimination individuals who have completed a rehabilitation programme and no longer need medical treatment for addiction, as well as those who are currently on a medically supervised rehabilitation programme (e.g. a methadone- or Subutex-based treatment programme), whilst excluding from any discrimination protection those who are currently *illegal* drug misusers.

Illegal use of drugs, and use of alcohol in the workplace are, under the terms of the ADA, grounds for denying (firing, or not hiring) employment. Employers are also entitled to test job applicants, or current employees for substance abuse, which includes alcohol or illegal drugs.

I do hope this is helpful to the Panel's deliberations.

My best wishes,

Medical Officer of Health"