

White Paper

Law to protect against Sex Discrimination

14 March 2014

Purpose and type of consultation

To invite comments on the proposed scope of protection against discrimination on grounds of sex, prior to the Minister requesting law drafting.

Closing date 30 May 2014

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SUMMARY

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

The purpose of this consultation is to invite comments from stakeholders on a number of issues that must be addressed in relation to the details of that proposal, including;

1. How to deal with the issue of discrimination and equality in pay systems.
2. What characteristic(s) should be protected?
 - Sex
 - Pregnancy and maternity
 - Sexual orientation
 - Gender reassignment
 - Marriage and civil partnership
3. What exceptions should apply so that an act is not an act of sex discrimination?
 - Religion
 - Pay during maternity leave
 - Positive discrimination
 - Charities and associations

The Minister wishes to fully consider any concerns and questions that arise in order to introduce appropriate protection. The Minister is inviting representations from stakeholders on a number of policy issues, which are outlined in this white paper. The Minister will consider any comments received before preparing law drafting instructions.

SECTION 1 – BACKGROUND

Discrimination (Jersey) Law 2013

The Discrimination (Jersey) Law 2013 (the ‘Discrimination Law’) was adopted by the States of Jersey on 14 May 2013 and sanctioned by Order of Her Majesty in Council on 9 October 2013. At the States’ sitting of 18 March 2014, the Minister will ask the States to approve an appointed day act¹ that would bring the Discrimination Law into force on 1 September 2014, with race as the first protected characteristic.

In order to prepare appropriate legislation, the Minister had taken into account;

- The need to keep the Law as simple and clear as possible
- Changes in the UK as a result of the Equality Act 2010
- Guernsey’s experience of sex discrimination legislation
- Comments received from stakeholders during consultation

Consultation on the Discrimination Law had indicated that employer representatives were concerned about the cost to business; primarily the anticipated cost of dealing with complaints to the Jersey Employment and Discrimination Tribunal² (the ‘Tribunal’). That cost has been restricted in terms of the compensation that is available from the Tribunal.

The Minister has committed to conducting further consultation with stakeholders before introducing other protected characteristics.

When preparing the legislation, the Minister recognised that sex discrimination is likely to be more complex than race discrimination because sex discrimination necessarily involves issues relating to equal pay, pregnancy, maternity and family friendly rights. These issues are discussed in Section 4.

Protected characteristics

Article 5 of the Discrimination Law allows the States to introduce further protected characteristics by Regulation. This enables a consistent and equitable approach to different types of discrimination and simplifies the complexity that has resulted in other jurisdictions as a consequence of having separate and different laws. The Minister intends to propose the protected characteristics in the following order:

¹ P.5/2014

² If the draft Employment and Discrimination Tribunal (Jersey) Regulations 201- are adopted by the States on 18 March 2014 (P.4/2014), the Employment Tribunal will become the Employment and Discrimination Tribunal on 1 September 2014.

1. Race
2. Sex (in conjunction with family friendly legislation)
3. Age (in conjunction with changes to the State pension age)
4. Disability.

The priority order takes into consideration;

- States priorities
- Co-ordinating the work with other States' policies as far as possible
- International obligations
- Anticipated cost implications of compliance, and
- The need to reflect the proportion or number of people likely to be affected.

This approach will also enable public consultation to be undertaken at each stage and to spread any potential administrative burden for employers, organisations and other individuals over a period of time. The Minister is committed to ensuring that the legislation is extended in a way that is sympathetic to the difficulties faced by businesses, particularly small businesses.

Timetable

Subject to the States Assembly approving the proposed appointed day act, the Discrimination Law will come into force on 1 September 2014. This means that acts of discrimination on the grounds of race will be prohibited from that date. The interim period will allow sufficient time for employers, organisations and other individuals to make any necessary preparations.

The Minister hopes that the following timetable will be achieved in relation to sex discrimination;

March to May 2014 – sex discrimination consultation

June to July 2014 – review outcomes of consultation and agree proposals

August to December – request and undertake law drafting

January 2015 - lodge sex discrimination Regulations

March 2015 – States to debate Regulations

September 2015 – Sex discrimination and family friendly rights in force

Family friendly rights

Preparations are underway for an amendment to the Employment (Jersey) Law 2003 (the 'Employment Law'), that would introduce the following new rights;

1. Paid time off work to attend antenatal care appointments.
2. A maximum of 18 weeks maternity leave, including two weeks compulsory leave immediately after childbirth at full pay.

3. Two weeks unpaid paternity leave for an individual who has, or expects to have, parental responsibility for a child.
4. The right to unpaid adoption leave, equivalent to maternity and paternity leave for adoptive parents.
5. The right for employees to request a change to their working conditions (e.g. hours, times or location) where they are providing care for another person (adults and children).
6. A right not to be dismissed (from day one of employment) in specified circumstances relating to pregnancy, childbirth or maternity.

The family friendly proposals reflect the recommendations of the Employment Forum³, as approved by the former Minister for Social Security⁴. The Minister intends that the family friendly rights and the sex discrimination Regulations would come into force on the same date in 2015.

The proposed family friendly rights will be achieved via a primary law amendment and so will take longer to progress than sex discrimination Regulations because sanction by Order of Her Majesty in Council will be required. For this reason, the family friendly legislation has been given priority.

Is there any evidence of sex discrimination in Jersey?

Proposals to introduce discrimination legislation have been widely supported. However, during consultation on the Discrimination Law itself, some stakeholders suggested that a law should not be introduced without evidence that discriminatory behaviour exists in Jersey and without evidence that legislation will remove or reduce inequalities. It is not realistic to expect the draft Law to prevent all discrimination or eliminate inequality entirely. What legislation can realistically achieve, however, is to provide legal protection where a person has, for example, been refused a job or a service because of their sex.

In the absence of legislation that prohibits discriminatory acts from taking place, 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, it is probable that acts of discrimination do not currently come to light. However, there is some evidence that sex 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. 9 percent of women and 2 percent of men reported having been discriminated against on the grounds of gender.

During the year 2013, JACS recorded 22 clients with issues relating to discrimination, 9 of which related to sex discrimination. During the same period, JACS recorded 89 clients with issues relating to maternity and 5 clients with issues relating to parental leave. To compare with data for the

³ www.gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20EmploymentForumsRecommen%20ationMaternityPaternityFamilyFriendly%2020091211%20EV.pdf

⁴ www.gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20Response%20to%20maternity,%20paternity%20and%20family%20friendly%20working%20recommendations%2020110420%20JS.pdf

year 2012; JACS recorded 47 clients with issues relating to discrimination, 10 of which related to sex discrimination, 149 clients with issues relating to maternity and 19 clients with issues relating to parental leave.

International obligations

In jurisdictions worldwide, it is taken for granted that laws exist to protect people against discrimination. There has been consistent and overwhelming support for the introduction of legislation in Jersey to address discrimination issues generally.

The introduction of the Discrimination Law will have wide-ranging implications for Jersey as a whole. However Jersey must have legislation in place in order to command respect internationally as a jurisdiction that promotes modern standards of respect for individuals' rights and equality.

Legislation is required for Jersey's international reputation and particularly to comply with the requirements of -

- the International Covenant on Civil and Political Rights⁵ (ICCPR), and
- the International Convention on the Elimination of All Forms of Racial Discrimination⁶ (ICERD).

Discrimination legislation is also essential in terms of Jersey signing up to a number of international covenants, conventions and treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

CEDAW was adopted in 1979 by the UN General Assembly and it was ratified by the UK in April 1986. CEDAW has not yet been extended to Jersey and it is understood that one of the main reasons for this is the absence of sex discrimination legislation in Jersey.

CEDAW defines discrimination against women as *"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*⁷

By accepting the Convention, States commit to taking measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure the elimination of all acts of discrimination against women by persons, organizations or enterprises.

⁵ The UK ratified the Covenant on 29 June 1976 in respect of Jersey.

⁶ The UK ratified the Convention on 7 March 1969 in respect of Jersey.

⁷ www.un.org/womenwatch/daw/cedaw/cedaw.htm

The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life, including the right to vote and to stand for election, as well as education, health and employment.

Following a Jersey Community Relations Trust (JCRT) seminar in October 2013 - 'Advancing Women in Politics & Public Life' – the JCRT has discussed plans with the Chief Minister to move equality up the political agenda, including the need for more affordable childcare, maternity legislation, flexible working laws and sex discrimination legislation. The JCRT has also announced its intention to launch a campaign to redress the under representation of women in positions of influence and to promote the equal participation of women in politics and public life⁸.

SECTION 2 - OTHER JURISDICTIONS

UK

Discrimination based on sex has been unlawful in the UK since 1975 when the Equal Pay Act 1970 and the Sex Discrimination Act 1975 came into force. Case law developments led the concept of 'sex' to include discrimination based on pregnancy, maternity and gender reassignment. Both Acts have since been subsumed into the Equality Act 2010 (the 'Equality Act') which now lists pregnancy and gender reassignment as protected characteristics in their own right.

Despite the discrimination laws being subsumed into one law, the Equality Act retains a legal distinction between discrimination in the treatment of employees and service users - for which a straightforward claim of direct or indirect sex discrimination is required - and discrimination in contractual pay, in relation to which an equal pay claim must be brought.

Claims based on equal pay result, if successful, in an award of back pay going back up to six years. Claims for discrimination can result in an award of compensation including compensation for injury to feelings. There is no cap on the amount of compensation that may be awarded.

Isle of Man

The Isle of Man's Employment (Sex Discrimination) Act 2000 makes it unlawful to discriminate in employment on the grounds of:

- a worker's sex; or
- because he or she is married; or
- because he or she is in a civil partnership.

The Equal Pay provisions require employers to treat men and women the same for the purposes of pay and other terms of employment where the man or woman is engaged:

- on the same or broadly similar work ("like work"); or
- on work rated as equivalent under a job evaluation scheme.

⁸ www.jerseycommunityrelations.org/

There are currently a number of different laws and provisions in the Isle of Man that deal with discrimination. An Equality Bill, based on the UK Equality Act, is being drafted which is intended to deal with discrimination comprehensively across a range of protected characteristics. It was reported by the media in May 2013 that the Chief Minister of the Isle of Man intends to accelerate that law drafting after a church minister refused to allow a gay couple to rent a flat of which he was the landlord on the grounds that the couple did not constitute a family.⁹

Guernsey

The Sex Discrimination (Employment) (Guernsey) Ordinance 2005 came into force in March 2006 under enabling legislation that allows Guernsey to legislate to prohibit discrimination on the basis of any protected characteristics. The law currently prevents discrimination in employment and related matters on the basis of sex only, which includes marital status and gender reassignment. The legislation does not cover sex discrimination in areas outside of employment (e.g. services, education and clubs).

The law arose from political pressure to comply with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which had highlighted the lack of sex discrimination legislation in Guernsey.

Guernsey has dealt with few complaints of sex discrimination and even fewer that have been heard by the Employment and Discrimination Tribunal. Around 30 complaints have included sex discrimination in the first 5 years of the legislation and only 6 of those resulted in a hearing.

If a complaint of discrimination is upheld by the Employment and Discrimination Tribunal, the award is based on three months' pay, or six months' pay if there has been a discriminatory dismissal.

SECTION 3 – EXISTING CONCEPTS

The Discrimination (Jersey) Law 2013 makes the following provisions which apply to discrimination on the grounds of race and which will also apply to discrimination on the grounds of sex when Regulations are introduced.

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.
- 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.

⁹ www.bbc.co.uk/news/world-europe-isle-of-man-22524369

- **Victimisation** – protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result.
- **Harassment** involves unwanted conduct which relates to a protected characteristic that violates the dignity of the victim or creates, for example, an intimidating or offensive environment, e.g. sexual harassment.

Areas in which discrimination is prohibited

1. Paid work including; recruitment, terms of employment and termination 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 currently includes 'general' exceptions that will apply to all protected characteristics and exceptions that are specific to certain protected characteristics.

The general exceptions relate to –

- Acts done to comply with a law or an order of a court of tribunal, and
- Acts done to comply with the law of another country.

Exceptions that relate specifically to race discrimination include –

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

A number of exceptions specific to sex are also likely to be required, for example, in relation to pregnancy and childbirth related rights, maternity pay and single-sex schools, clubs, services and accommodation.

Enforcement and remedies

The Employment and Discrimination Tribunal will hear complaints about acts of discrimination that occur in all areas. All complaints will be referred for conciliation or mediation, if both parties agree:

- Complaints relating to employment will be referred to JACS for conciliation.
- Complaints not relating to employment will be referred to the Community Mediation Service (via the Citizen's Advice Bureau) 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. 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 discrimination on the particular complainant.

SECTION 4 - POLICY ISSUES FOR CONSULTATION

The Minister believes that it should be unlawful to discriminate on the grounds of sex, pregnancy, sexual orientation and gender reassignment in each of the areas covered by the Discrimination Law. These protected characteristics are discussed in paragraphs 1 to 5 below and you are invited to give your views.

The Minister believes that this protection can be provided without placing an unfair burden on employers and businesses in Jersey provided that appropriate exceptions are made for certain specific situations. Some exceptions are matters of common sense and unlikely to be controversial. It is therefore proposed to include exceptions similar to those found in the Equality Act that will, for example, allow for single-sex schools and services which by their very nature are provided for members of a particular sex. Other exceptions will require more detailed consideration. Your views on these exceptions are invited in paragraphs 6 to 10 below.

1. Sex Discrimination and Equal pay

The Minister proposes that sex should be included as a protected characteristic under the Discrimination Law. This would make it unlawful to discriminate against either a man or a woman in relation to recruitment, promotion, treatment at work or any of the other circumstances in which discrimination is prohibited in relation to race. Sexual harassment will also be prohibited.

Including sex as a protected characteristic under the Discrimination Law will mean that it will be unlawful to pay a woman less than a man (or vice versa) because of sex. Also outlawed will be unfair pay practices which place women (or men) at a particular disadvantage. However, the Minister does not propose to include any specific measures relating to equal pay.

This will mean that Jersey's law will be different from the UK. Under the Equality Act, issues relating to the equality of terms and conditions of employment are dealt with in a separate chapter of the law with its own specific rules and requirements. This only applies where the protected characteristic is sex. Claims based on any other protected characteristic such as race or religion are dealt with through a normal claim of direct and indirect discrimination even where the discrimination is in relation to terms and conditions of employment. If the protected characteristic is sex, however, a normal direct or indirect discrimination claim cannot be brought in relation to terms and conditions of employment and the employee's only option is an equal pay claim.

An equal pay claim requires the claimant to identify an actual comparator who is employed on equal work with the claimant. Work is equal if it is essentially the same, has been 'rated as equivalent' under a job evaluation scheme or if it is of 'equal value'. A detailed procedure exists to assess whether two jobs (which may be completely different) are of 'equal value' which may involve the appointment of an independent expert to carry out a detailed assessment. If the two jobs are found to be equal, then the claimant is entitled to equal pay and does not need to show that the difference in pay is actually based on sex. However the employer has a defence if it can show that the difference in pay is due to a 'material factor' which is not the difference in sex. Whether this defence can be established will generally depend on whether the reason for the difference in pay is tainted by direct or indirect discrimination.

UK equal pay law is complicated and the litigation can often take years to complete. The outcome of cases, however, often simply depends on whether there is sex discrimination in the employer's pay system.

The Minister feels that there is no need to adopt such a complicated and time-consuming process for Jersey. Instead, pay inequality between men and women can be dealt with as a normal discrimination claim. This would mean that the claimant would have to show that the reason for the difference in pay was either direct or indirect sex discrimination. However it would not be necessary to follow a complicated and time-consuming procedure deciding whether two very different jobs are actually 'equal'.

The Isle of Man law also makes a distinction between sex discrimination and equal pay complaints. Guernsey, however, was advised to avoid the costly and complex UK route and so the law protects against sex discrimination in relation to terms and conditions including pay. Few sex discrimination complaints have arisen in Guernsey. Employers were assisted to make preparations prior to the law coming into force, particularly surrounding pay in the public sector.

The Minister intends that sex discrimination in relation to pay (as part of an employee's terms and conditions of employment) should be treated as an act of discrimination under the Discrimination Law in the same way that discrimination in relation to pay on grounds of race is already present in the Discrimination Law. There is no need to make specific provision for separate equal pay claims.

Questions

1a. Should discrimination based on sex be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

Yes

No

Please give any reasons for your response.

1b. Should the issue of pay and other terms and conditions be dealt with as an issue of discrimination (as it is with race) rather than as a separate provision dealing specifically with Equal Pay?

Yes

No

Please give any reasons for your response.

1c. What unintended consequences might result from a decision **not** to make separate provision for equal pay claims? Please set out any concerns you have.

2. Pregnancy and maternity

Careful consideration must be given to how the law should deal with pregnancy as this is a condition unique to women which has a major impact in the workplace. Simply put, should less favourable treatment on the grounds of pregnancy (or a matter related to pregnancy) amount to sex discrimination?

This caused much debate in the UK in the 1990's culminating in a reference to the European Court of Justice (ECJ)¹⁰ in which it was held that since only women could be pregnant, any less favourable treatment on the grounds of pregnancy was direct sex discrimination. This means that there is no opportunity for employers to argue that, in the particular circumstances of their case, they took action that was justified. In Guernsey, discrimination on grounds of pregnancy is also direct discrimination.

The Tribunal would not be bound by the UK case law which established that any less favourable treatment on the grounds of pregnancy is direct sex discrimination. However, if pregnancy is not explicitly dealt with in the Discrimination Law, then both employers and employees would be left in doubt as to what protection pregnant employees and those who have recently given birth will have and when issues relating to pregnancy can and cannot be taken into consideration by an employer when making decisions about recruitment, promotion, redundancy selection, etc. The only way to resolve the issue would be through litigation in the Tribunal which would be controversial, time consuming and expensive for those involved.

The Minister believes that a law against sex discrimination will not be effective if it does not also protect against discrimination based on pregnancy and believes that the Discrimination Law should specify that discrimination against a woman on the grounds that she is, has been, or may become pregnant should be unlawful. The Law should also prevent discrimination based on the direct consequences of pregnancy such as absence from work, or the taking of maternity leave.

UK case law¹¹ has confirmed that fertility treatment is not the same as pregnancy and so less favourable treatment on the grounds that an employee is undertaking in vitro fertilisation (IVF) does not constitute direct sex discrimination. However, a pregnancy achieved as a result of IVF is no different from any other pregnancy in terms of protection against discrimination on grounds of pregnancy.

There may be very specific and limited circumstances in which an employer may have a compelling business need to discriminate. A blanket rule against discrimination based on pregnancy could place an unfair burden on some employers. For example, an employer recruiting for a temporary position which requires the employee to be working at a particular time may legitimately want to recruit somebody who will be available for work at that time.

The Minister invites views on whether and in what circumstances it may be legitimate to discriminate against an employee or job applicant on the grounds of pregnancy or maternity.

It is widely recognised that breastfeeding is important in the first months of a baby's life. The Equality Act specifically outlaws discrimination by service providers based on the fact that a customer is breastfeeding a baby and the Minister proposes that the same rule should apply in Jersey.

¹⁰ Webb v EMO Air Cargo (UK) Ltd (No.2) [1995] IRLR 645

¹¹ Sahota v Home Office and Pipkin UKEAT/0342/09

Questions

2a. Should discrimination based on pregnancy and maternity be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

Yes

No

Please give any reasons for your response.

2b. Are there any circumstances in which discrimination based on pregnancy or maternity should be permitted?

Yes

No

If yes, please set out any circumstances in which discrimination based on pregnancy or maternity should be permitted.

Please give any reasons for your response.

2c. Are there any businesses or service providers that should have the right, in certain circumstances, to discriminate on the grounds that a woman is breastfeeding a baby?

Yes

No

If yes, please set out any circumstances in which businesses or service providers should have the right to discriminate on the grounds that a woman is breastfeeding a baby.

Please give any reasons for your response.

3. Sexual orientation

A law prohibiting discrimination based on sex will not, on its own, be wide enough to cover discrimination based on sexual orientation. However the Minister believes that it would be appropriate to make sexual orientation a protected characteristic at the same time as sex.

In the employment sphere this is unlikely to cause any practical difficulties. In the UK, sexual orientation discrimination has been outlawed since 2003 but has generated only a small number of claims.

Sexual orientation would be defined so that it includes sexual orientation towards persons of the same sex, persons of the opposite sex or persons of either sex. The law would therefore protect people against discrimination whether they were gay, straight or bi-sexual.

In relation to the provision of goods and services, a rule against sexual orientation discrimination should again cause very few problems. In the vast majority of cases a service provider will not even know what the sexual orientation of their customer is.

In the UK there has been some controversy over the provision of hotel or bed and breakfast accommodation to gay couples where the owner of the business has had a strong religious objection to a same sex couple being given a double bed. The Supreme Court ruled in 2013 that insisting on only allowing married couples (as opposed to civil partners) to sleep in a room with a double bed amounted to direct discrimination¹².

The Minister feels that if hotel accommodation and other services are provided to the public then the same rules against discrimination should apply

¹² Bull & another v Hall & another [2013] UKSC 73, 27 November 2013

whatever the beliefs of the individual business owner. The Minister does however wish to consider whether it is appropriate to allow for exceptions where services are provided by or on behalf of an organised religion. Further exceptions are also being proposed in relation to employment for the purposes of an organised religion (see paragraph 7 below).

Questions

3a. Should discrimination based on sexual orientation be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

Yes

No

Please give any reasons for your response.

3b. Are there any businesses or service providers that should have the right, in certain circumstances, to discriminate on the grounds of sexual orientation?

Yes

No

If yes, please set out any circumstances in which businesses or service providers should have the right to discriminate on the grounds of sexual orientation.

Please give any reasons for your response.

4. Gender reassignment

Gender reassignment is inherently bound up with gender identity and therefore needs to be considered in any discussion of sex discrimination.

In the case of *P v. S and Cornwall County Council*, Case C-13/94, [1996] IRLR 347 the European Court of Justice held that discrimination against someone on the grounds that they had undergone gender reassignment was tantamount to sex discrimination and was accordingly covered by the Equal Treatment Directive. UK legislation was amended to reflect this ruling and gender reassignment is listed as a protected characteristic in its own right under the Equality Act.

The Tribunal would not be strictly bound by the *Cornwall County Council* case but if the Discrimination Law does not deal with the issue expressly, there will be uncertainty about the extent to which transgender people will be protected. The main form of discrimination faced by transgender people is harassment.

The Minister considers that gender reassignment should be included as a protected characteristic under the Discrimination Law at the same time as sex. Views are invited as to whether any exceptions (in addition to those already set out in the Discrimination Law) will need to be included to avoid any unintended consequences, or to avoid placing too great a burden on employers and businesses.

The UK introduced protection against discrimination on grounds of gender reassignment in 1993. The Equality Act provides that a person has the protected characteristic of gender reassignment where he or she has proposed, started or completed a process to change his or her sex.

This should not be confused with cross-dressing where there is no change in the gender of the person concerned. What is required is that the individual has begun or completed a process of living as a person of the acquired gender. This usually, but not always, includes surgery and other forms of medical intervention. A person does not have to be under medical supervision to be protected against gender reassignment discrimination.

The Equality Act also provides that absences arising from the process of gender reassignment should be treated equally with absences arising from sickness or injury.

Once a person has completed the process of gender reassignment they should, for all purposes, be accepted as being of their acquired gender. However, it may be appropriate to provide for exceptions to deal with situations during the period of transition involving privacy and intimate contact, for example, the provision of communal changing facilities or shared accommodation. It may also be appropriate to provide for occupational requirements where it would not be appropriate to employ someone who was going through the process of transition.

Questions

4a. Should discrimination based on gender reassignment be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

Yes

No

Please give any reasons for your response.

4b. Are there any circumstances in which discrimination based on gender reassignment should be permitted?

Yes

No

If yes, please set out any circumstances in which discrimination based on gender reassignment should be permitted, including any circumstances in which discrimination during the period of transition may be appropriate.

Please give any reasons for your response.

5. Marriage and civil partnership

The Equality Act includes marriage and civil partnership as a protected characteristic, however it only protects those who are married or in a civil partnership and not those who are single.

Discrimination based on marriage was initially outlawed in the Sex Discrimination Act 1975 at a time when it was assumed that women would leave their job when they got married. In the modern context, very few claims of marriage discrimination are actually brought. Many couples choose to cohabit and it seems unlikely that anyone would be treated less favourably because they were or were not married.

The Minister considers that adequate protection will be provided by a law prohibiting discrimination based on sex. Provided that both men and women are treated equally, **the Minister considers that there is no need to provide for a separate protected characteristic relating to marital status.**

Questions

5a. Should discrimination based on marriage and civil partnership be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

Yes No

Please give any reasons for your response.

5b. If you have answered yes to question 5a, are there any circumstances in which discrimination based on marriage and civil partnership should be permitted?

Yes No

If yes, please set out any circumstances in which discrimination based on marriage and civil partnership should be permitted.

Please give any reasons for your response.

6. Exceptions - Religion

The Minister recognises that organised religions may have particular beliefs about the role of women and the importance of gender identity or sexual orientation. The Equality Act provides exceptions for religious requirements relating to sex, marriage and sexual orientation. Where employment is for the purposes of an organised religion, the employer is allowed to apply a

requirement to be of a particular sex or not to be a transsexual person, or to make a requirement related to the employee's marriage or civil partnership status or sexual orientation, but only if –

- appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or,
- because of the nature or context of the employment, employing a person who meets the requirement is a proportionate way of avoiding conflict with a significant number of the religion's followers' strongly held religious convictions.

The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext. Applying the requirement must be a proportionate way of meeting either of the two criteria.

The Minister considers that it would be appropriate to provide a similar exception to that found in the Equality Act for recruitment to a role which is for the purposes of an organised religion.

Questions

6a. Should an exception be provided for recruitment to a role which is for the purposes of an organised religion, as is currently provided in the Equality Act?

Yes

No

If yes, please specify any specific circumstances that should be covered by such an exception.

Please give any reasons for your response.

6b. Should any other exceptions relating to religion be provided for acts of discrimination on the grounds of sex?

Yes

No

If yes, please specify any specific circumstances that should be covered by such an exception.

7. Exceptions - Pay during maternity leave

The Minister is preparing legislation so that a woman who is absent from work on maternity leave will have the right to two weeks' paid leave as part of an overall maternity leave entitlement of either 8 weeks or 18 weeks depending on her length of service. This amount has been carefully arrived at to minimise the administrative and financial burden on employers and should be seen alongside the 18 weeks' of maternity allowance which the majority of pregnant women will also be entitled to claim.

It is intended that an employer who meets the statutory obligations in relation to maternity leave and pay should not be subject to a complaint of sex discrimination if the maternity pay is lower than the amount that would be available to an employee who was on sick leave.

The Minister therefore proposes that an exception should be made in relation to pay during the maternity leave period.

Questions

7a. Should an exception be provided so that an employer who meets the statutory obligations in relation to maternity leave and pay is not subject to a complaint of sex discrimination if the maternity pay is lower than the amount that would be available to another employee who was on sick leave?

Yes

No

If yes, please specify any specific circumstances that should be covered by such an exception.

Please give any reasons for your response.

8. Exceptions - Positive discrimination

The Equality Act provides that it is not prohibited to use positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, or meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.

The extent to which it is proportionate to take positive action measures which may result in people who do not have the relevant characteristic being treated less favourably will depend on factors such as the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them. In the UK, this is interpreted in accordance with European law.

Also, an employer may take a protected characteristic into consideration when deciding who to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are equally qualified. Each case must be considered on its merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation. The Equality Act does not allow the employer to impose quotas on the number of women or minorities who will be employed in a particular post, nor does it allow particular jobs to be reserved for candidates with a particular protected characteristic.

Guernsey's law does not include any provision for positive sex discrimination.

The Discrimination Law does not include an exception to allow positive action in relation to race. However, the position of women in the workplace is a particular concern, as demonstrated by the Jersey Community Relations Trust in a current campaign to highlight and redress the under representation of women in positions of influence (see page 6). It is unlikely that significant progress will be made without some sort of positive action being permitted in relation to certain roles.

The Minister wishes to consider whether it would be appropriate to make limited provision for positive action where women (or men) are under-represented in a particular role provided that the person who is selected is as qualified for the role as any other candidate.

Questions

8a. Should an exception be provided to permit positive action where men or women are under-represented in a particular role?

Yes

No

8b. Should such an exception apply only if the person who is selected (via positive discrimination) is as qualified for the role as any other candidate?

Yes

No

Please give any reasons for your responses.

8c. Are there any other circumstances in which positive action should be permitted?

Yes

No

If yes, please specify any specific circumstances that should be covered by such an exception.

9. Exceptions – Charities and associations

Section 193 of the Equality Act allows charities to provide benefits only to people who share the same protected characteristic (for example sex, sexual orientation or race), if this is in line with their charitable instrument and if it is objectively justified or to prevent or compensate for disadvantage.

It remains unlawful for charities to limit their beneficiaries by reference to their colour. Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic (other than supported employment for people with the same disabilities).

Single-sex activities are allowed for the purpose of promoting or supporting a charity. For example, Race for Life, a women-only event which raises money for Cancer Research UK, is lawful. It would clearly make sense to allow a similar situation in Jersey.

There are also associations and clubs that are clearly aimed at members of one particular sex. Private clubs with 25 or more members are covered by the Discrimination Law which means that discrimination is prohibited in the running of the club, in the treatment of applications for membership and in the treatment of members¹³. There is an exception in relation to race where the

¹³ Article 25 of the Discrimination Law defines 'clubs' and excludes professional trade organisations and organisations of voluntary workers.

essential character of the club is that it provides benefits to a particular racial group (unless identified by colour)¹⁴. A similar exception in relation to associations and clubs that are aimed at providing benefits for members of one sex would seem appropriate.

Questions

9a. Should an exception be provided for charities to provide benefits only to people who share the same protected characteristic, as is provided in the Equality Act?

Yes

No

If yes, please specify any specific circumstances that should be covered by such an exception.

Please give any reasons for your response.

9b. Should an exception be provided for clubs and associations that are aimed at providing benefits for members of a particular sex?

Yes

No

If yes, please specify any specific circumstances that should be covered by such an exception.

Please give any reasons for your response.

¹⁴ Discrimination Law, Schedule 2, paragraph 14

10. Any other exceptions

The Minister wishes to ensure that extending the characteristics that are protected under the Discrimination Law should 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 special provision should be made in particular cases in respect of sex, maternity, sexual orientation or gender reassignment.

10a. 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.

Please give any reasons for your response.

11. Other comments

11a. Do you have any other comments relating to the issues raised in this consultation that you would ask the Minister to take into account?

12. About you

12a. Please tick which of the following you are responding as:

Employer

Employee

Employers' association

Trade union/staff association

Other, please specify below

12b. If you are an employer or an employee, please specify your sector.

- Agriculture
- Construction
- Electricity, gas and water
- Financial services
- Manufacturing
- Hotels, restaurants and bars
- Public sector
- Wholesale and retail
- Transport, storage and communications
- Other sector, please specify below

12c. Do you give the Minister permission to quote your comments publicly?

- Yes, anonymously Yes, attributed to me No

12d. If your comments are to be quoted, who should they be attributed to?

SECTION 5 – RESPONDING TO THE CONSULTATION

Please submit your comments by 30 May 2014.

You can respond to the consultation in the following ways:

- complete the online survey www.gov.je/consult
- email or post your comments to Kate Morel
- ask to be involved in a focus group to discuss the issues

Kate Morel
Policy Principal
Social Security Department
Philip Le Feuvre House
La Motte Street
St Helier, JE4 8PE
Telephone 01534 447203
Email K.Morel@gov.je

NOTE - Consultation responses may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, listed on a consultation summary etc).

APPENDIX 1 – List of questions

1. Sex Discrimination and Equal pay

1a. Should discrimination on the grounds of sex be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

1b. Should the issue of pay and other terms and conditions be dealt with as an issue of discrimination (as it is with race) rather than as a separate provision dealing specifically with Equal Pay?

1c. What unintended consequences might result from a decision **not** to make separate provision for equal pay claims? Please set out any concerns you have.

2. Pregnancy and maternity

2a. Should discrimination based on pregnancy and maternity be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

2b. Are there any circumstances in which discrimination based on pregnancy or maternity should be permitted?

If yes, please set out any circumstances in which discrimination based on pregnancy or maternity should be permitted.

2c. Are there any businesses or service providers that should have the right, in certain circumstances, to discriminate on the grounds that a woman is breastfeeding a baby?

If yes, please set out any circumstances in which businesses or service providers should have the right to discriminate on the grounds that a woman is breastfeeding a baby.

3. Sexual orientation

3a. Should discrimination based on sexual orientation be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

3b. Are there any businesses or service providers that should have the right, in certain circumstances, to discriminate on the grounds of sexual orientation?

If yes, please set out any circumstances in which businesses or service providers should have the right to discriminate on the grounds of sexual orientation.

4. Gender reassignment

4a. Should discrimination based on gender reassignment be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

4b. Are there any circumstances in which discrimination based on gender reassignment should be permitted?

If yes, please set out any circumstances in which discrimination based on gender reassignment should be permitted, including any circumstances in which discrimination during the period of transition may be appropriate.

5. Marriage and civil partnership

5a. Should discrimination based on marriage and civil partnership be unlawful in broadly the same circumstances that the Discrimination Law makes it unlawful to discriminate on the grounds of race?

5b. If you have answered yes to question 5a, are there any circumstances in which discrimination based on marriage and civil partnership should be permitted?

If yes, please set out any circumstances in which discrimination based on marriage and civil partnership should be permitted.

6. Exceptions - Religion

6a. Should an exception be provided for recruitment to a role which is for the purposes of an organised religion, as is currently provided in the Equality Act?

If yes, please specify any specific circumstances that should be covered by such an exception.

6b. Should any other exceptions relating to religion be provided for acts of discrimination on the grounds of sex?

If yes, please specify any specific circumstances that should be covered by such an exception.

7. Exceptions - Pay during maternity leave

7a. Should an exception be provided so that an employer who meets the statutory obligations in relation to maternity leave and pay is not subject to a complaint of sex discrimination if the maternity pay is lower than the amount that would be available to another employee who was on sick leave?

If yes, please specify any specific circumstances that should be covered by such an exception.

8. Exceptions - Positive discrimination

8a. Should an exception be provided to permit positive action where men or women are under-represented in a particular role?

8b. Should such an exception apply only if the person who is selected (via positive discrimination) is as qualified for the role as any other candidate?

8c. Are there any other circumstances in which positive action should be permitted?

If yes, please specify any specific circumstances that should be covered by such an exception.

9. Exceptions – Charities and associations

9a. Should an exception be provided for charities to provide benefits only to people who share the same protected characteristic, as is provided in the Equality Act?

If yes, please specify any specific circumstances that should be covered by such an exception.

9b. Should an exception be provided for clubs and associations that are aimed at providing benefits for members of a particular sex?

If yes, please specify any specific circumstances that should be covered by such an exception.

10. Any other exceptions

10a. Are there any other circumstances in which an exception should be provided that has not been covered in any of the questions listed above?

If yes, please specify any specific circumstances that should be covered by an exception.

11. Other comments

11a. Do you have any other comments relating to the issues raised in this consultation that you would ask the Minister to take into account?

12. About you

12a. Please tick which of the following you are responding as:

12b. If you are an employer or an employee, please specify your sector.

12c. Do you give the Minister permission to quote your comments?

12d. If your comments are to be quoted, who should they be attributed to?