

---

# STATES OF JERSEY



## **SOCIAL SECURITY CONSULTATION PAPER: DRAFT DISCRIMINATION (DISABILITY) (JERSEY) REGULATIONS 201-**

---

**Presented to the States on 5th September 2017  
by the Minister for Social Security**

---

**STATES GREFFE**



## **Law to protect against Disability Discrimination**

### Summary:

This consultation invites comments from stakeholders on the proposed scope of protection against discrimination on grounds of disability and the Draft Discrimination (Disability) (Jersey) Regulations 201-. The consultation responses will be reviewed and the draft Regulations amended, as required, prior to the Minister for Social Security asking the States Assembly to approve the draft Regulations.

---

Date published:  
4th September 2017

Closing date:  
10th November 2017

---

Supporting document attached:  
Draft Discrimination (Disability) (Jersey) Regulations 201-

---

### **How we will use your information**

The information you provide will be processed by the Social Security Department in compliance with the [Data Protection \(Jersey\) Law 2005](#) for the purposes of this consultation.

The States of Jersey may quote or publish responses to this consultation, but will not publish the names and addresses of individuals without consent. Confidential responses will still be included in any summary of statistical information received and views expressed.

Under the [Freedom of Information \(Jersey\) Law 2011](#), information submitted to this consultation may be released if a Freedom of Information request requires it, but no personal data may be released. For more information about how we handle data, please contact Kate Morel at: [K.Morel@gov.je](mailto:K.Morel@gov.je).

---

### **Feedback on this consultation**

This consultations follows the States of Jersey consultation code of practice. We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation, please contact [Communications.Unit@gov.je](mailto:Communications.Unit@gov.je).

## **Outline of the Consultation**

The Minister for Social Security (“the Minister”) is proposing draft Regulations that would introduce protection against discrimination on grounds of disability. The Consultation invites your comments on the draft Regulations to ensure that we introduce appropriate protection. You are invited to comment on the scope of protection against disability discrimination, including the following policy issues:

1. The definition of ‘disability’ for the purpose of protection against discrimination
2. Other types of disability discrimination:
  - Discrimination arising from a disability
  - Reasonable adjustments
3. Exceptions so that an act is not an act of disability discrimination.

The Minister will consider any comments received before finalising the draft Regulations and lodging them for States debate in 2018. The Regulations are expected to come into force on 1st September 2018.

This Consultation Paper has been sent to the Public Consultation Register and a number of other relevant stakeholders.

---

## **Ways to respond**

You can respond until **10th November 2017** in the following ways:

**Online survey:** [www.gov.je/consult](http://www.gov.je/consult)

**E-mail:** [K.Morel@gov.je](mailto:K.Morel@gov.je)

**Telephone:** +44 (0) 1534 447203

**Write to:** Kate Morel  
Policy Principal  
Social Security Department  
Philip Le Feuvre House  
La Motte Street  
St. Helier, JE4 8PE

**Large print versions are available on the website.**

**If you have any access or communication needs to help you respond, please let us know and we will do our best to accommodate you.**

### Public meetings

If you would like to attend a stakeholder meeting in October to discuss the draft Regulations, please book your place using the Eventbrite website.

[www.eventbrite.co.uk/e/disability-discrimination-law-public-consultation-tickets-37331497514](http://www.eventbrite.co.uk/e/disability-discrimination-law-public-consultation-tickets-37331497514)

All meetings will be held at St. Paul's Centre, which is accessible and has hearing-loop facilities.

| <b>Date</b>               | <b>Time</b> | <b>Venue</b>      |
|---------------------------|-------------|-------------------|
| Tuesday 24th October 2017 | 13:00–14:15 | St. Paul's Centre |
| Tuesday 24th October 2017 | 14:30–15:45 | St. Paul's Centre |
| Monday 30th October 2017  | 13:00–14:15 | St. Paul's Centre |
| Monday 30th October 2017  | 14:30–15:45 | St. Paul's Centre |

If you would like to attend a meeting but you cannot attend on these dates, please e-mail or call us and we will try to make alternative arrangements.

Phone: +44 (0) 1534 447203

E-mail: [K.Morel@gov.je](mailto:K.Morel@gov.je)

### Your response

Consultation responses may be made public (for example sent to other interested parties on request, provided to the Scrutiny Office, quoted in a published report, etc.). Please tell us if:

- a. your comments may be made public and attributed to you
- b. your comments may be made public but not attributed to you
- c. you do not want your comments made public.

If you do not provide this information, we will assume that you do not want your comments, or your name, made public.

### Offensive comments

Offensive comments will not be included in the consultation report and, if any are posted, via Facebook or Twitter, they will be removed.

| CONTENTS                                   | Page |
|--|------|
| Section 1 – Background                     | 4    |
| Section 2 – Other jurisdictions            | 10   |
| Section 3 – Policy issues for consultation | 12   |

---

## SECTION 1 – BACKGROUND

### Discrimination (Jersey) Law 2013

The [Discrimination \(Jersey\) Law 2013](#) provides a framework for protection against discrimination on the grounds of race, age, sex, sexual orientation, gender re-assignment and pregnancy and maternity. The legislation is proposed to be extended by Regulations to protect people in Jersey against disability discrimination with effect from 1st September 2018.

#### Protected characteristics

Introducing protected characteristics into the main Law by Regulations 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. This approach has also allowed public consultation to be undertaken at each stage, and has spread any potential administrative burden for employers, service providers and other individuals over a number of years.

#### Types of discrimination

The framework of the Discrimination Law sets out 4 types of discrimination:

- A person **directly** discriminates against another person if he or she treats that person less favourably than another person because of a particular characteristic. For example, an employer will be directly discriminating if they dismiss an employee who has been diagnosed with cancer because they think the person will take a lot of time off sick.
- A person **indirectly** discriminates against another person where they apply a provision, criterion or practice, which the person cannot show to be a proportionate means of achieving a legitimate aim, that disadvantages (or would, if applied, disadvantage) people with a particular characteristic. An employer who requires job applicants to

have a driving licence, for example, may be indirectly discriminating against people with epilepsy. Many people with that condition are able to drive normally, but a significant number are unable to do so. The issue will be whether there is a genuine need to have a driving licence for that particular position.

- Protection from **victimisation** protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result. An employee who claims that her employer is failing to promote employees with disabilities, for example, will be able to claim victimisation if the employer dismisses her as a result.
- Protection from **harassment** protects people from unwanted conduct relating to a protected characteristic that violates the dignity of the victim or creates an intimidating or offensive environment. If, for example, an employee is subjected to name-calling in relation to his disability, which persist even when he has made it clear that he finds the comments offensive, will be able to claim harassment.

To take account of some of the particular issues raised by disability discrimination, it is proposed to extend the scope of direct and indirect discrimination specifically in relation to this characteristic. Further information is provided in Section 3.

### **Areas in which discrimination is prohibited**

Discrimination is currently prohibited in the following areas:

1. Paid work including recruitment and terms of employment
2. Contract workers
3. Partnerships
4. Professional or trade organizations
5. Professional bodies
6. Vocational training
7. Employment agencies
8. Voluntary work
9. Education
10. Goods, facilities and services
11. Access to and use of public premises
12. Disposal or management of premises, e.g. letting property
13. Clubs

## **Exceptions**

Exceptions set out the circumstances in which an act will not be treated as a prohibited act of discrimination. The Discrimination Law includes some general exceptions that will apply to all protected characteristics. Currently, these relate to –

- Acts done to comply with a Law or an order of a court or tribunal
- Acts done to comply with the law of another country
- National security
- Positive action
- Charities
- Clubs restricted to persons who share a protected characteristic
- Pre-selection by an employment agency
- Selection for domestic employment
- Genuine occupational requirement
- Vocational training
- Provision of care in the carer's home
- Disposal of premises.

The Discrimination Law also includes some exceptions that are specific to each of the protected characteristics. A number of exceptions specific to disability will be required. Further information is provided in Section 3.

## **Enforcement and remedies**

The Employment and Discrimination Tribunal will hear complaints about acts of disability discrimination. All complaints will first be referred for conciliation or mediation, if both parties agree:

- complaints relating to disability discrimination in employment will be referred to the Jersey Advisory and Conciliation Service (JACS) for conciliation
- complaints relating to disability discrimination in other areas will be referred to the Community Mediation Service for mediation by a qualified mediator.

A complainant will need to demonstrate to the Tribunal that, on the balance of probabilities, he or she has been discriminated against on grounds of disability. If the Tribunal finds that a complaint has been proved, it may:

1. Make an order declaring the rights of the complainant and the respondent;
2. Order compensation of up to £10,000 for any financial loss and up to £5,000 for hurt and distress, subject to an overall limit of £10,000; and



3. Recommend that the respondent takes certain action to reduce the adverse effect of the act of disability discrimination on the particular complainant.

### People with disabilities in Jersey

A Disability Strategy for Jersey<sup>1</sup> was launched by the Chief Minister's Department in May 2017 to promote equality for disabled Islanders and work to ensure that people living with disability can enjoy a good quality of life.

According to the strategy report, 14% of the Island's population are disabled, which is 13,900 people in Jersey<sup>2</sup>. With an ageing population, these numbers are expected to increase, given that at least 51% of Islanders aged over 85 are disabled. In addition, two-thirds of all households in Jersey are estimated to include at least one person with a functional impairment (difficulty carrying out everyday tasks due to a sensory, physical or mental impairment).

The strategy was developed in partnership between government, voluntary and community organisations, and the business community. It sets out 5 key priorities for people with disabilities to –

1. Have support to communicate and access information
2. Have greater access to the Island
3. Have good health and wellbeing
4. Have access to education, employment and enriching activities
5. Have equal rights and experience equality.

People living with disability in Jersey report having a lower level of wellbeing than non-disabled Islanders. A key outcome of the strategy is to ensure that people living with disability in Jersey enjoy a good quality of life and to reduce this inequality between disabled and non-disabled Islanders.

The strategy is intended to be delivered in partnership through the Disability Strategy Delivery Group alongside this separate project to introduce protection against discrimination on grounds of disability. Legislation will provide individuals with the right to take a complaint to the Employment and Discrimination Tribunal when they believe they have experienced discrimination, whereas the strategy is intended to work proactively to change attitudes and improve disability awareness. Both elements are intended to work towards the elimination of disability discrimination in Jersey.

---

<sup>1</sup> [www.gov.je/government/pages/statesreports.aspx?reportid=2849](http://www.gov.je/government/pages/statesreports.aspx?reportid=2849)

<sup>2</sup> Based on the UK Equality Act definition of disabled – an individual has a physical or mental health condition or illness lasting or expected to last 12 months or more which impacts on their ability to carry out day-to-day activities – see the Health and Life Opportunities Survey, p.3 <http://bit.ly/26AM2a8>

## **Disability discrimination in Jersey**

There is some evidence that disability discrimination occurs in Jersey. The States of Jersey Statistics Unit included questions about discrimination in the 2012 Jersey Annual Social Survey (JASS). A quarter (25%) of adults reported having been discriminated against in the previous 12 months. For around one in 20 people (5%), the discrimination was on grounds of health or a disability. A similar proportion reported discrimination on grounds of pregnancy and maternity (6%) and gender (5%).

Citizen's Advice Jersey provides advice on non-employment-related discrimination, such as in relation to goods, services and housing. During the 6-month period 1st January to 30th June 2017, 20 clients have requested and been provided with the advice service. Two of those clients asked for advice in relation to disability discrimination. By comparison, during the same period, 8 clients requested advice about race discrimination, 5 clients requested advice about sex discrimination, and 5 clients requested advice about age discrimination.

JACS provides advice on discrimination in employment and recruitment. Discrimination was one of the top 5 most viewed topics on the JACS website in 2016. During the 6-month period 1st January to 30th June 2017, JACS did not receive any enquiries relating to disability discrimination. By comparison, JACS recorded the following enquiries in relation to the characteristics that are already protected under the Law: 29 enquiries relating to race discrimination, 31 enquiries relating to sex discrimination, and 41 enquiries relating to age discrimination.

Given that there is no legislation to protect people against disability discrimination in Jersey, it is difficult to assess the prevalence of unacceptable discriminatory acts. Without a legal benchmark against which behavioural standards can be assessed, and with no recourse to justice or compensation, acts of disability discrimination may not currently come to light.

## **International obligations**

In jurisdictions worldwide, it is taken for granted that laws exist to protect people against discrimination. It is important that we have legislation in place in order to demonstrate internationally that Jersey is a jurisdiction that promotes modern standards of respect for individuals' rights and equality. There has been consistent and overwhelming support for the introduction of legislation in Jersey to address discrimination issues generally.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is an International Convention that sets out what human rights mean in the context of disability<sup>3</sup>. It seeks to realise the right of disabled people to be treated as full and equal citizens and to change attitudes and approaches to people with disabilities. Once the disability strategy and disability discrimination legislation are in place, the Council of Ministers may seek to extend ratification of the convention to Jersey.

### **States Strategic Plan 2015 – 2018**

The introduction of protection against disability discrimination will contribute to the aims and objectives of the States of Jersey as stated in the States' Strategic Plan for 2015 – 2018<sup>4</sup> which reports that one of the goals of the Council of Ministers is to *"Help people in Jersey achieve and maintain financial independence and safeguard the most vulnerable in our community."*

One of the main priorities of the Council of Ministers is to optimise economic growth with the intention of helping to create more good jobs and opportunities for Islanders, removing barriers to employment, and increasing participation. The desired outcome is that all working-age people should fulfil their potential in rewarding employment with a key focus being to *"Identify and address barriers to work for key groups, including those wanting to work beyond retirement, looking after home and long-term sick."*

In addition, one of the 3 strategic aims of the Social Security Department, as stated in the Department's 2017 Business Plan<sup>5</sup>, is *"to help people to achieve and maintain financial independence"*. One of the Department's responsibilities in relation to this aim is *"Discrimination legislation, which protects people from unfair or unequal treatment"* with preparations for disability discrimination legislation listed as a specific project for 2017.

---

<sup>3</sup>[www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities](http://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities)

<sup>4</sup>[www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20States%20of%20Jersey%20Strategic%20Plan%202015-18%2020150430%20VP.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20States%20of%20Jersey%20Strategic%20Plan%202015-18%2020150430%20VP.pdf)

<sup>5</sup>[www.gov.je/SiteCollectionDocuments/Government%20and%20administration/BP%20Social%20Security%202017%20business%20plan%20RB.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/BP%20Social%20Security%202017%20business%20plan%20RB.pdf)

## **SECTION 2 – OTHER JURISDICTIONS –**

### **UK**

The Disability Discrimination Act was introduced in the UK in 1995. It was amended and extended several times during 1997 to 2010, in particular to implement the EU Equality Directive<sup>6</sup>, before being subsumed into the Equality Act 2010<sup>7</sup>. The UK legislation takes account of the particular ways in which disabled people may be disadvantaged, both in the workplace and in the provision of goods and services. As well as protection against direct and indirect discrimination, the Equality Act includes protection against unfavourable treatment because of something arising in consequence of a disability.

The Act also imposes a specific duty to make reasonable adjustments in circumstances where a disabled person is otherwise placed at a disadvantage. The duty to make reasonable adjustments has been developed and phased-in over a number of years. Businesses and organisations that provide services to the public were only subject to that duty from 2002 and a duty to make adjustments to the physical features of premises was implemented from 2004. Some aspects of the duty to make adjustments in relation to the ‘common parts’ of leased premises have not yet been implemented.

### **Northern Ireland**

As in the UK, the Disability Discrimination Act<sup>8</sup> was introduced in 1995. The Act now only applies in Northern Ireland because England, Scotland and Wales are covered by the Equality Act 2010. The Act has been amended a number of times by regulations implemented in Northern Ireland<sup>9</sup>. For example, the Special Educational Needs and Disability (NI) Order 2005 provides protection against disability discrimination in relation to schools, education and library boards, colleges and universities.

The Act protects disabled people in employment, access to goods, facilities and services and when buying or renting land or property. Discrimination occurs where a disabled person is treated less favourably than someone else for a reason relating to the person’s disability and this treatment cannot be justified, as well as where there is a failure to make a reasonable adjustment for a disabled person.

---

<sup>6</sup> 2000/78/EC

<sup>7</sup> [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents)

<sup>8</sup> [www.legislation.gov.uk/ukpga/1995/50/contents](http://www.legislation.gov.uk/ukpga/1995/50/contents)

<sup>9</sup> See NI Assembly Briefing Paper for more details

[www.niassembly.gov.uk/globalassets/Documents/RaISe/Publications/2012/ofmdfm/2712.pdf](http://www.niassembly.gov.uk/globalassets/Documents/RaISe/Publications/2012/ofmdfm/2712.pdf)

### **Isle of Man**

The Disability Discrimination Act 2006<sup>10</sup> makes it unlawful for a service provider to discriminate against disabled people when providing that service. It also places a duty on service providers to make reasonable adjustments in the provision of services to disabled people. The Act will come into force in phases over a 4-year period:

1. 1st January 2016 – guidance and a code of practice.
2. 15th December 2016 – unlawful to discriminate against a disabled person in the provision of goods, facilities and services and in the disposal or management of premises.
3. 1st January 2018 – service providers must take reasonable steps to change practice, policy or procedure, or to provide an auxiliary aid, to enable a disabled person to use a service.
4. 1st January 2020 – where a physical feature of a building or access makes it impossible or unreasonably difficult for disabled people to use the service, service providers must take reasonable steps, e.g. remove or alter the feature.

The Isle of Man's Equality Bill 2016<sup>11</sup> is intended to deal with discrimination comprehensively across a range of protected characteristics and will replace the Disability Discrimination Act. The Bill will be phased-in over a 2-year period following Privy Council assent, which is expected to be granted in 2017.

### **Guernsey**

In 2013, the States of Guernsey approved “The Disability and Inclusion Strategy”. The strategy aims to improve the quality of life of disabled islanders and their carers through changing attitudes towards disabled people and carers so that they can be active and engaged socially, economically and culturally.

One of the projects within that strategy is to introduce protection against disability discrimination. The Committee for Employment and Social Security, which assumed responsibility for the implementation of the Strategy following the reorganisation of government in May 2016, has committed to return to the States of Guernsey with detailed policy proposals for this legislation by 2020.

---

<sup>10</sup>[www.legislation.gov.im/cms/images/phocadownload/Acts\\_of\\_Tynwald/Primary\\_2006/Disability%20Discrimination%20Act%202006.pdf](http://www.legislation.gov.im/cms/images/phocadownload/Acts_of_Tynwald/Primary_2006/Disability%20Discrimination%20Act%202006.pdf)

<sup>11</sup>[www.tynwald.org.im/business/bills/Bills/Equality\\_Bill\\_2016-amended.pdf](http://www.tynwald.org.im/business/bills/Bills/Equality_Bill_2016-amended.pdf)

## The European Union

As a result of the Equality Framework Directive<sup>12</sup> in 2000, all member states of the European Union must provide protection against discrimination in relation to disability. The Directive is of limited scope in that it applies to employment, but it does not apply to the provision of goods and services, which is left to individual member states to regulate.

The Directive states that: *“The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability. This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”*

In December 2010, the European Union formally ratified the United Nations Convention on the Rights of People with Disabilities which requires States Parties to protect and safeguard all human rights and fundamental freedoms of persons with disabilities. The European Union’s disability strategy for 2010–2020<sup>13</sup> focuses on the need to remove the barriers to full participation placed in the way of disabled people. The strategy states that it: *“sets in motion a process to empower people with disabilities, so that they can participate fully in society on an equal basis with others. As Europe’s population ages, these actions will have a tangible impact on the quality of life of an increasingly large proportion of its people.”*

## SECTION 3 – POLICY ISSUES FOR CONSULTATION

The Minister believes that it should be unlawful to discriminate on the grounds of disability. You are invited to give your views on the scope of that protection in paragraphs 1 to 8 below.

The Minister hopes that stakeholders will find it helpful to review a set of draft Regulations as part of this consultation process. The Minister has not made firm policy decisions at this stage, but we have had the Regulations drafted based on some of the existing provisions in the Discrimination Law and the Equality Act, where possible. We expect to revise the draft Regulations to reflect the outcomes of this consultation.

---

<sup>12</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

<sup>13</sup> <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:FN:PDF>



## 1. The definition of 'disability' as a protected characteristic

The draft Regulations amend Schedule 1 of the Discrimination Law to insert 'disability' as a new protected characteristic. In considering what definition of disability should be included in the legislation, we considered the UK Equality Act definition, which is complex and is supplemented by detailed guidance and Regulations. The definition in the Equality Act is a medical model that focusses on what condition a person has and how it impacts on their ability.

We have considered other approaches, including the UN Convention on the rights of people with disabilities which provides that: *"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*<sup>14</sup>

Jersey's disability strategy defines disability in line with the Convention approach. This is a social model that, instead of focussing on the medical effect of the condition, it focusses on the way that the individual interacts with barriers that are put in their way. However, the terms used in that description are not intended to be used as a definition in legislation, and the terminology used is unlikely to be appropriate for a legal definition. Our draft draws from the Convention approach as much as possible and tries to avoid the complexity of the Equality Act.

We have made provision for specific conditions to count as a disability, irrespective of whether they would otherwise meet the definition. Cancer, Multiple Sclerosis and HIV would always amount to a disability<sup>15</sup>. We have also made provision for specific conditions not to be treated as amounting to a disability, including addictions and conditions that consist of a tendency to steal. Our aim here is to avoid requiring employers and service providers to accommodate individuals with harmful personality disorders<sup>16</sup>.

For a condition to amount to a disability it must be 'long-term'. The UK Equality Act<sup>17</sup> requires the effect of any impairment to have lasted (or be expected to last) for at least 12 months. This seems an unduly technical distinction, which becomes complicated when an underlying condition causes intermittent short-term impairments. It may also require complex medical evidence to be presented in the Tribunal, which would further complicate litigation. Our preferred approach is to allow the Tribunal to distinguish, as a matter of

<sup>14</sup> [www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html](http://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html)

<sup>15</sup> See Schedule 1, paragraph 6 of the Equality Act [www.legislation.gov.uk/ukpga/2010/15/schedule/1](http://www.legislation.gov.uk/ukpga/2010/15/schedule/1)

<sup>16</sup> The Equality Act makes provision by Regulation [The Equality Act 2010 \(Disability\) Regulations 2010, Regulations 3-5](http://www.legislation.gov.uk/ukpga/2010/15/schedule/1/regulations/3-5)

<sup>17</sup> See Schedule 1, paragraph 2 [www.legislation.gov.uk/ukpga/2010/15/schedule/1](http://www.legislation.gov.uk/ukpga/2010/15/schedule/1)

commonsense, between conditions that are merely a temporary illness or injury, and conditions which can properly be said to amount to a disability.

Because the definition deals with the potential that a condition has to impact on the activities of an individual, we can also avoid complex provisions dealing with the effect of medical treatment. For example, Type 1 Diabetes is a condition that could dramatically affect an individual's ability to participate in everyday activities and will therefore count as a disability under the Jersey Law. This is despite the fact that, if the condition is controlled through medication, any actual impact is likely to be minimal. It would clearly be wrong if someone who was harassed because they took insulin injections was prevented from bringing a claim because the effective treatment of his or her condition meant that it was not treated as a disability under this Law.

### Question 1

Do you agree with the proposed definition of disability?

Yes

No

Please give any reasons for your response.

## 2. Direct discrimination – exception for more favourable treatment

Good practice sometimes requires taking positive measures in favour of a person with a disability. For example, an employer might guarantee an interview to disabled job applicants who meet the minimum criteria, or may make special arrangements allowing a disabled employee to work flexibly, or benefit from particular equipment. It is important that such measures do not amount to direct discrimination.

The draft Regulations amend the current definition of direct discrimination (Article 6) so that it will not be direct discrimination to afford more favourable treatment to an individual because of his or her disability.



The equivalent Equality Act provision<sup>18</sup> only applies to the relative treatment of a disabled person and a non-disabled person. We are proposing a wider provision, because there may be circumstances where special treatment that is appropriate in relation to one individual with a particular disability may not be appropriate to another individual with a different disability. For example, an employer may allow an employee with dyslexia to have longer to complete particular tasks, but would not afford the same consideration to a person who uses a wheelchair.

### Question 2

Do you agree with the proposed extension to the description of direct discrimination so that more favourable treatment afforded to an individual because of his or her disability will not be direct discrimination?

Yes

No

Please give any reasons for your response.

### 3. Direct discrimination – Discrimination arising from a disability

The draft Regulations amend the current definition of direct discrimination (Article 6) so that direct discrimination includes treating a disabled person unfavourably because of something **arising in consequence** of the person's disability.

This measure is required because direct discrimination, as currently defined, is of limited use in the context of disability. For example, if a restaurant refuses to seat a customer with a Guide Dog, that is unlikely to be direct discrimination. The refusal is because of the dog, rather than because of the disability itself. However, the fact that the customer is accompanied by a dog

<sup>18</sup> See section 13(3) [www.legislation.gov.uk/ukpga/2010/15/section/13](http://www.legislation.gov.uk/ukpga/2010/15/section/13)

is a fact which only arises because of his or her disability, and so this should amount to direct discrimination.

We recognise, however, that there will be circumstances in which unfavourable treatment because of something arising from a disability is justified. For example, if a disability renders an employee incapable of going to work, there will come a point when their employer may have no choice but to terminate employment. The draft Regulations therefore provide that there will be no direct discrimination where the unfavourable treatment is a proportionate means of achieving a legitimate aim<sup>19</sup>. The draft Regulations also specify that this provision only applies if the respondent knows or ought to have known of the person's disability.

### Question 3

Do you agree with the proposed extension of direct discrimination so that the Law protects against discrimination arising from a disability?

Yes

No

Please give any reasons for your response.

#### 4. Indirect discrimination – Failure to make reasonable adjustments

One limitation of indirect discrimination is that the focus is on whether the employer or business can justify a particular provision, criterion or practice (PCP). Much of the disadvantage suffered by disabled people is imposed by barriers and obstacles inadvertently placed in their way in the pursuit of reasonable objectives. To address this issue, there needs to be a positive obligation on employers and businesses to do what they reasonably can to remove those barriers and obstacles.

---

<sup>19</sup> See section 15 of the Equality Act [www.legislation.gov.uk/ukpga/2010/15/section/15](http://www.legislation.gov.uk/ukpga/2010/15/section/15)

The draft Regulations therefore extend the description of what constitutes indirect discrimination (Article 7) to include a duty to make reasonable adjustments in 3 sets of circumstances –

- i. where a provision, criterion or practice causes a disadvantage (e.g. an informal parking space policy or a formal sickness absence policy)
- ii. where the absence of an auxiliary aid or service causes a disadvantage (e.g. a hearing induction loop or information in alternative formats)
- iii. where a physical feature of premises causes a disadvantage (e.g. the approach to or exit from a building, stairs, or bathroom facilities).

In deciding whether reasonable steps have been taken to prevent or remove the disadvantage, the draft Regulations provide a list of factors that must be taken into account –

- a) the extent to which any steps are, or would be if taken, effective to prevent or remove the substantial disadvantage;
- b) the extent to which any steps are, or would be if taken, practical;
- c) the cost of any steps that have or might be taken;
- d) the extent of the financial, administrative and any other resources available to the person, including any provided by a third party, for the purpose of taking any steps;
- e) any particular characteristics, such as the nature and size of the person's business.

As in the Equality Act<sup>20</sup>, the draft Regulations provide that the disabled person must not be required to pay any associated costs of the adjustments.

Many reasonable adjustments can be made at little or no cost and with relatively little effort. However, a duty to make alterations to the physical features of a workplace or other premises is much more onerous. As well as employers, schools and service providers, this requirement will also apply to public premises, and to those who are disposing of and managing residential and commercial properties, such as landlords and managing agents. It is important that the sudden introduction of the duty does not impose disproportionate costs on businesses, and so we propose that the requirement to make adjustments to physical premises should not come into force until 1st September 2020.

This 2-year interval is intended to allow businesses to schedule changes that may be needed to premises and include them in any renovation plans. Typical

---

<sup>20</sup> See Section 20, paragraph 7 [www.legislation.gov.uk/ukpga/2010/15/section/20](http://www.legislation.gov.uk/ukpga/2010/15/section/20)

adjustments are likely to be the installation of appropriate facilities for wheelchair users, including ramps and suitable bathroom facilities where appropriate. There will of course be some premises that do not lend themselves to such alterations, or where such alterations could only be made at a disproportionate cost. It will always be open to a business to argue that such adjustments would not be reasonable in their case. The Tribunal would take into account the cost of making the adjustment in deciding whether or not the duty had been complied with.

**Question 4a**

Do you agree with the proposed extension of the Law to provide that a failure to make reasonable adjustments for disabled people in the 3 defined circumstances (disadvantage caused by a provision criterion or practice, the absence of an auxiliary aid, or a physical feature of premises) is indirect discrimination?

Yes

No

Please give any reasons for your response.

**Question 4b**

Do you agree with the proposal to give 2 years' notice of the requirement to make reasonable adjustments where a **physical feature** of premises causes a disadvantage (in force 1st September 2020)?

Yes

No

Please give any reasons for your response.

## 5. Exceptions

The draft Regulations include a wide provision in Article 6 so that it would not be direct discrimination to treat a person **more favourably** because of his or her disability. This means that we will not need to include as many exceptions for specific situations as have been included for the other protected characteristics.

The draft Regulations provide a new Part 5 in Schedule 2 which sets out the proposed exceptions that are specific to disability discrimination. Five exceptions have been included on which your views are invited –

- In relation to school admissions (Article 21), the selection of pupils according to ability is not disability discrimination. The exception would not allow a school to refuse admission to any disabled child. It would allow the school to refuse admission to a child whose disability prevents them from meeting the academic level required for entry to the school.
- In relation to financial and insurance arrangements, disability discrimination is permitted if it is reasonable having regard to statistics or actuarial data. Similar exceptions have been included for sex, race and age discrimination. For example, an insurance provider may charge a disabled person a higher premium for travel insurance, only if they can show that there is a greater risk because of the disability and the decision was based on objective information about that condition.
- In relation to sport and competitions, disability discrimination is permitted as long as it is consistent with the rules of international sporting organisations. This will help to make it clear that sports clubs can organise themselves using the same categories as the Paralympics, for example.
- In relation to goods and services (Article 22), a failure to make reasonable adjustments will not be an act of discrimination in relation to the provision of passenger transport services or private hire vehicles. These services would be separately regulated by the Minister for Infrastructure to ensure that vehicles are appropriately equipped to accommodate disabled users<sup>21</sup>.
- an act of discrimination that was done to comply with Building Bye-laws<sup>22</sup> in Jersey constitutes a defence to any claim for a failure to make a reasonable adjustment, including in relation to employment.

<sup>21</sup> For example, accessible taxi-cabs [www.gov.je/news/2016/pages/wheelchairaccesstaxis.aspx](http://www.gov.je/news/2016/pages/wheelchairaccesstaxis.aspx)

<sup>22</sup> [www.jerseylaw.je/laws/revised/Pages/22.550.05.aspx](http://www.jerseylaw.je/laws/revised/Pages/22.550.05.aspx)

**Question 5a**

Do you agree with the proposed exception which provides that the selection of pupils according to ability will not be an act of discrimination in relation to school admissions (Article 21)?

Yes

No

Please give any reasons for your response.

**Question 5b**

Do you agree with the proposed exception which would permit disability discrimination in relation to financial and insurance arrangements only where the act is reasonable having regard to statistics or actuarial data?

Yes

No

Please give any reasons for your response.

**Question 5c**

Do you agree with the proposed exception which would permit disability discrimination in relation to sport and competitions as long as the act is consistent with the rules of international sporting organisations?

Yes

No

Please give any reasons for your response.

**Question 5d**

Do you agree with the proposed exception which provides that a failure to make reasonable adjustments will not be an act of discrimination in relation to the provision of passenger transport services or private hire vehicles?

Yes

No

Please give any reasons for your response.

**Question 5e**

Do you agree with the proposed exception which provides that an act of discrimination done to comply with Building Bye-laws provides a defence to any claim for a failure to make a reasonable adjustment?

Yes  No

Please give any reasons for your response.

**6. Any other exceptions**

We want to ensure that extending the characteristics that are protected under the Discrimination Law does not lead to unintended consequences that limit the legitimate activities of businesses, organisations or individuals in Jersey. Views are therefore invited from any stakeholder who feels that other special provisions should be made for particular circumstances in respect of disability discrimination.

**Question 6**

Are there any other circumstances in which an exception should be provided that has not been covered in any of the questions listed above?

Yes  No

If yes, please specify any specific circumstances that should be covered by an exception and give any reasons for your response.



## 7. Domestic service

The draft Regulations remove from the Discrimination Law the current general exception for 'selection for domestic employment or work' (Schedule 2, paragraph 2F). An equivalent provision was included in the UK Race Relations Act, but it was removed many years ago and was not included in the Equality Act. The question of whether it is appropriate to retain this exception in the Jersey Law has been raised in previous rounds of consultation, and so the Minister agreed that the exception would be reviewed.

The exception was initially included to avoid interfering in private household arrangements. However, cases in the UK have shown that domestic servants can be particularly vulnerable to abuse and exploitation<sup>23</sup>. We believe that excluding domestic workers from the scope of the Discrimination Law can no longer be justified.

### Question 7

Would any issues or problems would arise if the general exception for domestic service was removed from the Law?

Yes

No

Please give any reasons for your response.

---

<sup>23</sup> [www.cloisters.com/latest/court-of-appeal-decides-that-discrimination-on-grounds-of-migrant-status-of-a-domestic-servant-does-not-amount-to-race-discrimination](http://www.cloisters.com/latest/court-of-appeal-decides-that-discrimination-on-grounds-of-migrant-status-of-a-domestic-servant-does-not-amount-to-race-discrimination)

## 8. About you

### Question 8

Are you responding as any of the following?

- Employee
- Employer
- Service provider
- Individual
- Representative of a group that supports people with a disability or condition
- Other, please specify below

### Question 9

Do you give permission for your comments to be quoted?

- No
- Yes, anonymously
- Yes, attributed

Name/organisation to attribute comments to, if applicable



Jersey

## **DRAFT DISCRIMINATION (DISABILITY) (JERSEY) REGULATIONS 201-**

### **Arrangement**

---

#### **Regulation**

|   |   |   |
|---|---|---|
| 1 | Discrimination (Jersey) Law 2013 amended..... | 2 |
| 2 | Article 6 amended .....                       | 2 |
| 3 | Article 7 amended .....                       | 3 |
| 4 | Article 7A inserted .....                     | 3 |
| 5 | Schedule 1 amended.....                       | 4 |
| 6 | Schedule 2, Part 1 amended .....              | 5 |
| 7 | Schedule 2, Part 5 inserted .....             | 5 |
| 8 | Citation and commencement.....                | 6 |



Jersey

## **DRAFT DISCRIMINATION (DISABILITY) (JERSEY) REGULATIONS 201-**

*Made* [date to be inserted]  
*Coming into force* [date to be inserted]

**THE STATES**, in pursuance of Articles 5 and 47 of the Discrimination (Jersey) Law 2013, have made the following Regulations –

### **1 Discrimination (Jersey) Law 2013 amended**

The Discrimination (Jersey) Law 2013 is amended in accordance with Regulations 2 to 7.

### **2 Article 6 amended**

In Article 6 after paragraph (10) there shall be added the following paragraphs –

- “(11) In relation to a person who has a particular disability (‘disabled person’), a person (‘the person’) does not directly discriminate against another person who does not have that particular disability (‘the subject’) if the person treats the disabled person more favourably than the subject because of the disabled person’s particular disability.
- (12) Without prejudice to the generality of paragraph (1) but subject to paragraph (13), a person directly discriminates against a disabled person (‘the subject’) if –
  - (a) the person treats the subject unfavourably because of something arising as a consequence of the subject’s disability; and
  - (b) the person cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (13) Paragraph (12) does not apply if the person shows that he or she did not know, and could not have been reasonably expected to know, that the subject had the disability.”.

### 3 Article 7 amended

In Article 7(4) after sub-paragraph (e) there shall be added the following sub-paragraph –

“(f) disability”.

### 4 Article 7A inserted

After Article 7 there shall be inserted the following Article –

#### **“7A What constitutes indirect discrimination – failure to make reasonable adjustments regarding disability**

- (1) If a provision, criterion or practice of a person (‘the person’) puts a disabled person (‘the subject’) at a substantial disadvantage in comparison with persons who are not disabled, the person discriminates against the subject if the person fails to take reasonable steps to avoid the substantial disadvantage.
- (2) If a disabled person (‘the subject’) is put at a substantial disadvantage in comparison with persons who are not disabled by reason of a physical feature of premises, a person (‘the person’) discriminates against the subject if the person fails to take reasonable steps to avoid the substantial disadvantage.
- (3) If a disabled person (‘the subject’) would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, a person (‘the person’) discriminates against the subject if the person fails to take such steps as it is reasonable to take to provide the auxiliary aid.
- (4) Paragraphs (1) to (3) apply only if the person knows or reasonably should have been expected to know –
  - (a) that the subject has the disability; and
  - (b) of the substantial disadvantage that the provision, criterion, practice, physical feature of premises or lack of auxiliary aid would cause to the subject.
- (5) In taking reasonable steps to avoid the substantial disadvantage described in paragraph (1), (2) or (3), the person must not require the subject to pay any or all of the person’s costs in taking such steps.
- (6) For the purposes of paragraph (2) a physical feature includes –
  - (a) a feature arising from the design or construction of a building;
  - (b) a feature of an approach to, exit from or access to a building;
  - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises;
  - (d) any other physical element or quality.

- (7) For the purposes of paragraph (2), avoiding the substantial disadvantage includes –
  - (a) removing the physical feature in question;
  - (b) altering it; or
  - (c) providing a reasonable means of avoiding it.
- (8) For the purposes of paragraph (3), the reference to an auxiliary aid includes a reference to an auxiliary service.
- (9) In determining whether the person has taken reasonable steps to avoid the substantial disadvantage described in paragraph (1), (2) or (3), matters to be taken into account include –
  - (a) the extent to which any steps are, or would be if taken, effective to prevent or remove the substantial disadvantage;
  - (b) the extent to which any steps are, or would be if taken, practical;
  - (c) the cost of any steps that have or might be taken;
  - (d) the extent of the financial, administrative and any other resources available to the person, including any provided by a third party, for the purpose of taking any steps;
  - (e) characteristics of the person such as the nature of the person’s business, if any, and size.”.

## 5 Schedule 1 amended

In Schedule 1 after paragraph 7 there shall be added the following paragraph –

### “8 Disability

- (1) Disability is a protected characteristic.
- (2) A person has the protected characteristic if the person has one or more long-term physical, mental, intellectual or sensory impairments which, when taken together if more than one, can adversely affect the person’s ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law.
- (3) In relation to the protected characteristic –
  - (a) a reference to a person who has the protected characteristic is a reference to a disabled person;
  - (b) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.
  - (c) a reference to persons who share a particular protected characteristic is a reference to persons who have the same disability.
- (4) Each of the following is a disability regardless of whether paragraph (2) applies –

- (a) cancer,
  - (b) multiple sclerosis;
  - (c) HIV infection, that is infection by a virus capable of causing Acquired Immune Deficiency Syndrome.
- (5) 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.
- (6) None of the following is a disability –
- (a) a tendency to set fires;
  - (b) a tendency to steal;
  - (c) a tendency to physical or sexual abuse of other persons.

## **6 Schedule 2, Part 1 amended**

Paragraph 2F of Part 1 of Schedule 2 shall be repealed.

## **7 Schedule 2, Part 5 inserted**

In Schedule 2 after Part 4 there shall be inserted the following Part –

### **“PART 5**

#### **EXCEPTONS TO PROHIBITED ACTS: DISABILITY**

#### **42 Disability: goods, facilities and services**

- (1) A person does not contravene Article 22 by discriminating against a person under Article 7A where the contravention relates to the carrying of passengers for hire or reward in a public service vehicle.
- (2) In this paragraph ‘public service vehicle’ has the same meaning as in Article 1 of the Motor Traffic (Jersey) Law 1935.

#### **43 Disability: building bye-laws**

A person does not contravene anything in Parts 3, 4, 5 or 6 by discriminating against a person under Article 7A where the contravention arises from compliance with any provision of the Building Bye-laws (Jersey) 2007.

#### **44 Disability: admission to schools**

- (1) A person does not contravene Article 21(1), so far as relating to the protected characteristic of disability, only by applying arrangements for selective admission to a school.

- (2) In sub-paragraph (1), ‘arrangements for selective admission’ mean arrangements which provide for some or all of a school’s pupils to be selected by reference to general or special ability or aptitude, with a view to admitting only pupils of high ability or aptitude.

#### **45 Disability: financial and insurance arrangements**

- (1) Parts 3 and 5 do not prohibit a person discriminating against a person, in so far as such discrimination relates to the protected characteristic of disability, in relation to the terms on which an annuity or policy of insurance is offered to, or may be obtained by, that person, if the discrimination is reasonable in the circumstances, having regard to any statistical or actuarial data on which it is reasonable for the person to rely.
- (2) Article 22 does not prohibit a person discriminating against another person, in so far as such discrimination relates to the protected characteristic of disability, in the provision of a relevant financial service, if the provision is in pursuance of arrangements made by an employer for the service-provider to provide the service to the employer’s employees, and other persons, as a consequence of the employment.
- (3) In this paragraph ‘relevant financial service’ means –
  - (a) insurance or a related financial service; or
  - (b) a service relating to membership of or benefits under a personal pension scheme.

#### **46 Disability: sport and competitions**

A person does not contravene this Law in relation to the protected characteristic of disability only by doing anything in relation to the participation of persons in a sport or competition which is consistent with the rules relating to that sport or competition of an international competition or international organisation.”.

### **8 Citation and commencement**

- (1) These Regulations may be cited as the Discrimination (Disability) (Jersey) Regulations 201-
- (2) Subject to paragraph (3), these Regulations shall come into force on 1st September 2018.
- (3) Regulation 4, in relation to the insertion of Article 7A(1), shall come into force on 1st September 2020.