Consultation Summary of Responses
Social Security Department

States of Jersey

Law to protect against Disability Discrimination

Summary of consultation responses:

The Minister for Social Security (the 'Minister') consulted on the proposed scope of protection against discrimination on grounds of disability and the draft Disability Discrimination Regulations[1]. The Minister invited comments from stakeholders on a number of policy issues including the following;

1. how we should define 'disability' for the purpose of this law
2. whether any exceptions should be made
3. requiring reasonable adjustments to premises

The proposals were generally supported by respondents. It is clear that there is widespread support for the overall approach taken in the draft Regulations. There are also aspects of the draft that can be simplified or improved. More information is provided in this consultation outcomes report.

Minister/department response to this feedback:

The Minister is very grateful to those who responded to this consultation. The Minister has considered the comments submitted by each respondent and this process has informed her decisions. The draft Regulations will be amended to include the following changes -

1. To expressly provide that a 'long-term' impairment is one which has lasted or is expected to last for at least six months
2. To ensure that disfigurements are treated as a disability
3. The remove the provision specifying that cancer, MS and HIV/Aids are to be treated as disabilities as it is unnecessary
4. In considering whether reasonable adjustments have been made, the Tribunal will be asked to consider the extent to which the need for a particular adjustment could have been anticipated
5. To make an exception to ensure that States policies to improve employment opportunities and access to services for disabled people can be acted upon.

The draft Regulations will be lodged by 6 February 2018 for States debate on 20 March 2018. The Minister intends that, subject to the States Assembly approving the Regulations, protection against disability discrimination will be available from 1 September 2018 and a duty to make reasonable adjustments to premises will apply from 1 September 2020.

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

CONSULTATION OUTCOMES

Members of the public were invited to give their views on the scope of the protection against disability discrimination, as set out in the draft Regulations. The Minister had not reached any firm policy decisions prior to the consultation, but decided that it would be helpful to circulate draft Regulations to help stakeholders consider the proposals. The consultation paper[2] provided information about the framework of the current Discrimination (Jersey) Law 2013, legislation in other jurisdictions and the policy issues for consideration. Section 2 of this report sets out the responses to the consultation in more detail.

Section 1 - Consultation method

The Minister issued a consultation paper on 4 September 2017 inviting respondents to complete the online survey, send written comments or attend a stakeholder meeting. The Minister received 101 written responses to the consultation. In addition, the response submitted by Law at Work presented the views collected from 31 clients of Law at Work and the response from the Jersey Chamber of Commerce represented the views of 46 Chamber members. Although these respondents completed different surveys, 178 written responses in total were submitted as part of this consultation. The responses can be categorised into the following respondent types;

Respondent type	Number
Individual	33
Employer	12
Employee	3
Representative of a group that supports people with a disability/condition	8
Service provider	4
Employer/business association	1
Trade union/staff association	2
Other (e.g. JACS, lawyers)	18
Not specified	20
Chamber of Commerce survey respondents	46
Law at Work survey respondents	31
TOTAL	**178**

[2] https://www.gov.je/Government/Consultations/Pages/DisabilityDiscriminationLaw.aspx

In addition to this, more than 70 stakeholders attended a number of public and private meetings on 23, 24 and 30 October 2017 to discuss the issues raised in the consultation paper. This included representatives from the Jersey Disability Partnership, EyeCan, Oxygen, Shopmobility, Jersey Employment Trust, Liberate, the Jersey Parent Forum, States of Jersey Planning and Property Holdings departments, Jersey Advisory and Conciliation Service, Citizens Advice Jersey, CIPD Jersey Branch and representatives from local Law firms, architects and financial services. Some of the stakeholders who attended a meeting also submitted a written response.

The Minister is very grateful for the detailed comments that have been provided by the respondents and for the efforts that have been made to collect the views of certain groups in the community. Some of the responses represented the views of more than one individual, including the following;

Jersey Disability Partnership (JDP) – The views presented reflect points raised at a JDP meeting and the disability discrimination briefing sessions that were attended by JDP Committee members, and the views of the JDP Committee, all of whom are closely involved in one or more disability charities and have campaigned for protection against disability discrimination.

Jersey Chamber of Commerce (Chamber) - Chamber is the largest employer representative body in the Island which includes members from all business sectors who are dedicated to the promotion of trade, commerce and the general prosperity of Jersey. Chamber circulated its own survey to all of its member organisations.

Law at Work (LAW) – LAW is a provider of employment relations consultancy services to Channel Island based employers. LAW acts for employers and primarily represents their views and concerns in responding. Recipients of the LAW e-bulletin were sent a survey to which 31 employers responded.

Unite the Union (Unite) - Unite is the UK's largest trade union with 1.4 million members across the private and public sectors. The union's members work in a range of industries including all the manufacturing and transport sectors, financial services, print, media, construction, local government, education, health and not for profit sectors. Unite is Jersey's biggest union.

Guernsey Disability Alliance (GDA) - The GDA was formed in 2008 and is a collective voice for individual disabled islanders in Guernsey, their family members and more than 40 member charities. The GDA's mission is equality of opportunity for disabled islanders and carers in Guernsey and to change how Guernsey thinks about disability.

dDeaf individuals as a group using British Sign Language – With assistance from the Senior Practitioner with dDeaf and Hard of Hearing People, dDeaf individuals submitted their views as a group using British Sign Language to discuss and provide collective comments.

Section 2 - Consultation responses

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

Any references to the Regulations in the following report refer to the Regulation and paragraph numbers that were set out in the consultation draft of the Discrimination (Disability) (Jersey) Regulations 201-[3].

General comments

A number of respondents commented generally in support of introducing protection against disability discrimination, including the following comments;

> "*The Jersey Chamber of Commerce is fully supportive of Jersey having a full scope of disability legislative measures in place, to ensure that everyone in the island has fair and full access to employment and social activities."* (Lorna Pestana, Chair, HR Committee, Jersey Chamber of Commerce)
>
> *"The introduction of legislation to protect against disability discrimination is undoubtedly a positive step in terms of addressing inequality in the Island. As set out in the Disability Strategy for Jersey, given that at least 51% of Islanders aged 85 or over are disabled, with this number expected to rise, it is important that there is some form of legislation in place to protect against this form of discrimination and we thoroughly support this initiative."* (Law firm)
>
> *"I would like to congratulate you, on behalf of the many charities that we work with, for a draft law and consultation document that, generally, are easy to understand, address almost all of the points we have*

[3] https://www.gov.je/Government/Consultations/Pages/DisabilityDiscriminationLaw.aspx

campaigned for in this law, and are appropriate and proportionate to Jersey. We are also delighted that there is now every chance that this law will be adopted by the States before the next election." (Jersey Disability Partnership)

"The Strategic Housing Unit support the proposed extension of the Discrimination (Jersey) Law 2013 to protect people against disability discrimination. The proposed legislation supports the aim of the 2016 Housing Strategy, which states that all people in Jersey should have access to affordable, good standard and secure accommodation. The Strategic Housing Unit believes that the proposed legislation will help to clarify the obligations of landlords in respect of tenants with disabilities, including helping to prevent discriminative letting policies and practices." (Strategic Housing Unit)

Outcomes
The Minister is pleased that the legislation was generally supported. The gradual implementation of the Discrimination Law has been a success in Jersey and its extension to the protected characteristic of disability is an important step forward. While some changes will be made to the draft Regulations to ensure maximum clarity and that they achieve their intended purpose, the broad thrust of the Regulations as proposed will remain unchanged.

1. The definition of disability

Respondents were asked if they agree with proposed definition of disability. 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 a medical model that focusses on the medical effect of the condition.

We also considered other approaches, including the UN Convention on the rights of people with disabilities which focusses instead on the way that the individual interacts with barriers that are put in their way. Our draft Regulations draw from the Convention approach as much as possible and tries to avoid the complexity of the Equality Act.

Of the responses to the Minister's survey, 91 percent of respondents agreed with the proposed definition. The written responses and the public meetings provided much discussion about the advantages and disadvantages of taking a medical approach or a social approach to the definition. Comments on our proposed approach included the following;

"JET welcomes and fully supports the definition of disability used. It is particularly important that it embraces the social model as opposed to the medical model of disability. The medical model looks at what is 'wrong' with the person and not what the person needs. It creates low expectations and can lead to people losing independence, choice and control in their own lives. The social model of disability placed the responsibility on the way society is organised, rather than by a person's impairment or difference. It does not seek to change persons with impairment to accommodate society It looks at ways of removing barriers that restrict life choices for disabled people." (Jersey Employment Trust)

"By being a wide definition (not labelling individual and / or diversity of individual experience of dDeaf, hearing impairment or sight / hearing impaired or deafblind) it is tactful and sensitive…Deafness has cultural and linguistic / communication difference that is not always appreciated." (dDeaf individuals as a group using British Sign Language)

"I would prefer the law to take into account the wider UN definition...the social model should be included as much as the medical model. I would not want my daughter to be defined by her disability only. I would like to see Jersey appreciate the capabilities of our young people whilst acknowledging their right to participate fully in island life. I believe the UN definition of disability would better address these requirements." (Lesley Bratch)

"Unite agrees that the UK Equality Act definition is flawed in that it is complex to apply and that it is in effect a "medical model". We accept that the definition in the UN Convention on the rights of people with disabilities is a better base, including the reference to being or likely to be "long term"." (Unite)

"I agree that the UK Equality Act's definition has become overly complex and that caselaw has not always assisted in that respect. Further, a social model should be adopted, in line with the expectations of international human rights law including the United Nations Convention on the Rights of Persons with Disabilities and its application by the European Court of Human Rights, which treats it as reflecting general principles of international law even when a state has not signed and ratified the UNCRPD." (Professor Claire de Than, Institute of Law, Jersey)

"YES, we agree with the definition, although we suggest some points of clarification below. In particular we very much welcome that it is based on the broader UN Convention approach to disability, rather than the narrower UK Equality Act definition, thus combining both a social as well as a medical model of disability. However, we recognise the difficulty of translating the UN Convention approach into a legal definition. 1b. The numbers from the Jersey Disability Survey that fall under the UN definition are some 35,000 rather than 13,900 under the medical model. We think the numbers are important to put the different models/definitions into context." (Jersey Disability Partnership)

"The idea that it is the interaction and/or the experienced barriers for a disabled person will include more effectively dDeaf and hard of hearing / hearing impaired islanders in the definition of disability. It will give weight to the awareness of communication needs and access to everyday, ordinary, and extraordinary life events and being part of many communities as are hearing people – by interest, choice, and personal, private and public services…The definition is also more supportive of other invisible disabilities and hopefully will start participation and engagement by these groups. too often the stereotype is wheelchair user, guided blind people, noticeable body, or facial difference (including disfigurement)" (Senior Practitioner with dDeaf and hard of Hearing People)

"Your proposing leaving the distinguishing (presumably on a case by case basis?) of what can properly be said to be a disability on the 'common sense' of a Tribunal leaves the burden of not knowing what sense a Tribunal would make of a complex condition unfairly on the person coming to the Tribunal seeking the disabilities recognition. This ambiguity is very likely to dissuade people from seeking the 'common sense' of the Tribunal." (James Deane)

"The definition is more balanced, pragmatic in its application, whilst allowing for a distinction to be made between longer term disabilities and those of a shorter term duration. The UK approach is difficult and complex to apply and additional requirements to obtain medical evidence can be detrimental to individuals." (Anonymous employer)

"Definition of disability enables dDeaf, hard of hearing and deafblind people to be recognised not by the label but by the barriers that are created being in a hearing world. Many barriers are linked to access to information and communication. Also barriers that do not recognise that needs are not just about their deafness but the interaction between deaf and hearing worlds." (Member of dDeaf Partnership Board)

"The GDA believes that the proposed definition of disability will be confusing and onerous to employers and service providers and will invite misplaced focus and argument, particularly between employer and employee, about who is and who isn't disabled and whether a need, connected with disability, should be accommodated." (Guernsey Disability Alliance)

"LAW is not averse to either a social or medical model so long as there is proportionality in the resulting burden this places upon businesses. LAW itself has always been practical in its advice to those clients (who have already anti-disability discrimination regimes in their workplace) and usually counsels clients to assume anybody who is not well, behaving oddly or asking for help may be suffering from a disability. We advise not wasting time on legal questions and concentrating on the consequences of the impairment or ill health. We would comment, however, that in our view, despite the drafting and purpose of the Regulations, medical evidence will nevertheless come to bear on the question of disability and discrimination both internally and during litigation, and we believe Jersey will nevertheless be running a social-medical model under these Regulations." (Law at Work)

"Not all disabilities are obvious, personally I would not expect my employer to believe me without some sort of assurance." (Response collected by LAW, Finance/Legal).

"It's not perfect asking GPs' medical opinion but it is the best system we have - and unless Jersey is prepared to fund an independent panel who can assess disability consistently." (Response collected by LAW, Charity).

"The definition of disability used within this legislation is based on a social, not medical model. The question of proof of disability could therefore be a subjective and difficult point to prove, as it is unclear at this stage which professional opinions would be necessary in order to correctly assess disability." (Lorna Pestana, Chair, HR Committee, Jersey Chamber of Commerce)

"There has been a serious attempt to draft legislation that reflects a social model of disability, i.e. instead of focusing on the medical effect of the impairment, it focuses on the way that the individual interacts with barriers that hinder their full participation in society. It is not entirely convincing that the draft legislation succeeds in this...a mixture of social and medical models might more properly recognise impairment and disability working together to produce disadvantage.

In this, Jersey's draft law succeeds, in as much as the new paragraph 8 defines disability medically and the new Article 7A acknowledges the social barriers that need to be removed through the process of reasonable adjustment. In defining disability, the question then arises as to how wide the parameters should be set?" (Liberate)

"The Disability Regulations put the Tribunal in the position of making a medical judgment. This approach may lead to maters being appealed to the Royal Court. Until such time as this case law is developed in the Island, it will be difficult to say with any certainty whether a particular condition does constitute disability, albeit that the definition refers to "can adversely affect" which is a fairly wide test. This will place employers (and advisers) in an unenviable position. In addition, we are of the view that the wider definition will not necessarily disperse of the need to have a preliminary hearing to determine whether the person does fall within the definition of disabled. In practice, it is likely that there will be legal debate surrounding whether the definition is engaged and most employers will want to refer to medical evidence in any event." (Law firm)

"The Equality Act 2010 definition at section 6 of the Act is (whilst undeniably a medically based and complex test) robust and has the benefit of a substantial body of case law in relation to how it should be interpreted…The UK definition also has the additional benefit of focusing on the actual impact of a disability on day-to-day activities. Our concern with the proposed Jersey definition is that it focuses on the potential impact of the condition on activities caught by the Discrimination (Jersey) Law 2013 –not upon the actual impact of a condition on an individual undertaking their ordinary day to day activities. This gives rise to a potential that employees and service users may be denied protection on the basis that there disability does not prevent them from taking up employment or using services but otherwise has a substantial impact on their day-to-day lives." (Huw Thomas, Carey Olsen)

Outcomes
The meaning of 'disability' is a subject of on-going debate and this is reflected in the responses that we have received on the proposed definition. Central to the debate is the general preference among people with disabilities and their representatives for a social model rather than a medical model of disability. This recognises that it is disempowering to describe a disability as something that is inherently 'wrong' with the individual and that it is important to acknowledge the role of societal barriers in creating the impairment that we recognise as a disability.

As has been acknowledged by a number of the respondents, our proposed definition takes elements from both the medical and social models. There is a requirement for a long-term impairment, but the definition is careful not to require a detailed examination of the personal functionality of a claimant, such as by examining their day-to-day activities. The focus is placed instead on the potential of the particular impairment to adversely affect the individual's ability to engage or participate in an activity (such as work, or the use of a service) that is relevant for the purposes of the Discrimination Law. This means that, for most disabled people, there will be no need for an intrusive examination of their personal circumstances.

There will be situations in which the question of whether or not the individual is disabled is disputed. Since the question will only arise in the context of a discrimination complaint, it will be for the Tribunal to determine whether or not the complainant is disabled within the meaning of the Law. Medical evidence will inevitably form a part of many such cases, although there will not usually be any need for a detailed consideration of the particular impact of the impairment on the individual concerned. Under the UK Equality Act, a key question is often what impact the impairment has on the individual's day-to-day activities and this can be both intrusive and distressing for the individual concerned. Under our draft Regulations the question is whether the impairment identified is one which has the potential to affect an individual's participation. That is a much more general question that is less reliant on the personal circumstances of the individual.

The definition needs to be workable in practice and it must be easily understood by those with little experience of disability. Most of the respondents who opposed the definition did not propose any alternative wording. The Guernsey Disability Alliance proposed that one option would be not to define disability at all. The Minister believes that this level of uncertainty would not be satisfactory. While philosophical debates on the nature of disability continue, disabled people are left unprotected and the Minister does not believe that this should be allowed to happen in Jersey. Ultimately, the debate on the meaning of disability has to be translated into statutory language which is clear and capable of being understood in practical terms. The Minister is of the view that, subject to minor alterations aimed at improving clarity, the proposed definition strikes the right balance.

Specific inclusions

As in the UK Equality Act, specific conditions have been proposed to count as a disability, irrespective of whether they would otherwise meet the definition, e.g. Cancer, Multiple Sclerosis and HIV/AIDS. A number of

respondents commented on this, both at the public meetings and in writing, including the following comments;

> *"I agree with the principle as per paragraph "8 Disability", but suggest that an autism spectrum diagnosis might also be specified under 8 (4), since this is irreversible and can give rise to unfair discrimination - e.g. in the workplace - if reasonable allowances are not made."* (Paul St John Turner)

> *"I would like to see chronic conditions such as M.E. and fibromyalgia included in the definition. These chronic conditions, while not life threatening, cause considerable hardship and are debilitating."* (Anonymous individual)

> *"Respondent also feel strongly against the automatic deeming of specific conditions as a disability – this was considered arbitrary and the preference expressed was for each alleged disability to be judged on its own merits in light of the general statutory definition."* (Law at Work)

> *"The draft Regulations specifically include certain conditions: cancer, HIV and multiple sclerosis, yet there are scores of other chronic and progressive conditions which are not automatically included. Such exclusions and inclusions tend to invite employers to first decide, when considering whether to make a reasonable adjustment, whether someone fits a list of excluded or included conditions or a legal definition of disability, rather than to first decide whether it would be reasonable to accommodate a need."* (Guernsey Disability Alliance)

> *"We would also strongly suggest that the list of "deemed" conditions is extended to take account of: • Blindness, severe sight impairment, sight impairment and partial sightedness (provided this is certified by a consultant ophthalmologist) • Severe disfigurements, with the exception of unremoved tattoos and piercings."* (Huw Thomas, Carey Olsen)

> *"Severe disfigurement – in the Uk it has been added that this does not include tattoos and piercings."* (Jersey Employment Trust)

> *"If the definition is to remain as drafted, we are of the view that the specific references to cancer, multiple sclerosis and HIV at Article 8 (4) may not be necessary as the definition is wide enough such that is captures these conditions. All of these conditions can adversely affect a person's ability to engage or participate in any activity."* (Law firm)

Outcomes
The draft Regulations proposed that, as in the UK Equality Act, three conditions – cancer, MS and HIV/AIDS - should be deemed to be disabilities irrespective of whether they would otherwise meet the definition. The rationale behind this was to cover situations in which a condition might be diagnosed before the individual has developed any symptoms that could be said to amount to an impairment. However, the proposal has caused confusion and concern. Some of the respondents were concerned that certain conditions were not specified in the list. It was not the intention to create the impression that specific conditions, such as lapsing and remitting conditions, would only amount to disabilities if they were included in this list.

Discussions at the stakeholder meetings and one of the written responses from a law firm indicated that that the inclusion of these named conditions is not actually necessary. The definition of disability covers conditions which 'can' – that is, they have the potential to – have an adverse effect. Unlike under the UK Equality Act, there is no requirement for the condition to have actually had that effect in the case of the individual claimant. Cancer, HIV and MS would all therefore count as disabilities even before symptoms developed because all of those conditions can have the effect set out in the definition. Since the provision is unnecessary and has caused some confusion, the Minister has decided that it should be removed from the draft Regulations.

On the issue of disfigurements, the Minister agrees that there is some doubt as to whether this would be covered under the general definition. A person with a disfigurement may well encounter prejudice and discrimination, but it could be argued that the disfigurement itself does not affect their ability to engage and participate. To avoid any doubt on this issue the Minister feels it would be appropriate to make specific provision – as is the case in the UK Equality Act – and provide that a disfigurement (other than a tattoo or decorative piercing) is a disability within the meaning of the law.

Long-term

Under the definition as drafted, for a condition to amount to a disability it must be 'long-term'. This was discussed in some detail at the public meetings and a number of respondents commented on this requirement in writing, including the following comments;

> *"Within the UK definition of disability, 'long-term' is defined as 12 months. There is no timeframe laid out in the Jersey legislation. We suggest it would be sensible to include a timescale that clearly defines what the States of Jersey consider is long-term...Over 90% of respondents urge Jersey to pre-define 'long-term', providing a clear,*

objective measure." (Lorna Pestana, Chair, HR Committee, Jersey Chamber of Commerce)

"Short Term disabilities must be recognised, a disability is a disability no matter how long it lasts." (Anonymous employer)

"How we define long term is important and mental health issues should be considered. Medically s chronic disorder is 6 months according to pain clinic so maybe an illness longer than 6 months should be long term." (Anonymous employer)

"To define a disability only as long term does not recognise that disabling aspect of mental health illness and those recovering from injuries to say the least. This will hinder the recovery from these states of inability and disable people from living out their full potential." (James Deane)

"It clearly and succinctly sets out what the law is covering and such clarity assists considerably. The only concern would be when does disability discrimination 'kick in'? By way of an example, someone may be unwell and undergoing a series of tests to determine what the illness is, it may only be some 6 months or more down the line that a diagnosis is given that as a consequence means the illness is now long-term. Would the protection only apply once this 'long term' diagnosis was given, or would it effectively mean the protection started when the tests started?" (JACS).

"In the Jersey law, it is also unclear how a relapsing and remitting condition such as rheumatoid arthritis or an episodic condition like epilepsy or depression would qualify as a 'long-term' disability. The UK is better as the effects of the condition may well be long-term, even though the condition comes in bursts." (Liberate)

"First, three respondents felt workers suffering short-term conditions warranted protection – e.g. "Sight-loss can be temporary" (Eyecan, 10 employees) and 'It's a disability full stop. Might be a broke leg or MS. The person is still disabled." (Anon., Wholesale/Retail, 150 employees). Second, the lack of a statutory definition of 'long-term' gives concern that some individuals with disabilities will fall outside the law's protection. One respondent was concerned that the requirement for 'long-term' this may result in the very opposite of what was intended i.e. relapsing and remitting conditions not being considered a disability (Anon, Charity, 1 employee), and others warn that individuals who are

yet to know their intermittent short-term illnesses are actually the result an underlying long-term condition could lose out." (Law at Work)

"Our view is that disability should be measured on actual (rather than potential) impact on day-to-day activities and that the relevant impact should be demonstrably long-term. In our view, the Act takes a sensible approach to such matters:

(1) The effect of an impairment is long-term if:

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected. (Schedule 1 Part para 2 Equality Act 2010)

Whilst issue may be taken with the time periods utilised in the Act, the general principle is in our view a sound one in ensuring that that there is a level of certainty. The difficulty with the proposed test as to whether a condition is long term – which is stated to permit the Tribunal to make a "common sense" decision – is that it effectively means that both employees and employers (or service provision users and service providers) will have no certainty as to the conditions which are caught and which they need to take into account unless they litigate." (Huw Thomas, Carey Olsen)

Outcomes

There were differences of opinion amongst respondents as to whether there should be any requirement around the duration of the impairment. Some respondents were concerned that a requirement for a long-term condition would mean that fluctuating conditions such as bipolar disorder would not be covered. However this should not be a problem because it is the impairment itself that needs to be long-term rather than its effect. A person with bipolar disorder will be disabled under the Law and will remain so even during periods when they are well.

Other respondents felt that there should be no requirement for a condition to be long-term in order for it to qualify as a disability. The Minister is concerned that, without some qualification, any short-term illness would amount to a disability under the Law. While employers should treat sick employees with sympathy and understanding, the Minister does not feel that the full weight of protection against discrimination would be appropriate to protect individuals who develop a condition that is usually short-term such as a cold or a broken bone.

Many respondents felt that the phrase 'long-term' was too vague to provide the clarity needed as to who is, and who is not, disabled. Having explored this issue with stakeholders at some of the meetings and having considered the

responses, the Minister agrees that a more precise definition is needed – while avoiding placing too high a hurdle for protection. It is therefore proposed that long-term will be defined as a condition which:

- has lasted for 6 months
- is expected to last for at least 6 months or
- is expected to last for the rest of the individual's life if that is expected to be less than 6 months.

It is important to appreciate that this does not mean that an individual will only 'become' disabled once six months have passed. In most cases it will be clear from the time of diagnosis whether the condition is likely to last for long enough to qualify and the protection of the Law will apply from that point.

Some other jurisdictions do not define disability within their discrimination legislation and of those that do, only a few limit disability by reference to the time an impairment has existed or is expected to exist. Of 8 jurisdictions found where disability is qualified by reference to time, only the UK includes a 12 month period. Austria, the USA, Germany and Liechtenstein specify 6 months. The others refer to 'permanent' (Sweden), 'permanent or indefinite' (Cyprus), or do not specify what long term means (Estonia).

Addiction

"Since addiction is a medical matter, treated with medical treatment and gaining ground as being seen as a disease why then is it that it is considered to be left out?" (James Deane)

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

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

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

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

Other comments on the definition

Why are only some of the UK exemptions to the definition of disability being included rather than all of them? Are hayfever, voyeurism, and exhibitionism different in Jersey from the UK? (Professor Claire de Than, Institute of Law, Jersey)

"We would also suggest that Jersey should adopt the provisions of Regulation 6 of the Equality Act (Disability) Regulations 2010: "For the purposes of the Act, where a child under six years of age has an impairment which does not have a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities, the impairment is to be taken to have a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities where it would normally have that effect on the ability of a person aged 6 years or over to carry out normal day-to-day activities."" (Huw Thomas, Carey Olsen)

"If Jeresy's disability strategy is to be informed by the social model of disability, it should include developments of, and reactions to, the social model, which address neuro-divergence (1). For example, these developments understand Autism as not being an impairment, but as a way of being; Autism and other neuro-divergent ways of being are socially constructed as an impairment.. Therefore the definition should include the term 'neuro-divergence.'" (Mike Steel)

"Some at the JDP meeting questioned the phrase 'when taken together if more than one' as implying that more than one impairment was needed to be disabled. The Committee do not think this is necessarily unclear. We understood this to mean that any single impairment could 'qualify' for someone to be disabled, if severe enough, or a combination of impairments of lesser severity, taken together, could qualify. We are not law draftsmen, but perhaps that phrase could be reviewed." (Jersey Disability Partnership)

Outcomes

The Minister does not feel that there is a need to specifically exclude hayfever from the definition of disability. If a person experiences that condition to the extent that it hampers their ability to engage or participate in an activity and that person is discriminated against as a result, then there is no reason in principle why they should be excluded from protection. As for voyeurism and exhibitionism, it is not clear that these are impairments at all, nor how they could adversely affect someone's ability to engage or participate. It is not clear what scenarios the UK had in mind when excluding these 'conditions' but the Minister is not persuaded that there is any need for a similar provision in Jersey.

The reference to children under age 6 is necessary in the UK legislation because the definition focuses on day-to-day activities and children under age 6 are likely to have many day-day activities done for them. The Jersey definition is concerned with the potential for an impairment to adversely affect participation in an activity. Therefore, the Law will apply in so far as someone under the age of 6 experiences discrimination because of, or arising in consequence, of an impairment.

While the use of the term 'impairment' may be controversial for some, the term is still widely used by people with and without disabilities. Terms such as 'neuro-divergence' are not universally accepted and are the subject of continued debate. While, as acknowledged by the UN Convention, the concept of disability is a developing one, the Minister feels that the need for clarity and certainty is best served by retaining the vocabulary used in the proposed definition.

The Minister appreciates that the vocabulary used to describe disability is important and is keen that the definition is as inclusive as possible. What must be weighed against that is the need for clarity in determining who is protected by the Law and who is placed under legal obligations as a result. The Minister has decided to ask the Law Draftsman to review the phrase 'when taken together if more than one'.

2. Direct discrimination – more favourable treatment

Respondents were asked if they 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.

Good practice sometimes requires taking positive measures to support 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 arrangements allowing a disabled employee to work flexibly, or benefit from particular equipment.

Of the responses to the Minister's survey, 96 percent of respondents agreed with the proposed exception for more favourable treatment. Comments included the following;

> *"If such an extension were not in place it is likely to render disability as a protected characteristic unusable for the majority of those with disabilities, therefore rather hollow 'protection'."* (JACS)

> *"JET fully supports the exemption for favourable treatment it saves any confusion over what is and what isn't "positive action" which is the term used in the UK to enable this type of differentiation. We fully support the proposed wider provision that does not treat people with a disability as a homogenous group but recognises that all people are individuals and that different action may be required to meet their specific needs."* (Jersey Employment Trust)

> *"Again the UK focus on comparators creates unnecessary complexity. As the consultation paper puts it: " The equivalent Equality Act provision 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.""* (Unite the Union)

> *"It does depend on whether the more favourable treatment is a 'proportionate means of achieving a legitimate aim'. A concern is how does an employer determine whether someone is disabled and what is proportionate?"* (Representative of a group that supports people with a disability or condition)

"From personal experience I can say that specialised equipment has enabled me to keep my job." (Jennifer Stafford, Deputy-Chair of Sight Impaired Partnership Board)

"Disability awareness training needs to be part of any induction for a new job and in staff training. Every opportunity to use assistive technology must be explored and GST rated zero on all disability aids." (Peter Le Feuvre, Chairman of the dDeaf Partnership Board / Member of Sight Impaired Board)

"It is high time that the disabling aspects of the way that society is designed is recognised and ameliorated to make participation in society accessible for disabled people. This is a good move to bring in more talent, intelligence and perspectives into the endeavors of society." (James Deane)

"It would be good for dDeaf and hard of hearing and deaf blind (sight and hearing impaired) islanders to have improved access to all areas." (Senior Practitioner with dDeaf and hard of Hearing People)

"Better communication and hearing awareness needs to be shared so that needs are automatically met for dDeaf, hard of hearing and deafblind people." (Member of dDeaf Partnership Board)

"YES we agree. However, we think it does depend on whether the more favourable treatment is a 'proportionate means of achieving a legitimate aim'. Our concern is how does an employer determine whether someone is disabled and what is proportionate?" (Jersey Disability Partnership)

"While welcome, agreement is with reservations; the term 'more favourable treatment' is open to misinterpretation; treating people equally does not mean treating people 'more favourably', or treating everyone in the same way. The 'more favourable treatment' of Disabled people indicates that we require favourable treatment to remedy disadvantages, disadvantages which (in social model thinking) arise from societal barriers and disabling practices. Therefore the focus of change should be on removing disabling barriers and practices, not on Disabled people." (Mike Steel)

Outcomes
The exception for more favourable treatment will not need to be justified as a proportionate means of achieving a legitimate aim and is distinct from the existing provisions for positive action that apply to all of the protected characteristics. The provision accepts that 'removing disabling barriers and practices' would in terms of this law be capable of amounting to more favourable treatment on the grounds of a protected characteristic. The Minister does not want employers or businesses to feel concerned that in taking such steps there is a risk of a discrimination claim from someone who is not disabled, or from someone with a different disability.

For example, many employers will want to make special provision to ensure that they do not exclude disabled people from the recruitment process. This may involve guaranteeing an interview to disabled people who otherwise meet the requirements for the job. Without this exception such steps would amount to direct discrimination and would not necessarily fall within the scope of the existing positive action exception. The Minister is satisfied that this provision will help to ensure that appropriate measures can be taken to remove barriers that might otherwise be placed in the way of disabled people.

3. Direct discrimination – discrimination arising from a disability

Respondents were asked if they agree with the proposal that direct discrimination should include treating a disabled person unfavourably because of something arising in consequence of the persons' disability.

This extra measure has been included because the current protection against direct discrimination may be 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 is a fact which only arises because of his or her disability and so this should amount to direct discrimination, unless the unfavourable treatment is justified (a proportionate means of achieving a legitimate aim). The provision would apply only where the respondent knows or ought to have known of the person's disability.

Of the responses to the Minister's survey, 97 percent of respondents agreed that direct discrimination should include treating a disabled person unfavourably because of something arising in consequence of their disability. Comments included the following;

> *"YES we agree. Darren gave a good example about discriminating against a blind/visually impaired person with a guide dog, on the basis*

that no dogs were allowed at a venue, rather than discriminating against someone who is blind. In fact a lady at the JDP meeting had experienced exactly that form of discrimination in restaurants." (Jersey Disability Partnership)

"My personal experience as a guide dog owner means I certainly believe that I should not be discriminated against because I rely on my dog to take me to the places I need and want to go to." (Jennifer Stafford, Deputy-Chair of Sight Impaired Partnership Board)

"Of 12 respondents, 75% agree with this added protection of 'consequential discrimination'. Of those dissenting, concern was expressed that such protection gave individuals with a disability more favourable treatment than others…Of 11 respondents, 100% agree with the availability of a defence to consequential discrimination." (Law at Work)

"There is no description of what an employee is reasonably expected to know. Is the responsibility on the person to disclose their disability? Or is it that everyone is to ask/ request everyone else notice of before any relating or provision of service etc. o their disability?" (James Deane)

"The above would also presumably mean that for any new job advertised, the employer will need to request information as to whether a prospective employee has a disability, the employee may not wish to disclose their disability at this stage for fear of being discriminated against in the selection process. How would discrimination in the selection process be monitored and designed out?" (Gaby Deane)

"We understand that the reference to "something" is intended to be broad and capture, for example, where an individual is dismissed by reason of sickness absence but that sickness absence is caused due to a disability. That dismissal would amount to disability discrimination because the reason for dismissal was as a consequence of the disability. We are of the view that this test is positive in terms of its application. Although, its scope is likely to be wide." (Law firm)

"Yes and no. It is acknowledged that in certain circumstances continued absence from work related to disability may make it difficult for an employer to terminate employment. the onus on employers to ensure that any unfavourable treatment is proportionate may be a grey area and one which is impossible to justify. this could be alleviated by

requiring employers to undertake impact assessments." (Anonymous employer)

"I think it will be important to educate employers on the way they should apply these provisions to prevent confusion or misunderstandings on its application." (Anonymous advisor on employment matters)

"It may well be the consequences of, rather than the disability itself that may cause 'problems' as can be seen in the example above. Some consequences may not be as obvious as an assistance dog, but the consequence of having - say - diabetes means that regular sugar levels and medication need to be taken, this in turn may make overtime at short notice a problem; or an individual who has no outwardly visible signs of a disability but would require either a larger screen or larger font in order to complete tasks due to a visual impairment." (JACS)

"The test of "arising in consequence" of the persons' disability is preferable to the test under UK law in this context...Unite also accepts the provision that there will be no direct discrimination where the unfavourable treatment is a proportionate means of achieving a legitimate aim, including that 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. We also note that the provision is only intended to apply if the respondent knows or ought to have known of the person's disability." (Unite the Union)

Outcomes
This provision is an important part of the protection for disabled people and it mirrors the position in the UK. The Minister is satisfied that there is a clear need for the provision to apply only when the alleged discriminator knows of the individual's disability. Knowledge of the disability should lead to a consideration of how that might affect the way in which a disabled person participates in a particular activity. But without the requirement for that knowledge then almost any action could amount to disability. For example, if an employee failed to complete work quickly enough, that might lead to dismissal. However if the employer knew of a disability that might affect the pace of the employee's work then dismissal would only be lawful if it was a proportionate response. We cannot expect employers to avoid taking any disciplinary action because of a potential risk that any employee might be disabled.

The Law will not require anyone to disclose the fact that they are disabled at any stage in the recruitment process. However, if the disability is not

disclosed, it would be unfair to expect the employer to make adjustments in relation to any issues that might arise as a result.

The Minister notes from the consultation responses that there is some confusion over the scope of this provision and will ensure that appropriate guidance is published before the measure comes into force.

4. Indirect discrimination - reasonable adjustments

Respondents were asked if they agree that a failure to make reasonable adjustments for disabled people in three defined circumstances should be indirect discrimination under the Law. Much of the disadvantage suffered by disabled people is imposed by barriers and obstacles inadvertently placed in their way. The draft Regulations therefore extend the description of what constitutes indirect discrimination to include a duty to make reasonable adjustments in the following three sets of circumstances -

1. Where a provision, criterion or practice causes a disadvantage (e.g. a parking policy or a sickness absence policy)

2. Where the absence of an auxiliary aid causes a disadvantage (e.g. a hearing induction loop or information in alternative formats)

3. 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, factors will be taken into account such as the cost and the size of the business.

Of the responses to the Minister's survey, 91 percent of respondents agreed that a failure to make reasonable adjustments for disabled people should be indirect discrimination in the three defined circumstances. Comments included the following;

"A lack of such a provision would effectively be reduction in the amount of protection afforded under the legislation and therefore defeat the purpose for a significant number of individuals." (JACS)

"Although perhaps the States can support smaller employers with the cost of making these adjustments." (Anonymous individual)

"All public buildings should have Fire Alarms that are dDeaf friendly. They should also have high visibility edging to steps and uncluttered

corridors for ease of access and use by the sight impaired." (Peter Le Feuvre, Chairman of the dDeaf Partnership Board / Member of Sight Impaired Board)

"There are perhaps two parts to this. Firstly, what adjustments are available and, secondly, what adjustments will be 'reasonable'? What will be the criteria to test for reasonableness? The new Article 7A(9) gives useful guidance but not thresholds or tests for cost, effectiveness, practicality, resource availability and the nature or size of the business. The provision of free or low cost competent advice, or guidelines, will be key here, e.g. whether from JACS or Citizens Advice." (Representative of a group that supports people with a disability or condition)

"The issue was raised at the JDP meeting about what was reasonable if an employee had a disability (e.g. cataracts), which could be resolved by an operation, but the individual declined to have the appropriate medical treatment. Also at what point does the cost of 'more favourable treatment' make it unaffordable to the employer?" (Jersey Disability Partnership)

"The physical/built environment can often be a barrier which prevents people with a disability from playing a full part in the community. Experience shows that unless there is a Law in place, change will not necessarily happen. Social inclusion is critically important for all people, so this extension benefits the entire population - as does the Law as a whole." (Representative of a group that supports people with a disability or condition)

"It is important to emphasise as stated within the guidance for this consultation that the vast majority of reasonable adjustments can be made at either no or very low cost. In 2016 JET placed 208 people with a disability/ long term health condition into employment with no financial implication for the employer. Guidance for employers and service providers should be available on what and how reasonable adjustments can be made. In the employment situation JET would be more than willing to advise any employer of how barriers can be overcome within the work place." (Jersey Employment Trust)

"I agreee because being able to physically enter a building is not enough if the way a service is provided or lack of aids prevents access." (Anonymous individual)

"As stated before, provided that changes can be made easily in an environment. A lift might mean major structural alterations and might even be impossible. A blanket policy is not rational unless it takes account of circumstances.In respect of that, it will be interesting to see how the States themselves plan for the visitors gallery which is inaccessible to wheel chair users." (Tony Bellows)

"Article 7A (1) What constitutes 'substantial disadvantage'? How would disabled people understand this so as to be able to know it what they experience it?" (James Deane)

"Need to make sure that there is right awareness training and guidance in place. Not from a hearing perspective of what they think they might need if they were hearing impaired / deaf e.g. the experience and views are sought from the appropriate groups to reflect the diversity of needs." (dDeaf individuals as a group using British Sign Language)

"Housing do adjust premises for a disabled person in a wheelchair such as making doors wider, fitting ramps and adjusting the height of kitchen worktops etc. When you are deaf you have to rely on Charities to help you with a light bell so people outside your home are able to contact you. Door entry/phone entry systems are no good for a deaf person and it is expensive to convert these to work for deaf people. Landlords are so insensitive to a deaf persons needs and I can see many not wanting a deaf person to occupy their rented properties as a result. Housing are no exception." (Member of the deaf community)

"The old factors from the DDA 1995, s.18B as to reasonable adjustments have been inserted into the Draft Regulations, although they are no longer directly part of the comparable UK law and are now merely in the EHRC Code as factors which might be taken into account, not must. This blending of old and new approaches from UK source laws might not work well in practice, since the changes to UK law were deliberate and made as responses to particular developments.I would be interested in the reason behind the difference in the proposal." (Professor Claire de Than, Institute of Law, Jersey)

"In order for companies to thoroughly examine the full extent of necessary adjustment in the workplace, it is highly likely that professional opinions will be sought. For some small and medium sized organisations and charities, the cost of this assessment could be difficult to absorb. The Jersey Chamber of Commerce would suggest that the States of Jersey has a duty of care to help businesses and

organisations carry out this type of assessment. Therefore, in the same way that the Jersey Advisory and Conciliation Service (JACS) provides advice and templates on issues such as disciplinary matters, so too should the States provide procedures and assessment templates and guide notes, as to what is considered 'reasonable adjustment'." (Jersey Chamber of Commerce)

"Drawing on the definitions from the Equality Act 2010, "substantial" means more than minor or trivial. We would therefore suggest that it may be appropriate to include a definition of substantial disadvantage within the Disability Regulations to enable a comparative exercise to be carried out to determine whether a person has failed to make reasonable adjustments." (Law firm)

"The Royal Court, where jury trials are predominantly held at present, is a listed building and in many ways, is not susceptible to reconfiguration without changing the character of a historic building or at considerable expense…At present, if a person with a disability is served with a summons for Jury service, if they notify the Viscount's Department of their disability and ask to be released from the obligation to serve, the Viscount has an ability to grant them an exemption from service…If, however, once the Regulations have been introduced, a person with a disability did not seek exemption and wanted to serve as a juror there may be cases where it would be very difficult indeed to make sufficient adjustments to allow them to serve. ..Our concern is that we may not be able, in advance of a person being called to serve on a trial, to make adjustments within the relevant timescale." (Viscount)

"On the basis of the sample work JPH intends to further investigate the status of the buildings and spaces for which it is responsible to fully ascertain the condition of the portfolio and prioritise any works or moves that might be required to ensure appropriate accessibility to services and to employees. This will start with a formal programme of assessment during early / mid 2018…It is apparent that there may well be significant resource implications. Some buildings and places perform well on accessibility others require significant investment - easily into the millions of pounds - in order to provide appropriate arrangements. Limitations such as some of the buildings and places being Listed adds further complexities to the process. Once a fuller picture of the likely implications are available any required actions can be prioritised and an action plan which will cover a number of years can be formulated." (Jersey Property Holdings)

"By requiring that prior knowledge of a disability is needed to conclude that this provision has been breached, there is a somewhat bizarre implication that the discriminatory disadvantage caused by a PCP may not be required to be removed or avoided, if the employer or service provider maintains he didn't know of the disability." (Guernsey Disability Alliance)

Outcomes
To provide clarity, the Minister agrees that it would be helpful to define 'substantial' as meaning more than minor or trivial in relation to reasonable adjustments for people with disabilities where there is a substantial disadvantage.

A potential issue was identified in that the duty to make reasonable adjustments only arises when the employer or business knows of the individual's disability, but many of the adjustments necessary may need to be made before any claimant experiences the disadvantage. For example, some improvements in the accessibility of shops and businesses cannot simply be made when a disabled person attempts to gain access – they must be made in advance. Since the duty only arises when the employer or business knows of the individual's disability, it could be argued that it was not practicable to install a ramp with no advance notice.

There are some adjustments, however that any business could reasonably be expected to anticipate in order to ensure an appropriate level of accessibility. The Regulations will therefore be amended to specify that in considering the reasonableness of an adjustment, the Tribunal should have regard to the extent to which the business could reasonably have foreseen the need for the adjustment in question and the extent to which it would have been reasonable to have made the adjustment in advance of any particular person having need of it.

5. Indirect discrimination - reasonable adjustments – 2 years' notice

Respondents were asked if they agreed with the proposal to give 2 years' notice of the requirement to make reasonable adjustments where a physical feature of premises causes a disadvantage.

The consultation paper noted that many reasonable adjustments can be made at very little cost and with relatively little effort. However, a duty to make alterations to the physical features of a workplace or other premises is more onerous and so we proposed that the requirement to make adjustments to physical premises should not come into force until 1 September 2020 to give businesses time to plan any changes that may be needed.

Of the responses to the Minister's survey, 84 percent of respondents agreed with the proposal to give 2 years' notice. Comments included the following;

> *"This gives an opportunity for such adjustments to be made over this period without rushing things through or being exposed to the risk of claims, by having 'the adjustment' clause in from day one."* (JACS)

> *"I have always strongly supported a period of 'reasonable adjustment' for the Charities and Discrimination laws. I believe 2 years is a minimum and would not wish to see that period reduced."* (Representative of a group that supports people with a disability or condition)

> *"I agree but it would be better if the notice period was 12 months."* (Anonymous service provider)

> *"A target is a good idea, as are the resources to ensure it is 'policed'."* (Representative of a group that supports people with a disability or condition)

> *"I think large businesses and services can afford to make necessary changes sooner than this."* (Jennifer Stafford, Deputy-Chair of Sight Impaired Partnership Board)

> *"Building work cannot always be done immediately*." (Anonymous individual)

> *"It would seem fair that service providers should have time to make significant alterations particularly where planning approval would be required. However there are some circumstances where the physical adjustment is very minor and it would not be unreasonable for providers to undertake this minor adjustment immediately."* (Jersey Employment Trust)

> *"I believe should be longer, at least 3 years, as some works may will need to be scheduled when least disruptive to a business and when finances available."* (Anonymous employer)

> *"A longer period and funding should also be put in place."* (Anonymous employer)

"A premises should be required to publish the necessary adjustments outstanding to assist those with a disability in making plans in the interim." (Anonymous individual)

"Impossible to adjust some premises.....what then?" (Anonymous employer)

"Not all physical features are difficult to change, if it's handrails, a ramp etc these are simple but physical things that should just be done." (Anonymous employee)

"Some of these changes will be costly, and smaller businesses might not have the available funds to make changes that might only be used frequently, if at all." (Anonymous individual)

"Adequate time should be allowed in the case of introducing physical changes to the premises in order to provide these reasonable adjustments." (Paul St John Turner)

"Discussions at the consultation event showed that people felt the 2020 deadline should be increased to allow businesses more time to make these adjustments. Whilst I do sympathise with this point of view, I would not wish it to be extended by too long. As also discussed businesses have been aware of this for some time and I think the relevant word here is REASONABLE. I would also hope that the disabled community will also be reasonable and not expect small business to make expensive changes outside of their financial and trading ability." (Lesley Bratch)

"Some adjustments do not require structural / physical changes. Some involve a change in cultural approach and change of attitude through awareness of needs such as loop systems, subtitled presentations / training materials." (Senior Practitioner with dDeaf and hard of Hearing People)

"I would suggest that in relation to the changes to be made to buildings to make adequate adaptations for the disabled – that if a longer timespan is given for this work to be carried out – i.e. five years rather than the proposed two years, you shall need to make a stipulation that there should be proof that a business has this work in hand/under way." (Gaye Hitchen)

"For structural and physical adjustments this may be more relevant. For some things simple adjustments can make a big difference such

as set up of furniture, lighting, non-reflective glass at reception desks, quiet / break out areas. Loop systems, fire alarms, other options that allow dorp in that does not rely on spoken intercoms." (Member of dDeaf Partnership Board)

"From the uk experience, there are still many premises which do not comply. ~Our aim should be to ensure that as many premises as possible can comply. 2 years should be extended to 5 to enable phased compliance and minimised opportunities to avoid compliance." (Anonymous employer)

"If free help, as outlined above is available via a multi-agency approach, involving experts from the Planning and Building Control Departments along with Health & Social Services, then a period of two years may be a sufficient timescale." (Jersey Chamber of Commerce)

"Of 11 respondents, 64% reported that two years was an insufficient lead in time. Dissenting respondents felt two years was insufficient time to take the pre-requisite steps to renovations (i.e. obtaining specialist medical advice as regards the individual and construction advice as regards the premises inc.: landlord approval; planning permissions; cost quotations; budget commitments; sourcing a building contractor and scheduling works to accommodate new construction laws). Others cited the 'state of Jersey construction industry' and envisage the difficulty of obtaining a contractor in the local market as warranting more time." (Law at Work)

"We are of the view that the proposal to give a two-year transitional period in relation to the physical features of premises is appropriate. We would strongly recommend that in that time appropriate statutory guidance is formulated to provide guidance to those responsible for premises. We would recommend that a longer transitional period be granted in respect of employment in domestic dwellings." (Huw Thomas, Carey Olsen)

"We believe 2 years is a minimum and would not wish to see that period reduced…Our concern on having only a two year period is that it is likely to be insufficient if significant building works, for example, are required. It is not just a question of drawing up plans and obtaining the necessary planning permissions; for charities is may be necessary to raise funds to pay for 'adjustments' and this can take several months or a year or so, depending on the amount." (Jersey Disability Partnership)

"Although the Strategic Housing Unit believes that the proposed legislative provisions around 'reasonable adjustments' are a positive obligation, we note there may be concern from the industry with regard to the practical application of this requirement. Whilst alterations such as the installation of a handrail in a residential property can be made at little cost and with relatively little effort, a duty to make large-scale alterations to a property are more demanding and some properties might not easily lend themselves to such alterations. The Strategic Housing Unit, therefore, accepts that the requirement should not come into force until 1st September 2020, which will provide landlords and managing agents with a period of time to factor such potential costs into their business models." (Strategic Housing Unit)

"Whilst fully supporting the Disability Strategy and recognising the central role that the Regulations will play in supporting individuals when they believe they have experienced discrimination the timescale for them coming into effect – September 2020 – would be extremely challenging for JPH to complete the assessments and any necessary works, alterations or relocation of services. Whilst committing to progress the programme of assessments, a coming into force date of September 2021 at the earliest – a minimum of 1 extra year to the timescale as proposed in the consultation – may enable more of the programme to be completed." (Jersey Property Holdings)

Outcomes
Although there was some concern expressed about a two year implementation period it should be remembered that this period will only begin to run from September 2018. Businesses need not wait to make the necessary preparations and many will have been looking at this issue for some time already.

On balance, the Minister feels that the two-year transition period is adequate given the preparation time that businesses have already had. It was always made clear that disability would be a matter that would be covered by the Discrimination Law and so the need to make premises accessible has been known for some years now. In any event, the duty is only to do what is reasonable. If businesses have genuinely not had time to make the necessary changes, then that is a matter that the Tribunal will be entitled to take into account.

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 following five exceptions that are specific to disability discrimination were proposed.

6. Exceptions - school admissions

Respondents were asked if they 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.

Of the responses to the Minister's survey, 85 percent of respondents agreed with the proposed exception. Comments included the following;

"I have struggled with this, based on having an autistic son. Often the ability of an autistic child can be very strong in areas such as maths, and much less strong in, for instance, English. I believe therefore this exemption gives a school an ability to discriminate where a child meets or very comfortably exceeds the academic standards in nearly all subjects, and as such School will need to set very clear guidance, where fore instance a child has comfortably exceeded an average mark but failed in one or a few areas. Secondly, I am concerned that where extra time is given for exams, a School will be aware of additional needs ahead of determining whether a standard is met, and this could lead to some bias entering the decision process." (Anonymous individual)

"I believe that children with dyslexia and Aspergers should be provided with teaching styles and tools aligned to their brain function. They can be highly intelligent students with the potential to achieve academic excellence." (Anonymous employee)

"It is important that the institution shows they have made any reasonable adjustment to ensure the disability has not impaired the results of e.g. selection tests/interviews. A disability may mean that the individual needs additional support to evidence their academic ability." (Anonymous individual)

"A child must be able to cope academically in whichever school they are in." (Anonymous individual)

"This would be a dis-service to pupils with disabilities as their individual needs are unlikely to be fully met. Furthermore where there is an expected

academic entry level for schools it would not just be pupils with a disability that were unable to meet the relevant criteria." (JACS)

"It is in the interests of pupils of all ability levels that they be placed in schools or school streams appropriate for their level of ability. Mismatches in this respect can give rise to undue stress for both pupils and teachers, and impair educational performance." (Paul St John Turner)

"It needs to be agreed by another independent organisation. some dDeaf and hard of hearing students need adjustments in schools / colleges etc to meet their needs and this shouldn't be confused with them not having ability." (dDeaf individuals as a group using British Sign Language)

"This proposal seeks to continue the segregation and misunderstanding of disabled people in Jersey. If children when they are growing up don't socialise with and have friendly relations with disabled people they don't see disability as normal and acceptable." (James Deane)

"JET cannot see the need for such an exemption. This should be covered by the generic principle that it is not unlawful to set genuine criteria / standards if it is "a proportionate means of achieving a legitimate aim"To be legitimate, the aim of the provision, criterion or practice must be legal and non-discriminatory and must relate to a reasonable need on the part of the education provider.Even if the aim is legitimate, the means of achieving it must be proportionate. This means that the measure or actions taken to achieve the aim are appropriate and necessary. Whether something is proportionate in the circumstances will be a question of fact and involve weighing up the discriminatory impact of the action against the reasons for it, and asking if there is any other way of achieving the aim." (Jersey Employment Trust)

"We do not agree with this exception as this could prevent children and young people with specific difficulties accessing education which reasonable adjustments could otherwise make accessible and enable them to fulfil their full potential." (National Education Union – NUT Section, South West Region)
"Unite members have experience of children with relatively severe disabilities entering main stream classrooms, to the benefit of the disabled and non-disabled pupils and to societies greater understanding of the issues associated with disablement. We also consider this exception undermines the strategy and outcome expressed." (Unite the Union)

"Some dDeaf and hard of hearing students need adjustments in schools / colleges etc to meet their needs and this shouldn't be confused with them not having ability.There needs to be a standardised, fair and independent

assessment of a person's ability so that they are not excluded from achieving their best potential. Some dDeaf and hard of hearing people need the right support to gain their best potential this is not just good acoustic conditions, hearing aids and additional personal assistive equipment but human resources such as notetakers, communication support and translation." (Senior Practitioner with dDeaf and hard of Hearing People)

"Members of the GDA have diverse views about the merits or otherwise of selective education systems and we are therefore unable to offer a consensus view about excluding a student from a school on the basis of ability or disability. However, the GDA is generally committed to ensuring that people with disabilities are not excluded from the general education system." (Guernsey Disability Alliance)

"No. This proposal, if enacted, would by definition result in segregated education, contravening the following article of the CRPD; Article 24.2a – Education." (Mike Steel)

"YES we agree. The explanatory note in the consultation document, Section 5, first bullet point, is helpful, but is not carried forward into the regulations. We understand that the legal terminology in the regulations may mean the same thing, but again we would hope such guidance and examples in the consultation document are not 'lost' once the law is agreed by the States." (Jersey Disability Partnership)

Outcomes
It is important to appreciate the limited nature of this exception. It does not allow schools in general to discriminate on the grounds of disability, as some of the concerns suggest. It applies only in relation to selection – and only when the school has selection criteria based on aptitude or ability. The exception only applies to the application of those selection criteria that are aimed at selecting pupils of high aptitude or ability and there will be a duty to make reasonable adjustments in the way in which those criteria are applied. For example, if there is an entrance exam, then adjustments may be needed to ensure that the exam is conducted in an accessible way, without compromising the level of ability or aptitude required. The Minister considers that the exception was generally supported and intends to retain it as drafted.

7. Exceptions - financial and insurance services

Respondents were asked if they 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.

The exception would allow providers of insurance and financial services to continue to use disability as a factor in assessing risk, calculating premiums and benefits and charging for their products, only if it is reasonable to do so based on statistics and actuarial data from a source on which it is reasonable to rely. Similar exceptions already exist in relation to the protected characteristics of race, sex and age.

Of the responses to the Minister's survey, 86 percent of respondents agreed with the proposed exception. Comments from respondents included the following;

> *"The use of statistical/actuarial data is used across other protected characteristics, therefore is appropriate to have the same exception for disability as well."* (JACS)
>
> *"It seems appropriate that the cost of these arrangements should reflect the risks and costs involved in providing them."* (Paul St John Turner)
>
> *"It would be reasonable because this is how the premiums are arrived at."* (Anonymous individual)
>
> *"Provided the risk is demonstrable."* (Anonymous employer)
>
> *"With protection in place to ensure that statistics and actuarial data is fair and unbiased. i.e. not only from a hearing perspective but from a deaf perspective."* (Member of dDeaf Partnership Board)
>
> *"I am not sure. I do not want to see insurance premiums preventing someone doing an activity that they are capable of doing. Unless this exception was tightly defined it could be used as an unintended get out."* (Peter Le Feuvre, Chairman of the dDeaf Partnership Board/Member of Sight Impaired Board)
>
> *"There is a need to educate the Insurance sector about the nature and consequence of disability - ie to teach what can as well as what cannot be done by someone living with a disability. I am thinking of opportunity to work for example."* (Representative of a group that supports people with a disability or condition)
>
> *"It needs to be clear what these might be so disabled people are aware of these and can understand why this may be an exemption. Sometimes for example dDeaf people feel that they are discriminated against as the assumption that they do not have some functional*

hearing that puts them close to being able to experience the world as close to a hearing person when they have functioning hearing aids. It needs to be visible and transparent what these rules / exemptions are." (Senior Practitioner with dDeaf and hard of Hearing People)

"It should be the case that for any insurance where disability is relevant that the States provide the insurance, when justice and fairness would best be served, but if not there should be no exception that penalises citizens of Jersey in relation to insurance companies as a result of a disability that is no fault of their own." (Unite the Union)

"No. This proposal, if enacted, could contravene the following article of the CRPD; Article 28 – Adequate standard of living and social protection." (Mike Steel)

"Jersey should follow the Uk equality act on this provision where insurance providers are not allowed to have blanket or general policies of refusing to provide insurance or only providing insurance on certain terms, to disabled people. This would be unlawful discrimination under the Equality Act. The insurance company is allowed to charge a higher premium under the Equality Act but only if they can show that there's a greater risk in insuring you because of your disability. They would have to base their decision on your actual health condition and objective information about condition." (Jersey Employment Trust)

Outcomes
The responses generally indicate that it is appropriate to include an exception so that disability can be taken into account in the provision of financial and insurance services. The Discrimination Law already provides exceptions relating to financial and insurance services in relation to race, sex and age. In terms of the provision of a service, any less favourable treatment must be reasonable having regard to the relevant statistical information available to the service provider. The Minister intends to retain the exception to provide certainty in the provision of these services.

8. Exceptions - sport and competitions

Respondents were asked if they 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, e.g. the Paralympic rules.

Of the responses to the Minister's survey, 92 percent agreed with the exception. Comments from respondents included the following;

"In non competitive sport any disabled person should be able to join in. International sporting organisations should be required to look at the feasibility of disabled people taking up the sport and find a way of including them." (Peter Le Feuvre, Chairman of the dDeaf Partnership Board/Member of Sight Impaired Board)

"This exception is also used for other protected characteristics therefore appropriate to include it under disability as well, to do otherwise is likely to place Jersey at a disadvantage especially when competing at international/national level." (JACS)

"In general principle we believe that :-It should be unlawful for sports clubs to treat disabled people less favourably for a reason related to their disability Sports clubs should be required to make reasonable adjustments for disabled people such as providing extra help, specialist training for coaches or making changes to the way in which they provide their services Sports clubs should also have to make reasonable adjustments to the physical features of their premises in order to overcome physical barriers to access." (Jersey Employment Trust)

"The exception is too wide. There may be many instances in which those with a measure of disability wish to compete, but there is no justification for denying the opportunity." (Unite the Union)

"Qualified yes. However, any exclusions from sporting clubs or activities should be objectively justified." (Guernsey Disability Alliance)

"dDeaf people can be placed in-between disabled and non-disabled groupings e.g. they are not eligible to compete in the Paralympics on dDeafness alone." (Senior Practitioner with dDeaf and hard of Hearing People)

"Not as currently worded. This proposal, if enacted, would not fully meet requirements of the following article of the CRPD; 30.5 – Participation in cultural life, recreation, leisure and sport." (Mike Steel)

"This should be positive discrimination as well – i.e. for disabled people to be able to engage in sports adapted for their needs. This may mean exclusive as well as inclusive sports." (Member of dDeaf Partnership Board)

"Yes and no. Providing the rules of international sporting organisations demonstrate that discrimination risk has been evaluated and treated

appropriately. It is not enough to rely on n organisation's reputation and standing which does not demonstrate compliance." (Anonymous employer)

Outcomes
There is general support for the proposal and it makes sense to include this exception. The Discrimination Law already provides exceptions relating to sport and competitions in relation to race, sex, gender reassignment and age.

9. Exceptions - passenger transport services

Respondents were asked if they 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. The consultation paper noted that these services would be separately regulated by the Infrastructure Minister.

Of the responses to the Minister's survey, 57 percent agreed with the exception. This was the lowest level of support for any of the proposals. Comments from respondents included the following;

"Qualified yes. Whilst the GDA is in favour of reducing reliance on individual complaint in tackling systemic discrimination by introducing regulations concerning accessibility standards, it could be a mistake to remove the possibility of complaint under the Jersey Discrimination Law unless it was clear that this only removed the possibility of individual complaint regarding the design of vehicles and systems expressly caught by the regulations." (Guernsey Disability Alliance)

"This seems to refer only to a failure to make reasonable adjustments. Perhaps we have misunderstood, but although we can understand that a taxi, for example, could not take a passenger in a wheelchair unless the driver has a wheelchair accessible vehicle, it would also seem to exempt refusal to take any disabled passenger, almost at the whim of the driver, e.g. someone with a visual, hearing, or speech impairment, or other physical or mental impairment, even if the disabled person carries a 'connect-card', or similar, explaining their disability and the assistance they might need." (Jersey Disability Partnership)

"No. This proposal, if enacted, would contravene the following articles of the UN-CRPD, Article 9.1a – Accessibility Article 20 – Personal mobility." (Mike Steel)

"Yes - already regulated to this standard." (Nikki Withe, HR & Training and Community Manager, LibertyBus)

"I have said yes but I think the cost implications need to be considered and the viability in relation to wheelchair users on public transport if an group needed access to the bus at the same time." (Anonymous employment adviser)

"If access is to be improved transport companies should comply and be assisted for doing so." (Anonymous employer)

"Not every taxi needs to be Wheelchair friendly, but there needs to be a reasonable number available. I believe that buses should be Wheelchair friendly. Vehicles need to have various heights of seats and hand grips for varying conditions." (Peter Le Feuvre, Chairman of the dDeaf Partnership Board/Member of Sight Impaired Board)

"We should perhaps consider a sliding scale of what is reasonable, e.g, a taxi company with a fleet if 20 vehicles should surely have 1-2 vehicles with capabilities to take wheelchairs and support people with disabilities." (Anonymous employee)

"I do not think transport vehicles (i.e. busses, taxis & aeroplanes) should be exempt. Why should a disabled person have to wait much longer in a taxi queue just for the right type of taxi to become available? I think all transport services should be able to cater for the disabled." (Anonymous individual)

"I believe this should not be excluded and left to another minister. It should be in this act and hire vehicles and transport may be made available." (Anonymous individual)

"I am not sure how this is different to e.g. shops having to have ramps in place or a newly built house has to have doorways suitable for a wheelchair." (Anonymous individual)

"Separate regulation needs to be amended in parallel." (Representative of a group that supports people with a disability or condition)

"JET is of the view that people with disability should expect to have accessibility on public transport and therefore believes statutory provisions should be present in local discrimination legislation (as in the UK) and not a matter for wider public transport policies. Movement

around Jersey by people with disabilities, reduced mobility or certain health conditions can be fundamental to them accessing services or maintaining employment...the UK the accessibility requirements for buses and coaches are set out in the public service vehicles accessibility regulations 2000 which came into force in August 2000. Under this legislation, all buses must have been accessible by 1 January 2017 and all coaches by 1 January 2020. (Jersey Employment Trust)

"The separate regulations by the Infrastructure Minister would seem more appropriate." (Paul St John Turner)

"Loop systems in cabs would be useful. better understanding and awareness of invisible disabilities and how to communicate and support needs to be there as well." (dDeaf individuals as a group using British Sign Language)

"The proposed exemption would discriminate against disabled people and would bring Jersey into disrepute by doing so. I submit that it would be to the detriment of a disabled person if a vehicle used to carry passengers laid on (by say a club or society) were to be inaccessible." (James Deane)

"It may be that individual passenger transport or private hire does not need to be accessible for every disability e.g. wheelchair users, but does need to make adjustments for the invisible disabilities and those that are not just about wheelchair users." (Member of dDeaf Partnership Board)

"The Infrastructure Minister should be involved, but there is sense in the relevant laws being found in one place." (Professor Claire de Than, Institute of Law, Jersey)

"Only if "These services would be separately [and effectively] regulated by the Infrastructure Minister to ensure that vehicles are appropriately equipped to accommodate disabled users." (Unite the Union)

"Public transport is vital in enabling people with sight loss to live and work independently. Taxis and private hire vehicles (PHVs), and the door to door service they provide are particularly important for blind and partially sighted people, who are often unable to drive, and may have difficulties using other forms of public transport, such as buses. However, accessing taxis and PHVs can be a major challenge for assistance dog owners: A Guide Dogs survey found that 42% of

assistance dog owners were refused by a taxi or PHV driver in a one-year period because of their dog – despite this being a criminal offence under the Equality Act 2010.[1] Such access refusals can have a significant impact on assistance dog owners' lives, leading to feelings of anger and embarrassment and a loss of confidence and independence. We would recommend that people who operate public service vehicles do not have a blanket exception as proposed in the draft legislation, and that, as with UK law, specific appropriate exemptions (such as medical exemptions for taxi and PHV drivers who have a severe allergy to dog hair) are included in regulations. If the exemption is due to limitations on existing vehicles, such as vehicles that are unable to currently accommodate mobility aids such as wheelchairs, we would encourage the States of Jersey to ensure that complementary legislation is in place with the aim of requiring public service vehicles to meet accessibility standards within a reasonable timeframe. For example, the UK's Public Service Vehicle Accessibility Regulations (PSVAR) 2000 require bus operators to provide accessible vehicles, and gave sufficient time for operators to either modify or replace their vehicles. Similarly, provisions in the Equality Act 2010 concerning the carrying of wheelchairs by Taxis and PHVs also had a time-delay. Should the legislation be introduced as proposed in the consultation paper, with exemptions in the provision of passenger transport and for separate regulations to be introduced on this matter by the Infrastructure Minister, then a clear commitment on the timetable to consult on and publish these regulations should be made to ensure that the rights of assistance dog owners and other people with disabilities to use public transport are guaranteed." ('Guide Dogs')

Outcomes

The provision of accessible public transport is clearly an important factor in ensuring the participation of disabled people in society. The current exception is a very narrow exception because it only covers reasonable adjustments, which means that disabled passengers will be protected against both direct disability discrimination and also discrimination arising in consequence of a disability. The exception would not allow general discrimination against passengers on the grounds of disability, as some of the concerns suggest.

One example that arose in the consultation meetings was a taxi driver refusing to accommodate a guide dog. This would clearly be discrimination arising in consequence of a disability and the driver would be subject to the Law in the same way as a restaurant refusing admission for the same reason. If the driver is allergic to dogs, or has a profound fear of dogs, that might provide a defence of justification (a proportionate means of achieving a

legitimate aim). Rudeness towards disabled passengers or a refusal to provide them with appropriate assistance would be covered in the same way.

The only practical result of the exception is likely to be that a passenger could not insist that a disabled accessible car or bus is provided by the service provider. It seems appropriate that the provision of accessible vehicles (e.g. what percentage of buses and taxis in Jersey should be accessible) should be a matter for licensing and contract rather than the Discrimination Law, and this is already an issue that is being addressed.

The Infrastructure Department has advised that the bus route network was required to be 100% wheelchair-accessible from the start of the current bus operating contract (1 January 2013) and that this requirement will continue to be incorporated into the terms of future contracts. The Infrastructure Department has also specified requirements for taxis/cabs in the conditions of licence and minimum training standards for drivers. By 1 January 2019 all Public Rank and Private Hire taxi/cabs must be accessible, not necessarily fully wheelchair accessible, but with facilities such as swivel seats and slide-plates. On balance the Minister has decided to retain the exception as drafted.

10. Exceptions - Building Bye-laws

Respondents were asked if they 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.

Of the responses to the Minister's survey, 71 percent agreed with the exception. Comments from respondents included the following;

> *"Qualified yes – so long as the bye laws are not inherently and unjustifiably discriminatory."* (Guernsey Disability Alliance)
>
> *"But it should also be extended to cover businesses which cant make reasonable adjustments to buildings due to building by-law regulations."* (Anonymous 'other' respondent)
>
> *"I don't think that there should be building by-laws which put people in this position. They need to be reviewed and changed if necessary."* (Peter Le Feuvre, Chairman of the dDeaf Partnership Board/Member of Sight Impaired Board)
>
> *"Could carry high risk factors to not have to apply such by-laws."* (JACS)

"I believe By-laws should be updated and that if that do not amend to accommodate disabled individuals, that the by-law should be over-ruled in that case." (Anonymous individual)

"Not as worded. This proposal, if enacted as currently described, risks not meeting the following articles of the UN-CRPD, Article 9.1a – Accessibility Article 20 – Personal mobility." (Mike Steel)

"This depends on how reasonable the by-laws are doesn't it?" (Anonymous individual)

"Sometimes safety in a situation has to override ease of access." (Anonymous individual)

"Are there are other laws which could take precedence over the Disability law? E.g. Health and Safety legislation?" (Representative of a group that supports people with a disability or condition)

"Whilst the concept of a party being protected from sanctions under discrimination legislation as a result of them complying with restrictions imposed under the planning and building law (and its associated bye-law legislation)seems rational, JET feels such an approach detracts from the concept of "reasonableness" which will be present elsewhere in the discrimination legislation. For example, where proposals for a ramp or other accessibility aid are put forward by an employer and rejected by a States Authority should a duty be placed on the parties to re-examine the issue with a view to making reasonable adjustments to the development plan which would provide for accessibility and inclusion." (Jersey Employment Trust)

"Only if there is a commitment expressed in legislation to review building by-laws that are cited in any defence with a view to promoting the rights of those with disabilities." (Unite the Union)

"Any such building bye laws should, however, be subject to review for reasonableness in this context." (Paul St John Turner)

"Hopefully as building by-laws evolve the number of instances where this might arise will reduce." (Representative of a group that supports people with a disability or condition)

"Not sure that this is acceptable on the basis that not all alterations require structural changes. It would be beneficial if there were disabled people representation as a group where their experience gives them

an expertise to share to look at how building by-laws and planning can be better suited to include disabled people's needs. Their perspective and pragmatism will be different than a non-disabled, hearing or sighted or cognitive able person would understand any access or barrier challenges to access." (Senior Practitioner with dDeaf and hard of Hearing People)

"The by-laws should not provide a mechanism to side step the requirements to provide reasonable adjustments." (Anonymous employer)

Outcomes
The proposed exception is not a mechanism to side-step the importance of providing accessible premises. It provides that an act of what would otherwise be disability discrimination will not be unlawful if it arises from compliance with the Building Bye-laws (Jersey) 2007. For example, a person wishes to install a ramp but, in order to be built at an appropriate gradient for wheelchair users, the length of the ramp would mean that it encroaches on to a public highway which would not be permitted and so in order to comply with the Building Bye-laws, the person could not build a ramp. This particular failure to make a reasonable adjustment would not amount to unlawful discrimination under the Regulations as drafted.

Very detailed technical guidelines issued under the Building Bye-laws (Jersey) 2007 [4] on 'Access to and use of public buildings' already incorporate UK best practice on the accessibility of buildings. They draw from British Standard BS 8300:2001 'Design of buildings and their approaches to meet the needs of disabled people – Code of practice', although the guidelines no longer refer to disabled people in order to foster a more inclusive approach to meet the needs of all people.

11. Exceptions – Other exceptions

Respondents were asked if there are any other circumstances in which an exception should be provided that has not been covered in the draft exceptions. The Minister wants to ensure that the introduction of protection against disability discrimination does not lead to unintended consequences that limit the legitimate activities of businesses, organisations, or individuals in Jersey.

Of the responses to the Minister's survey, 27 percent said that there are other circumstances in which an exception should be provided.

[4] www.gov.je/PlanningBuilding/LawsRegs/Technical/Pages/08AccessToUseBuildings.aspx

Comments from respondents included the following;

> *"Three respondents contended for an exemption for small businesses. One argued small employers should be wholly exempt but did not propose criteria for defining small employers (Anon., Finance/Legal, 10 employees). Two other respondents suggested the number of employees should determine when a business is small, suggesting 10 and 12 respectively (Anon., Finance/Legal 150 employees) and (Anon., Hotel/ Restaurant/ Bars, 10 employees). In contrast, another respondent felt local companies have known for a decade that this law was to come into force and should already have made provision (Anon., Transport, storage and communications, 13 employees)."* (Law at Work)

> *"The only addition which should be considered might arise on the repeal of the general exemption for selection in respect of domestic employment. If this proposal is adopted, it may be appropriate to consider a exemption from the positive duty to make reasonable adjustments in relation to domestic employment. However, this should be carefully considered."* (Huw Thomas, Carey Olsen)

> *"Particular attention should be given to listed or historical buildings where modification is either impractical, for technical or financial reasons, or where modification may despoil the characteristic features of the building."* (Representative of an historic building that is used by people of mixed ability)

> *"There may be health and safety grounds for being unable to provide a service or employ someone:- eg scuba diving, horse riding, scaffold workers, etc."* (Anonymous 'other' respondent)

> *"All dental surgery staff must be fit and able to give CPR to a collapsed patient. Staff disability is inappropiate in a surgery."* (Anonymous employer)

> *"Size of business should be top priority in considering whether it is possible to employ people with disabilities and risk of continued sickness be allowed as s consideration."* (Anonymous employer)

Outcomes
A number of comments were provided in response to this question. However, rather than being matters for inclusion as additional exceptions, some of the suggestions were matters for the Tribunal to decide in the particular circumstances of the case. For example, if an employer requires employees

to be able to perform CPR, then the question might arise as to whether that is a proportionate requirement given the size of the business and the number of other employees who might be available if needed. It is not possible to legislate for every possible eventuality that might arise.

Similarly, it is highly unlikely that the Tribunal would require a householder to make adjustments to his or her home to accommodate a disabled domestic servant. There may be circumstances, however, where the home is very large and has separate servant quarters where an adjustment might be an appropriate step to take.

The Minister does not intend to include an exception for small businesses. Such an exception does not exist in relation to any of the other protected characteristics. If such an exception were to be included, it is not clear how it would be defined (e.g. by number of employees, square footage, or profits?)

As for historic buildings, the Tribunal will of course take into account any restrictions placed on alterations to a property because of its listed status or historical character. If an adjustment is not permitted by the law then it cannot be unreasonable to refuse to make it. Where an alteration would be legally permitted, but would be undesirable because of the impact that it would have on the character of the premises and other peoples' enjoyment of it, then that will be a matter for the Tribunal to take into account.

It was noted following consultation that an exception will be required so that an act of discrimination is not prohibited by the Law if it is done further to a States policy or a Ministerial decision that applies criteria for the purposes of

(a) promoting employment or other opportunities for disabled people; or
(b) providing access to facilities and services for disabled people.

For example, the Social Security 'access to work' pilot scheme which will provide disabled people with grant funding for aids or equipment to enable them to start, return to, or remain in their place of work. A scheme such as this should be able to set criteria relating to budget, resources and scope. Similar exceptions already apply in relation to race and age.

12. Exceptions - domestic service

Respondents were asked if any issues or problems would arise if the general exception for domestic service was removed from the current Law.

The draft Regulations would remove from the Discrimination Law the existing 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 decided to review the exception. 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.

Of the responses to the Minister's survey, 38% said that issues or problems would arise if the general exception for domestic service was removed from the current Law. Comments from respondents included the following;

> *"We fully support the rationale for removing this exception. However, we can see that it may be cause for concern for domestic employers particularly in relation to certain roles."* (Law firm)
>
> *"No. The proposal to remove the exception for domestic service is a welcome step towards preventing exploitation of domestic workers."* (Mike Steel)
>
> *"No – we need to work to best practice and if UK has already removed due to issues we should do so too."* (Nikki Withe, HR & Training and Community Manager, LibertyBus)
>
> *"There have been several cases in the media (UK) in respect of abuse and exploitation of domestic employment therefore any possible 'loop hole' should be removed in order to prevent such acts occurring in Jersey."* (JACS)
>
> *"I think this is not black and white. If a cleaner became disabled, and therefore unable to clean a private house adequately, I don't necessarily think the employer should have to keep the cleaner on. I don't think this is the same as bigger business and larger companies.Maybe there is another way around this - i.e. a specific type of insurance cover, or centrally funded pot?"* (Anonymous individual)
>
> *"It is important that domestic workers are included in the law. Although this involves private households they are still employees and should be protected."* (Anonymous individual)
>
> *"The selection of, say, a cleaner or gardener seems to me to be a very personal thing largely about intrusion into family life. I do not see how the average householder could be expected to make adjustments to*

suit a range of disabilities." (Representative of a group that supports people with a disability or condition)

"A domestic home can't be expected to make accommodations such as changing its access routes for example for disabled applicant that would be unfair." (Anonymous employer)

"All employees, domestic or commercial should be covered and governed by the same laws. A domestic employee must have the same rights and someone doing the same job in a commercial environment." (Anonymous employer)

"JET full supports the removal of this exemption to protect those people who are employed within domestic settings." (Jersey Employment Trust)

"More consideration needs to be given to this. A live-in in nanny is very different from a part time cleaner. One is in a situation where they can be abused or exploited, the other can simply leave the job.It also opens up a can of worms with regard to making a workplace environment suitable. While a business may need to take steps, even if at some expense, it cannot be right to force home owners to if disciminating against on grounds of a disability which would impede the ability to work.For instance, I would expect a Parish Hall to have a hearing loop. I cannot expect a home owner to have to install one." (Tony Bellows)

"This exception should be maintained for domestic service in respect of recruitment and retention, but not in other respects. This is in recognition of the more intimate nature of such employment, and also it would seem disproportionate to expect domestic employers to meet the "reasonable adjustments" which would otherwise be required." (Paul St John Turner)

"For the reasons stated that: "…cases in the UK have shown that domestic servants can be particularly vulnerable to abuse and exploitation. We believe that excluding domestic workers from the scope of the Discrimination Law can no longer be justified. "Unfortunately, domestic workers are vulnerable, even in the States of Jersey, not least because they are working within private household arrangements. "Modern slavery" is also an issue throughout the world." (Unite the Union)

"These arguments were settled in the UK and many other jurisdictions a long time ago. Jersey would violate various principles of international

law by having such an exemption." (Professor Claire de Than, Institute of Law, Jersey)

Outcomes
On balance, the Minister has decided that excluding domestic workers from the scope of the Discrimination Law can no longer be justified. The Minister is confident that if the issue of reasonable adjustments were to arise, the Tribunal would accept that in most cases it is highly unlikely to be reasonable to expect a home owner to make physical alterations to their home in order to accommodate a disabled domestic worker.

13. Other comments

A number of additional comments were received on matters outside of the remit of this consultation, including suggestions relating to the following;

Compensation award – "*I disagree fundamentally with the Payout Limit being set at a mere £10,000 where Discrimination has been proved. What happens to a person who was once gainfully employed and loses their employment because of an Impairment. A reinstatement of employment would be a much more appropriate outcome or Compensation commensurate with that person's relative earning if they are unable to find alternative employment."* (Aindre Reece-Sheerin, Reece-Sheerin Partners)

Multiple grounds of discrimination – *"The UN Convention calls for attention to the effect of discrimination which occurs on the basis of multiple grounds or characteristics: In particular, to how such discrimination may affect women and children. For example, disabled women may be subject to a set of stereotypes and assumptions not shared either by disabled men or by women in general (intersectional discrimination). The GDA recommends that the effects of combined, intersectional and compound discrimination should be considered within the Jersey Discrimination Law."* (Guernsey Disability Alliance)

Pre-employment questionnaires – *"The GDA believes that the Law should restrict the use of pre-employment questionnaires to matters concerning genuine occupational requirements."* (Guernsey Disability Alliance) and *"I note that the draft regulation do not address the asking of health related questions (sg s60 of the Equality Act). Is this deliberate?"* (Huw Thomas, Carey Olsen)

Carers – *"The draft regulations do not appear to offer protection against disability related discrimination experienced by carers and other associates of disabled people."* (Guernsey Disability Alliance) and *"We suggest that*

provision against discrimination of informal home carers in the work place should also be covered in the new law." (Jersey Disability Partnership)

Compensation award – The consultation did not seek comments on the current maximum level of compensation that may be awarded by the Tribunal and the Minister does not propose to amend the level of compensation at this time. The matter is likely to be consulted on in future. It should be remembered that someone who is dismissed because of their disability is likely to qualify for unfair dismissal compensation (up to 6 months' pay) as well as compensation for discrimination.

Multiple grounds of discrimination – The Discrimination Law already takes account of this. There is no question of someone losing the right to claim discrimination simply because the discrimination is based on more than one protected characteristic.

Pre-employment questionnaires – The requirement in the UK to not ask questions about a job applicant's health is a matter which is separate from the provisions of the Equality Act that deal with discrimination. It is a free-standing requirement that is enforced through the Equality and Human Rights Commission. Such a provision would be outside the scope of Regulations extending Jersey's Discrimination Law to new protected characteristics. However, if there is evidence that disabled people are, despite these Regulations, being disproportionately sifted out of a recruitment procedures then the Minister may review the position.

Carers – Anybody subjected to less favourable treatment **because of** disability is protected against direct discrimination – including the carer of a disabled person. However, as in the UK, being a carer is not in itself a protected characteristic. Carers who are employees also have employment rights including the right to request flexible working and protection against unfair dismissal.