

# STATES OF JERSEY



## **DRAFT DISCRIMINATION (SEX AND RELATED CHARACTERISTICS) (JERSEY) REGULATIONS 201-**

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**Lodged au Greffe on 21st April 2015  
by the Minister for Social Security**

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**STATES GREFFE**





Jersey

# **DRAFT DISCRIMINATION (SEX AND RELATED CHARACTERISTICS) (JERSEY) REGULATIONS 201-**

## **REPORT**

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### **PART 1 – INTRODUCTION**

The Draft Discrimination (Sex and Related Characteristics) (Jersey) Regulations 201- (the “draft Regulations”) would introduce into the existing Discrimination (Jersey) Law 2013 (the “Discrimination Law”) 4 new protected characteristics – sex, sexual orientation, gender reassignment and pregnancy and maternity.

In order to appreciate the effect of the draft Regulations, they should be read within the context of the Discrimination Law itself, which came into force on 1st September 2014 and provides a framework for protection against discrimination. The Discrimination Law describes what constitutes discrimination, the areas in which the Law applies and the remedies that are available from the Employment and Discrimination Tribunal (“the Tribunal”). Race was included as the first protected characteristic within Schedule 1.

The draft Regulations would primarily amend the Schedules to the Discrimination Law to add the 4 new protected characteristics and to make provision for appropriate exceptions. The best way to appreciate the effect of the draft Regulations is to see the new characteristics and the exceptions as they will appear within the context of Schedules 1 and 2. A consolidated version of the Discrimination Law<sup>1</sup> is therefore provided to assist States Members during the debate. Part 3 of this report describes the characteristics and the exceptions in more detail.

### **PART 2 – THE DISCRIMINATION LAW**

The framework of the Discrimination Law will apply in the same way to the new characteristics as it does to race. This means that the same concepts will apply – direct discrimination, indirect discrimination, victimisation and harassment<sup>2</sup>.

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<sup>1</sup> The consolidated version of the Discrimination Law has been published for guidance only and does not purport to be a definitive version of the revised Discrimination Law as it would be amended by this Proposition.

<sup>2</sup> Articles 6, 7, 27 and 28 of the Discrimination Law.

### **Direct discrimination**

A person **directly** discriminates against another person if he or she treats that person less favourably than another person has been (or would be) treated because of a particular characteristic. For example, refusing to employ a woman in a senior role because the employer believes that the job is better suited to a man would amount to direct discrimination.

### **Indirect discrimination**

In broad terms, indirect discrimination occurs when an apparently neutral practice causes an unjustified disadvantage to people who share a protected characteristic. A person **indirectly** discriminates against another person where they apply a 'provision, criterion or practice' which causes a particular disadvantage both to the individual claimant and also to people who share a protected characteristic with that individual.

Importantly – and in contrast to direct discrimination – there is a defence if the respondent can show that the 'provision, criterion or practice' is a proportionate means of achieving a legitimate aim. For example, an employer who insists on an employee working long and unsocial hours may indirectly discriminate against women who, on average, are more likely than men to have caring responsibilities that would conflict with such a requirement. An individual woman could therefore bring an indirect discrimination claim if she was forced to leave her job because her responsibilities prevented her from working those hours. The issue would be whether the employer could show that the requirement was justified. If the employer could show why the work needed to be organised in that way, then the claim is likely to fail. However, if the employer could reasonably have accommodated the employee's need to work different hours to look after her family, then the claim is likely to succeed.

### **Victimisation**

The Discrimination Law protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result. For example, an employee who is dismissed because he queries whether a promotion decision was based on sex will be able to complain of victimisation as if the dismissal were itself an act of discrimination.

### **Harassment**

Harassment involves unwanted conduct which relates to a protected characteristic. A wide variety of conduct can amount to harassment, the test being whether it violates the dignity of the victim or creates an intimidating, hostile, degrading, humiliating or offensive environment. For example, an employee claims to have been regularly subjected to 'gay jokes'. This could amount to harassment if the employee was genuinely and reasonably offended by them, but if the employer were to produce several e-mails where the employee told such jokes himself, the Tribunal might find that there was nothing to indicate that this amounted to unwanted conduct or that the employee was genuinely offended by them.

Acts of discrimination on grounds of sex, sexual orientation, gender reassignment and pregnancy and maternity will be prohibited in the same wide range of areas in which race discrimination is currently prohibited –

1. Paid work including recruitment, the terms on which employment is offered and the termination of employment (Articles 9 and 10).
2. Contract workers (Article 11).
3. Partnerships (Article 12).
4. Professional or trade organizations (Article 13).
5. Professional bodies (Article 14).
6. Vocational training (Article 15).
7. Employment agencies (Article 16).
8. Voluntary work (Articles 17 to 20).
9. Education (Article 21).
10. Goods, facilities and services (Article 22).
11. Access to and use of public premises (Article 23).
12. Disposal or management of premises, e.g. letting property (Article 24).
13. Clubs and associations (Article 25).

The existing enforcement and remedies that are set out in the Discrimination Law will also apply to the new protected characteristics. If both parties agree, complaints will be referred for conciliation by the Jersey Advisory and Conciliation Service or mediation via the Community Mediation Service. Where a complaint proceeds to the Tribunal, the complainant will need to demonstrate that, on the balance of probabilities, he or she has been discriminated against. If the Tribunal finds that a complaint has been proved, it may –

- (i) make an order declaring the rights of the complainant and the respondent;
- (ii) order compensation of up to £10,000 for any loss suffered (including up to £5,000 for hurt and distress); and
- (iii) recommend that the respondent takes certain action to reduce the adverse effect of the act of discrimination on the particular complainant.

### **PART 3 – THE DRAFT REGULATIONS**

The draft Regulations have been developed and refined following consultation with stakeholders during 2014 and 2015<sup>3</sup>.

#### **The protected characteristics**

Four new protected characteristics will be added to the Discrimination Law<sup>4</sup>: sex, sexual orientation, gender reassignment and pregnancy and maternity.

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<sup>3</sup> see Appendix 3 to this report and the White Paper –

[www.gov.je/Government/Consultations/Pages/SexDiscriminationLawConsultation.aspx](http://www.gov.je/Government/Consultations/Pages/SexDiscriminationLawConsultation.aspx)

<sup>4</sup> Regulation 7 inserts the 4 new protected characteristics into the Discrimination Law by adding paragraphs 3 to 6 into Schedule 1.

## **1. Sex**

Sex includes being a man, a woman or a person with intersex status. People who share the characteristic are people of the same sex, for example, men share the characteristic with men. Intersex status is a recognised biological condition which is defined in the draft Regulations.

It will be unlawful to discriminate against a man, a woman or a person who has intersex status in relation to recruitment, promotion, treatment at work or any of the other circumstances in which discrimination is prohibited in relation to race. Sexual harassment will also be specifically prohibited. Sex discrimination in relation to pay will be treated as an act of discrimination under the Discrimination Law in the same way that discrimination in relation to pay on grounds of race is already present in the Discrimination Law. This means that it will be unlawful to pay a woman less than a man (or vice versa) because of sex, and unfair pay practices which place women (or men) at a particular disadvantage will also be outlawed.

Extending the Discrimination Law to cover the protected characteristic of sex will help Jersey to achieve compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which is important for Jersey's international reputation.

## **2. Sexual orientation**

Sexual orientation is included as a protected characteristic to protect people against discrimination whatever their sexual orientation. A person's sexual orientation may be towards people of the same sex, people a different sex, or people of both the same sex and people of a different sex. People who share the characteristic are people of the same sexual orientation. This protection is unlikely to cause any practical difficulties in employment or in relation to non-work areas. Equivalent protection has existed in the UK since 2003, but has generated only a small number of tribunal claims. In the vast majority of cases, a service provider or employer, for example, will not know the sexual orientation of their customer or employee.

## **3. Gender reassignment**

Gender reassignment is included as a protected characteristic to remove uncertainty about the extent to which a transgender person would be protected by the characteristic of sex. People who share the characteristic are transgender people, for example, a transwoman and a transman both share the characteristic of gender reassignment. UK legislation introduced protection against discrimination on grounds of gender reassignment in 1993. As in the UK, the draft Regulations also provide that absences from work arising from the process of gender reassignment should be treated equally with absences arising from sickness or injury.

## **4. Pregnancy and maternity**

The Law will protect a woman against discrimination on the grounds that she is, has been, or may become pregnant, as well as the direct consequences of pregnancy, such as absence from work, or taking maternity leave. Essentially, any less favourable treatment on the grounds of pregnancy and maternity would amount to direct discrimination. There is also specific protection against discrimination in non-work-related areas based on the fact that a customer or service user is breastfeeding a baby.

### General exceptions

It is important that appropriate exceptions are made in the Discrimination Law for certain situations where treatment based on a protected characteristic is either justified, or occurs in circumstances where the law should not interfere.

The Discrimination Law currently provides 2 general exceptions that will apply to all of the protected characteristics, as well as a number of other exceptions that are specific to discrimination on grounds of race.

The Regulations would amend Schedule 2 of the Discrimination Law so that some of the existing exceptions for race would be extended to the new characteristics, as described in the table below.

Sch. 2 ref.	Exception	Description/purpose of exception
para. 2A	<b>National security</b>	This extends the existing exception for national security to the new characteristics. The exception ensures that it would not be an act of discrimination to do anything which would be justified on the grounds of safeguarding national security. Examples are likely to be rare, but could arise, for example, in the context of security vetting for work in an airport.
para. 2B	<b>Positive action</b>	<p>This is a new exception that will apply to all of the protected characteristics. It ensures that a person does not commit an act of discrimination where they reasonably think that a particular act will alleviate any disadvantage experienced by people who share a protected characteristic, reduce their under-representation in certain activities, or meet their particular needs. It will, for example, allow training to be targeted at women or men to better position them to gain certain types of employment.</p> <p>Any positive action measures must be a proportionate way of achieving the relevant aim. An employer will not be permitted to base the final recruitment or promotion decision on a protected characteristic (for example, choosing a female candidate because they want a better male/female balance in the office). The exception does not require or allow particular quotas based on protected characteristics.</p>
para. 2C	<b>Charities</b>	This is a new exception that will apply to all of the protected characteristics. It will allow charities to provide benefits to people who share the same protected characteristic if this is in line with their charitable instrument and if it is objectively justified, or to prevent or compensate for disadvantage. For example, the Women's Institute is a charity that is permitted to provide educational opportunities only to women. The exception also provides that a charity may restrict participation in activities to promote or support the charity to people who meet a certain requirement, e.g. participation in a race to raise awareness of testicular cancer may be restricted to men.

<b>Sch. 2 ref.</b>	<b>Exception</b>	<b>Description/purpose of exception</b>
para. 2D	<b>Clubs</b>	This extends the existing exception for clubs to the new characteristics. The exception ensures that clubs are not acting unlawfully where their main purpose is to bring together people who share a protected characteristic and the people mainly enjoying the benefits of the club share that characteristic. For example, the Whiteley Association would not be discriminating in limiting its membership to women because it is an association designed to provide networking opportunities for professional businesswomen in Jersey.
para. 2E	<b>Pre-selection by agency</b>	This extends the existing exception to the new characteristics. This exception provides that discrimination in the pre-selection of job candidates by an employment agency is not prohibited if prospective employers could themselves lawfully discriminate on those grounds if they had been selecting candidates for a vacancy. For example, the employer needs to employ a woman because the particular job requires intimate physical searches of other women.
para. 2F	<b>Selection for domestic employment</b>	This extends the existing exception for domestic employment to the new characteristics. The exception ensures that a person may discriminate when selecting staff to undertake domestic work within their own home, including domestic work that involves childcare or personal care for an adult <sup>5</sup> . The Discrimination Law is not intended to intrude on the private and domestic arrangements made by individuals in their own households. However, this is a limited exception which applies to recruitment decisions only, and it does not extend to the treatment that employees receive. For example, sexual harassment of domestic staff will be unlawful in exactly the same way as for any other employee.
para. 2G	<b>Genuine occupational requirement</b>	This extends the existing exception for occupational requirements to the new characteristics. There may be some roles which, because of the particular nature of the duties or the context in which work is done, can only be done by a person with a particular protected characteristic. For example, an organisation that is specifically aimed at the lesbian community may insist that their outreach worker must be a woman whose sexual orientation is towards people of the same sex. This will not be unlawful, provided the requirement is a proportionate one in all the circumstances.

<sup>5</sup> The draft exception was revised following consultation with the Health and Social Security Scrutiny Panel to ensure that 'domestic duties' would specifically include the provision of personal care for an adult.



<b>Sch. 2 ref.</b>	<b>Exception</b>	<b>Description/purpose of exception</b>
para. 2H	<b>Vocational training</b>	This extends the existing exception for vocational training to the new characteristics. It removes a potential overlap by providing that the prohibition on discrimination in the provision of vocational training does not apply where the provisions of the Law relating to recruitment, employment and education already apply. For example, since it would be lawful to discriminate in the appointment of a person to provide counselling services at the Women's Refuge, it would be lawful to discriminate in the provision of training to become such a counsellor.
para. 2I	<b>Provision of care in carer's home</b>	This extends the existing exception to the new characteristics. It ensures that people who provide care in their own home – including care for a child, an elderly person or a person requiring special care where that person is treated as a member of the family – may discriminate in the arrangements that are made for providing their services and their premises. For example, a couple may choose to foster only boys, or only children of a certain nationality.
para. 2J	<b>Disposal of premises</b>	This extends the existing exception to the new characteristics. The exception ensures that a person may discriminate when disposing privately of premises that they own and live in without advertising or using an estate agent. It also provides that a person may discriminate when disposing of small premises where that person, or their relative, lives in another part of the premises and the premises include shared facilities. <sup>6</sup> For example, where a person owns a 2 bedroom flat and one bedroom is occupied by her mother, the person may choose to rent the second bedroom only to another woman.

### **Exceptions specific to the new characteristics**

The Regulations also amend Schedule 2 of the Discrimination Law to introduce a number of exceptions that are specific to one or more of the new characteristics<sup>7</sup>.

<b>Sch. 2 ref.</b>	<b>Exception</b>	<b>Description/purpose of exception</b>
para. 15	<b>Single-sex schools</b>	This exception allows for the existence of single-sex schools and single-sex boarding at schools. It makes provision for the admission of small numbers of pupils of a different sex on an exceptional basis, or for certain classes, without changing the nature of the school from a single-sex school.

<sup>6</sup> The draft exception was revised following consultation with the Health and Social Security Scrutiny Panel to ensure that the definition of 'relative' would specifically include the relatives of the person's partner.

<sup>7</sup> Regulation 8 inserts the exceptions into Schedule 2.

Sch. 2 ref.	Exception	Description/purpose of exception
		For example, a boys' school which admits some girls to join 'A' level maths classes is not unlawfully discriminating if it refuses to admit girls to other 'A' level classes.
para. 16	<b>Single-sex services</b>	This exception allows for single-sex services in a wide range of circumstances. A service may be provided to people of one sex only, or may be provided separately and/or differently to people of a different sex if certain requirements are met. For example, if a single-sex service is more effective (e.g. a fathers' support group where men do not attend a parents' support group), if only one sex has a need for the service (e.g. post-natal classes for women), or if the service involves a high degree of physical contact (e.g. self-defence classes).
para. 17	<b>Segregation in religious services</b>	This is a limited exception that allows ministers of religion to provide separate and single-sex services, as well as different services or different treatment for people of different sexes, as long as this is done for religious purposes. For the exception to apply, the act must be done at a place used for those purposes, and it must be necessary to comply with the doctrines of the religion or to avoid conflict with a significant number of the religion's followers' strongly-held religious convictions. For example, a synagogue may require men and women to be seated in separate areas during religious services.
para. 18	<b>Recruitment to role in organised religion</b>	This is a limited exception so that, where a person is to be recruited for the purposes of an organised religion, the employer may apply a requirement to be of a particular sex, or not to be a transgender person, or to have a particular sexual orientation. This exception only applies if appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion or avoiding conflict with a significant number of the religion's followers' strongly-held religious convictions. In addition, the exception relates only to the recruitment of people who will be required to conduct religious services as part of their job, and it does not apply in recruitment to other roles associated with the religion (e.g. a caretaker or outreach worker).
para. 19	<b>Finance and insurance</b>	This exception allows those providing insurance and financial services to calculate different premiums and benefits for men and women if that is reasonable based on statistics and actuarial data. For example, an insurer may quote higher premiums for young men if this is based on data that justifies the differences.
para. 20	<b>Communal accommodation</b>	This exception allows communal accommodation to be restricted for the use of one sex only, as long as the accommodation is managed in a way that is as fair as

Sch. 2 ref.	Exception	Description/purpose of exception
		possible. This relates to residential accommodation, including dormitories or other shared sleeping accommodation that, for reasons of privacy, should only be used by people of the same sex. For example, a hostel providing shared bedrooms and bathrooms may restrict its residents to a single sex.
para. 21	<b>Sport and competitions</b>	For gender-affected sporting competitions, the exception permits separate events to be organised for men and for women. This applies where physical strength, stamina or physique are significant factors in determining success or failure, and people of one sex are at a comparative disadvantage. The participation of a transgender person in gender-affected sporting competitions may be restricted only if it is necessary to secure fair competition or the safety of competitors. In considering whether separate events should be organised for boys and girls, the age and stage of development of the children should be taken into account. For example, it would be lawful to organise separate swimming competitions for men and women, but not necessarily for boys and girls.
para. 22	<b>Pregnancy and maternity, health and safety risk</b>	The exception provides that suspending a pregnant woman from work or reassigning her to different duties for genuine health and safety reasons relating to her pregnancy or maternity will not amount to discrimination, as long as the employer would not have treated another employee (without the characteristic of pregnancy/maternity) more favourably. For example, a health and safety risk assessment determines that a radiographer is at risk during her pregnancy. She cannot be allocated to other duties and workplace changes cannot be made to reduce her exposure to ionizing radiation to acceptable levels. The woman is therefore suspended without pay for as long as necessary to protect her health and safety and that of the foetus. This is lawful as long as another employee (e.g. a woman who is not pregnant or a man) would not have been treated more favourably. If a man would have been suspended on full pay, for example, then that will be sex discrimination.
para. 23	<b>Pregnancy and maternity – recruiting to limited term contracts</b>	This provides a limited exception so that, where an employer is recruiting to a temporary position in which the employee will be required to complete a project within a limited timeframe, the employer can legitimately recruit somebody who will be available to work at the required time. It will not be an act of discrimination to refuse to recruit a woman whose period of maternity leave would restrict or prevent the completion of the project. For example, an employer is launching a new product and advertises a 6 month contract to provide marketing support in the lead-up to launch day. One of the candidates is

Sch. 2 ref.	Exception	Description/purpose of exception
		pregnant and her maternity leave period will span the last 4 months of the contract. It will not be an act of discrimination for the employer to refuse to employ her on that basis.
para. 24	<b>Maternity leave pay</b>	This provides an exception to ensure that an employer does not discriminate on grounds of pregnancy and maternity simply by providing a more generous contractual or discretionary sick pay policy than maternity pay policy. An employer may offer paid or unpaid maternity leave and sick leave as it chooses, as long as the statutory obligations surrounding maternity pay (2 weeks at full pay) are met.

### Other changes introduced by the draft Regulations

As well as inserting the new protected characteristics, exceptions and making the required associated amendments (such as adding the new definitions), the draft Regulations would make a small number of other changes to the Discrimination Law. These include –

- The provision dealing with clubs would be amended<sup>8</sup> to ensure that the original intention is met; that the Discrimination Law would apply to clubs with 25 or more members where membership of the club is regulated by rules and based on a selection process. The provision would also be extended to reflect the original intention that the guests of clubs should also be protected; so that a club must not discriminate against a person as to the terms on which they are prepared to invite or permit them to be invited as a guest, by not inviting, or not permitting them to be invited as a guest, in the way that they are afforded access to a benefit, facility or service, or by subjecting the guest to any other detriment.
- The provision for harassment would be extended to cover sexual harassment.<sup>9</sup> For example, an employee rejects the sexual advances of his manager, subsequently fails to secure a promotion and makes a complaint to the Tribunal on the basis that his rejection of his manager’s sexual advances is the reason for his failure to secure a promotion. The provision for harassment would also be amended to remove the requirement for unwanted conduct to be directed “towards a subject”. The provision was intended to be wider than it is currently, as it is in the UK, to include atmospheric discrimination such as sexually offensive calendars and screensavers in the workplace.
- Article 15 of the Gender Recognition (Jersey) Law 2010 would be removed by these Regulations<sup>10</sup> on the basis that an appropriate exception would be included instead in the Discrimination Law (Schedule 2, paragraph 21). The draft Regulations take the same approach as the UK; the equivalent Section 19 of the Gender Recognition Act 2004 was removed when the Equality Act 2010 was introduced with an exception for sporting competitions and gender reassignment.

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<sup>8</sup> Regulation 5

<sup>9</sup> Regulation 6

<sup>10</sup> Regulation 9

## **PART 4 – PREPARING FOR IMPLEMENTATION**

The draft Regulations would come into force on 1st September 2015, on the same date as the new family-friendly rights will be introduced into the Employment (Jersey) Law 2003.

### **Advice and training**

During the most recent consultation on the draft Regulations, a number of stakeholders highlighted the importance of providing guidance and training. It is vital that the legislation is properly understood and implemented. Where a discrimination issue relates to employment, JACS will provide the advisory service. Where a discrimination issue does not relate to employment, such as education, housing or services, an advisory service will be provided by CAB. Literature and training on general discrimination issues are already available, and detailed guidelines – with useful example scenarios – are available from JACS and CAB.

JACS has been providing public and in-house training on the principles of employment-related discrimination since 2008. During 2014, discrimination-related training was provided to 1,248 delegates. The public training course – ‘Discrimination in employment’ was attended by 172 delegates and, in addition, 38 JACS training sessions on discrimination were provided to businesses ‘in-house’, which were attended by 1,076 delegates. The Minister has allocated funds so that JACS can continue to provide its public discrimination law course at no cost to delegates during 2015.

### **Timetable for other protected characteristics**

Subject to the States adopting these draft Regulations, it is expected that further protected characteristics will continue to be introduced in a phased approach, to spread any potential administrative burden for employers, organisations and other individuals over a period of time, and to undertake public consultation at each stage. Protection against age discrimination is expected to be introduced in 2016, and protection against disability discrimination during 2017 to 2018. The proposed phasing takes into consideration the priorities determined by the States, including co-ordination with changes to the State pension age and the work of the Chief Minister’s Department in relation to a disability strategy for Jersey.

### **Financial and manpower implications**

**Policy development, advice, conciliation and enforcement** – For 2015, a budget of £168,550 is available, which includes the cost of the advisory, conciliation and mediation services provided by JACS and CAB, as well as the cost of providing an enforcement service via the Tribunal.

**States Human Resources** – Any work and associated costs that are required to review staff policies and provide staff training to support non-discriminatory behaviour will be undertaken as part of the ongoing Public Sector Reform programme. The potential cost of defending any discrimination complaints against the States in relation to the 4 new protected characteristics will be met from within existing resources. It is difficult to predict the potential and future costs of the Human Resources and Law Officers’ Departments’ time, particularly as there has not yet been a discrimination complaint to the Tribunal against the States Employment Board.

## APPENDIX 1 TO REPORT

### Other jurisdictions

#### The UK

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

Discrimination based on Sexual Orientation was first outlawed in employment cases by the Sexual Orientation Regulations 2003, and then extended to the provision of goods and services by the Equality Act 2006. The law is now contained within the Equality Act 2010, where sexual orientation is one of the 9 protected characteristics.

#### Isle of Man

The Isle of Man's Employment (Sex Discrimination) Act 2000 makes it unlawful to discriminate in employment on the grounds of a worker's sex, or because he or she is married, or because he or she is in a civil partnership.

An Equality Bill, based on the UK Equality Act, is being drafted in the Isle of Man, which is intended to deal with discrimination comprehensively across a range of protected characteristics, and would replace the existing assortment of laws and provisions that deal with discrimination.

#### Guernsey

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

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

Guernsey has dealt with few complaints of sex discrimination and even fewer that have been heard by the Employment and Discrimination Tribunal. Around 30 complaints included sex discrimination in the first 5 years of the legislation, and only 6 of those resulted in a tribunal hearing. If a complaint of discrimination is upheld by the tribunal, the award is based on 3 months' pay, or 6 months' pay if there has been a discriminatory dismissal.

### **International obligations**

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the UN General Assembly, and it was ratified by the UK in April 1986. CEDAW has not yet been extended to Jersey, and it is understood that one of the main reasons for this is the absence of sex discrimination legislation. By accepting the Convention, the States of Jersey would commit to taking measures to end discrimination against women in all forms, including –

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

## APPENDIX 2 TO REPORT

### Statistics and evidence

In the absence of legislation that prohibits discriminatory acts from taking place, it is difficult to assess the prevalence of discrimination in relation to sex, sexual orientation, gender reassignment or pregnancy and maternity. Without a legal benchmark against which behavioural standards can be assessed, and with no recourse to justice or compensation, acts of discrimination may not currently come to light. There is some evidence that discrimination occurs in Jersey, as summarised in the following.

#### *Jersey Annual Social Survey (JASS)*

The States of Jersey Statistics Unit included questions about discrimination in the 2012 JASS. A quarter (25%) of adults reported having been discriminated against in the previous 12 months. 9% of women and 2% of men reported having been discriminated against on the grounds of gender.

JASS 2014 explored people's attitudes towards pay at work, and specifically gender differences in pay and the impact of being a parent. Respondents were asked how much they agreed or disagreed with a statement, e.g. "In general, men earn more than women for doing the same work". Respondents were then asked how much they agreed or disagreed with a similar statement about their own workplace experience of the same issue, e.g. "In my place of work, men earn more than women for doing the same work".

Similar proportions of adults agreed (43%) and disagreed (38%) with the statement that 'in general, men earn more than women for doing the same work'. The same proportion of adults agreed (39%) and disagreed (39%) that 'it is easier for men to get jobs that pay well, even when women are as qualified for the job'. There were some differences by gender; women being more likely to agree with the statements about gender inequality at work, compared to men.

When similar questions were asked of respondents about their own workplaces, much smaller proportions of people agreed with the 2 statements; only 12% of adults felt that in their place of work men earned more than women for the same work (61% disagreed), and 14% agreed that it is easier for men to get jobs that pay well, even when women are as qualified for the job (65% disagreed). This suggests there may be a mismatch between people's general perception of gender inequality at work and what is currently being experienced by those who are actually in employment.

Over half (56%) of all adults agreed that 'being a working parent has an impact on pay or opportunities for a higher paid job', with this proportion rising to over two-thirds (68%) of those who were working parents. As with the statements around gender inequality, the proportions who agreed that 'in my place of work, being a working parent has an impact on pay or opportunities for a higher paid job' were lower than those who agreed with this statement 'in general', with just a quarter (24%) agreeing at some level, although this rose to a third (33%) for those who were working parents.



### ***Jersey Advisory and Conciliation Service (JACS)***

During the year 2014, JACS recorded 18 clients with issues relating to discrimination and equal pay in employment, and 94 clients with issues relating to maternity and family-friendly rights. In the first quarter of 2015, JACS has recorded 30 clients with issues relating to discrimination and equal pay in employment, and 40 clients with issues relating to maternity and family-friendly rights. Most of the 18 discrimination-related issues in 2014 related to race discrimination (11 issues), and only 2 issues related to sex discrimination; this likely to be because of the potential for a Tribunal complaint relating to race discrimination.

### ***Citizen's Advice Bureau (CAB)***

In the 6 month reporting period from 1st July to 31st December 2014, CAB recorded 21 clients that have requested and been provided with advice relating to discrimination in areas not related to employment (e.g. services provided to the Public). Most of the 21 requests in the 6 month period related to race discrimination (15 issues) and only 2 related to sex discrimination; this is likely to be because of the potential for a Tribunal complaint relating to race discrimination.

### ***Jersey Community Relations Trust (JCRT)***

In 2012, the JCRT released a report on the status of women in Jersey, which considered issues of inequality and discrimination affecting women. It highlighted the low representation of women in the States Assembly and other decision-making positions compared to the working population as a whole. The report noted that despite the high rate of female participation in paid employment in Jersey, women represent only 34% of managers, directors and senior officials. The JCRT<sup>11</sup> also noted that: *“women make up 83% of ‘caring, leisure and other service occupations’ and 78% of ‘administrative and secretarial occupations’. In the areas of ‘skilled trades’ and ‘process, plant and machine operatives’ women make up 6% and 5% of the workforce respectively. Such figures suggest that in Jersey society, stereotypical gender roles are overwhelmingly the norm, which can present constraints for women seeking entrance to certain sectors of the workforce.”*

### **Census 2011**

On census day 2011, 82% of the working age population was economically active (i.e. working or looking for work). 77% of working age women were economically active (slightly higher than in the 2001 census – 76%) compared to 81% of working age men. 44% of the economically inactive women of working age were looking after the home, compared with 3% of the economically inactive men. For all adults aged 16 or over (i.e. not just working age), the female economic activity rate in Jersey has increased substantially over the last 50 years, from 37% in 1961 to 61% in 2011, a rate higher than the equivalent recorded for the UK at that time (57%<sup>12</sup>).

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<sup>11</sup> Jersey Community Relations Trust Contribution to the Women's Resource Centre, CEDAW Shadow Report, submitted April 2012.

<sup>12</sup> Source: Office for National Statistics Labour Force Survey data February – April 2011.

## APPENDIX 3 TO REPORT

### Summary of the history of the development of protection against discrimination in Jersey

**1991 – 1993: Codes of Practice:** A number of Codes of Practice were introduced by the States and States Committees, dealing particularly with the issue of sex discrimination, sexual harassment and maternity rights, to establish guidelines and raise awareness of what amounted to acceptable practice.

**1998: Employment legislation:** In 1998, the former Employment and Social Security Committee issued the report, “Fair Play in the Workplace”, which consulted on a range of topics connected with the workplace, including discrimination. The research culminated in the Committee taking a proposal to the States on employment legislation (P.99/2000, adopted by the States, as amended, on 12th December 2000), which advocated that issues surrounding discrimination in the workplace should be dealt with through a separate all-encompassing discrimination law to be championed by the then Policy and Resources Committee.

**1999: Race Relations Working Party:** The former Legislation Committee established a Race Relations Working Party, which consulted on the issues of race relations and racial hatred in 1999.

**November 2000: Racial Discrimination Forum:** The Racial Discrimination Forum, led by the then Policy and Resources Committee, was established. Members were from the public and private sectors, and their work culminated in the States adopting a Proposition to set up the Jersey Community Relations Trust (P.120/2003 adopted by the States, as amended, on 20th January 2004).

**March 2002: Legislation Committee:** The Legislation Committee lodged a proposal for the preparation of a Race Discrimination Law (P.32/2002), based upon the recommendations of the Working Party (published as R.C.46/1999). On 14th May 2002, the States voted overwhelmingly in favour of the proposal. However, the Committee then reviewed the lack of legislation in Jersey aimed at eliminating discrimination on grounds other than race. It concluded that it would be desirable to take the opportunity to bring forward legislation that would promote not only the elimination of racial discrimination, but also, other forms of discrimination.

**2004: Jersey Advisory and Conciliation Service (JACS):** JACS was established as part of the phased development of employment legislation and opened in 2004. The service advises employers and employees on employment issues, including discrimination in employment.

**2005: Jersey Community Relations Trust (JCRT):** The JCRT was established in 2005. It aims to eliminate discrimination on any grounds and to encourage mutual respect among all people in the Island.

**July 2006: First consultation on the draft Law:** The Chief Minister’s Department consulted on draft legislation and proposed ‘race’ as the first protected characteristic in furtherance of the commitment made by the States in 2002. All of the 41 respondents were in favour of introducing a Law to protect against discrimination.

**2007: Ministerial responsibility:** Responsibility for the draft Law was transferred from the Chief Minister to the Minister for Home Affairs.

**September 2007: JCRT discrimination conference:** The JCRT held a major Island-wide conference on discrimination issues that was attended by nearly 300 people from a wide cross-section of the community. The conference revealed clear support for the introduction of discrimination legislation in Jersey.

**February – March 2008: Second consultation on draft legislation:** The former Minister for Home Affairs consulted on the changes that had been made to the draft legislation as a result of the 2006 consultation. Eight responses were received, which were generally of a technical nature relating to the terminology and application of the draft Law.

**March 2009: Enforcing the Law:** During discussions with stakeholders in 2008 about the most appropriate method of enforcing the Law, it was proposed that the Employment Tribunal should hear all discrimination complaints, not only those that are employment-related. This was proposed instead of options that would involve a Discrimination Panel and the Petty Debts Court, which could be confusing for users and potentially inconsistent.

**April – July 2010: Scrutiny:** The Minister for Home Affairs reviewed the draft Law and prepared a revised draft that included the protected characteristic of race (rather than being provided in separate Regulations). The draft Law was presented to the Education and Home Affairs Scrutiny Panel.

**2011: Funding:** The Home Affairs Department's budget for the draft legislation was agreed as a saving under the Comprehensive Spending Review, and so the draft was not progressed.

**July 2011: Ministerial responsibility:** The States adopted the Proposition "Discrimination Law and delay on pension reform" (P.118/2011), as amended by the Council of Ministers. Responsibility for discrimination legislation transferred to the Minister for Social Security, with sufficient funding allocated by the Minister for Treasury and Resources for implementation from 2013 and beyond.

**May 2012: Law drafting:** The Minister for Social Security reviewed the draft legislation prepared by the Home Affairs Department and submitted instructions to the Law Draftsman's Office to amend the draft. Law drafting continued during 2012.

**September – October 2012:** Consultation on a revised draft of the Law was undertaken with stakeholders, including representatives of the Tribunal, JACS, CAB, Chamber of Commerce and Institute of Directors. In view of the comments received, the Minister requested further amendments to the draft legislation.

**December 2012:** A draft Discrimination Law was presented to the Council of Ministers, Corporate Management Board and the Health, Social Security and Housing Scrutiny Panel.

**May 2013:** The Discrimination (Jersey) Law 2013 was adopted by the States of Jersey.

**October 2013:** The Discrimination Law was sanctioned by Order of Her Majesty in Council on 9th October and registered in the Royal Court on 18th October 2013.

**March 2014:** The States approved an Appointed Day Act on 18th March 2014 to bring the Discrimination Law into force on 1st September 2014 (*see* R&O.28/2014).

**March to May 2014:** A White Paper was issued to invite representations from stakeholders on the proposed scope of protection against discrimination on grounds of sex, which included policy issues such as; how to deal with discrimination and equality in pay systems, what characteristics should be protected and what exceptions should apply. The White Paper and a summary of the 152 written responses can be

found on the website<sup>13</sup>. The consultation outcomes helped to inform the policy decisions on which the Law drafting instructions were based.

**September 2014:** The Discrimination Law came into force, with race as the first protected characteristic.

**February to March 2015:** A wide range of relevant stakeholders and interested parties, including the Health and Social Services Scrutiny Panel, were asked to consider and comment on an early draft of the Discrimination (Sex and Related Characteristics) (Jersey) Regulations 201- so that the Minister could consider any representations before lodging the draft Regulations for debate by the States. Some detailed comments were received, as a result of which a number of improvements were made to the draft Regulations prior to lodging.

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<sup>13</sup> [www.gov.je/Government/Consultations/Pages/SexDiscriminationLawConsultation.aspx](http://www.gov.je/Government/Consultations/Pages/SexDiscriminationLawConsultation.aspx)

## Explanatory Note

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These Regulations amend the Discrimination (Jersey) Law 2013 (“the Law”) primarily so as to add the protected characteristics of sex, sexual orientation, gender reassignment and pregnancy and maternity as characteristics afforded protection by the Law.

*Regulation 1* provides for the Law to be amended by the remaining provisions.

*Regulation 2* inserts some new definitions, and amends an existing definition, to cross-refer to the relevant paragraph in Schedule 1 to the Law.

*Regulation 3* extends the provisions about what constitutes direct discrimination to matters relating to the protected characteristics added to the Law by these Regulations.

*Regulation 4* extends the provision dealing with indirect discrimination to cover the new protected characteristics (other than pregnancy and maternity).

*Regulation 5* amends the provision dealing with clubs to prohibit discrimination in relation to guests and to amend the definition of “club”.

*Regulation 6* extends the provision on harassment to cover unwarranted conduct of a sexual nature or that relates to sex, sexual orientation or gender reassignment.

*Regulation 7* amends Schedule 1 to the Law so as to add the new protected characteristics.

*Regulation 8* substantially adds to Schedule 2 of the Law which covers the exceptions to prohibited acts of discrimination. *Paragraph (2)* inserts paragraphs 2A to 2J, providing general exceptions in respect of national security, positive action, charities, clubs relating to persons who share a protected characteristic, pre-selection by an employment agency, selection for domestic employment or work, where there is a genuine occupational requirement for a person to have a protected characteristic, vocational training, the provision of care in a carer’s home and in relation to the disposal, etc. of premises. A number of these provisions currently apply to race only and are being extended to the new protected characteristics but the provisions relating to positive action and charities are new. *Paragraph (4)* adds a new Part 3 to the Schedule containing further exceptions specific to one or more of the new protected characteristics. These relate to admission to schools, single sex services, segregation in religious services, recruitment to a role in organised religion, financial and insurance arrangements, communal accommodation, sport and competitions, health and safety risk, recruiting to a limited-term contract and maternity pay.

*Regulation 9* repeals a provision of the Gender Recognition (Jersey) Law 2010 in the light of provision made by these Regulations.

*Regulation 10* names the Regulations and provides for them to come into force on 1st September 2015.





Jersey

## **DRAFT DISCRIMINATION (SEX AND RELATED CHARACTERISTICS) (JERSEY) REGULATIONS 201-**

### **Arrangement**

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#### **Regulation**

1	Amendment of the Discrimination (Jersey) Law 2013 .....	25
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3	Article 6 amended (direct discrimination).....	25
4	Article 7 amended (indirect discrimination) .....	26
5	Article 25 amended .....	27
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Jersey

## **DRAFT DISCRIMINATION (SEX AND RELATED CHARACTERISTICS) (JERSEY) REGULATIONS 201-**

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

**THE STATES**, in pursuance of Articles 1(2), 5 and 47 of the Discrimination (Jersey) Law 2013<sup>1</sup>, have made the following Regulations –

### **1 Amendment of the Discrimination (Jersey) Law 2013**

The Discrimination (Jersey) Law 2013<sup>2</sup> is amended in accordance with these Regulations.

### **2 Article 1 amended (definitions)**

In Article 1(1) –

- (a) after the definition “facilities” there shall be inserted the following definition –  
“ ‘gender reassignment’ shall be construed in accordance with paragraph 5 of Schedule 1;”;
- (b) in the definition “race” after the words “in accordance with” there shall be inserted the words “paragraph 2 of”;
- (c) after the definition “services” there shall be inserted the following definitions –  
“ ‘sex’ shall be construed in accordance with paragraph 3 of Schedule 1;  
‘sexual orientation’ shall be construed in accordance with paragraph 4 of Schedule 1;”.

### **3 Article 6 amended (direct discrimination)**

After Article 6(2) there shall be added the following paragraphs –

- “(3) In relation to the protected characteristic of sexual orientation direct discrimination includes treating people in a civil partnership less favourably than married people and vice versa.
- (4) In relation to the protected characteristic of gender reassignment, direct discrimination includes treating a transgender person’s absence from work because he or she is undergoing any part of the process mentioned in paragraph 5(2) of Schedule 1 less favourably than if the absence were due to sickness or injury.
- (5) In relation to the protected characteristics of pregnancy and maternity, for the purposes of Part 3 and 4 direct discrimination includes treating a woman less favourably (other than in relation to pay) because of –
- (a) any illness suffered by her as a result of the pregnancy during the protected period;
  - (b) her being on compulsory maternity leave;
  - (c) her exercising or seeking to exercise, the right to ordinary maternity leave.
- (6) For the purposes of paragraph (5) the protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends –
- (a) if she has the right to ordinary maternity leave, when her ordinary maternity leave ends or (if earlier) when she returns to work after the pregnancy; or
  - (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
- (7) In relation to the protected characteristics of pregnancy and maternity, for the purposes of Parts 3, 4 and 5 and where the subject is not a woman, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
- (8) In relation to the protected characteristic of maternity, for the purposes of Part 5, direct discrimination includes treating a woman who has given birth within the previous 26 weeks less favourably because she is breast feeding.
- (9) In this Article ‘compulsory maternity leave’, ‘compulsory maternity leave period’, ‘ordinary maternity leave’ and ‘ordinary maternity leave period’ have the same meaning as in Article 55A of the Employment (Jersey) Law 2003<sup>3</sup>.”.

#### 4 Article 7 amended (indirect discrimination)

- (1) In Article 7(1) and (2) for the words “protected characteristic” there shall be substituted the words “relevant protected characteristic”.
- (2) After Article 7(2) there shall be inserted the following paragraph –
 

“(2A) For the purposes of paragraph (2)(d) an employer’s long-term objective of reducing inequality in employment in respect of the

protected characteristics of race or sex is always to be regarded as a legitimate aim.”.

(3) After Article 7(3) there shall be added the following paragraph –

“(4) For the purposes of this Article the relevant protected characteristics are –

- (a) race;
- (b) sex;
- (c) sexual orientation;
- (d) gender reassignment.”.

## 5 Article 25 amended

For Article 25(3) and (4) there shall be substituted the following paragraphs –

“(3) A club, the committee of management of a club, or a member of the committee of management of a club, shall not discriminate against a person –

- (a) by refusing to invite, or not permitting the person to be invited, as a guest;
- (b) in the terms or conditions on which the club is prepared to invite, or permit the person to be invited, as a guest.

(4) A club, the committee of management of a club, or a member of the committee of management of a club, shall not discriminate against a guest it has invited or permitted to be invited (whether expressly or by implication) –

- (a) by denying the guest access, or limiting the guest’s access, to any benefit provided by the club; or
- (b) by subjecting the guest to any other detriment.

(5) For the purposes of this Law, ‘club’ means any association of persons, however described, whether or not incorporated and whether or not carried on for profit, other than one to which Article 13 or 19 applies –

- (a) that has at least 25 members; and
- (b) admission to membership of which is regulated by the club’s rules and involves a process of selection.

(6) The Minister may by Order amend the number in paragraph (5)(a).”.

## 6 Article 28 amended (harassment)

(1) In Article 28(2) the words “towards the subject” shall be deleted.

(2) After Article 28(2) there shall be inserted the following paragraphs –

“(2A) A person also harasses the subject if the person engages in unwanted conduct of a sexual nature and which has the purpose or effect referred to in paragraph (2)(a) or (b).

- (2B) A person also harasses the subject if –
- (a) the person or another person engages in unwanted conduct of a sexual nature or that is related to sex, sexual orientation or gender reassignment and which has the purpose or effect referred to in paragraph (2)(a) and (b); and
  - (b) because of the subject’s rejection of or submission to the conduct, the person treats the subject less favourably than the person would have done if the subject had not rejected or submitted to the conduct.”.

**7 Schedule 1 amended (protected characteristics added)**

After paragraph 2 of Schedule 1 there shall be added the following paragraphs –

**“3 Sex**

- (1) Sex is a protected characteristic.
- (2) In relation to the protected characteristic –
  - (a) a reference to a person who has that characteristic is a reference to a man, a woman or a person who has intersex status;
  - (b) a reference to persons who share the characteristic is a reference to persons who are of the same sex.
- (3) In this paragraph, a person has intersex status if the person has physical, chromosomal, hormonal or genetic features that are –
  - (a) neither wholly male or female;
  - (b) a combination of male or female; or
  - (c) neither male nor female.

**4 Sexual orientation**

- (1) Sexual orientation is a protected characteristic.
- (2) The protected characteristic refers to a person’s sexual orientation towards –
  - (a) people of the same sex as the person;
  - (b) people of a different sex from the person; or
  - (c) people of both the same sex as, and different from, the person.
- (3) In relation to the protected characteristic –
  - (a) a reference to a person who has that characteristic is a reference to a person who is of a particular sexual orientation;
  - (b) a reference to persons who share the characteristic is a reference to persons who are of the same sexual orientation.

**5 Gender reassignment**

- (1) Gender reassignment is a protected characteristic.
- (2) A person has the protected characteristic if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's gender by changing the person's physiological or other attributes that are associated with a particular gender.
- (3) A person who has the protected characteristic is known as a transgender person and persons who share the characteristic are known as transgender people.
- (4) A person is a transgender person whether or not the person has or intends to have any medical intervention in order to change any attributes that are associated with a particular gender.

**6 Pregnancy and maternity**

Pregnancy and maternity are protected characteristics.”.

**8 Schedule 2 amended (exceptions to prohibited acts)**

- (1) Schedule 2 is amended as follows.
- (2) In Part 1 after paragraph 2 there shall be inserted the following paragraphs –

**“2A National security**

An act of discrimination is not prohibited by this Law if it is done for the purpose of safeguarding national security, if the discrimination was justified by that purpose.

**2B Positive action**

- (1) An act of discrimination is not prohibited by this Law if it is a proportionate means of achieving an aim mentioned in subparagraph (2) because the person doing it reasonably thinks that –
  - (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic;
  - (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it; or
  - (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
- (2) The aims are –
  - (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage;
  - (b) meeting those needs; or

- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.
- (3) This paragraph does not apply to the treating of a person ('the subject') more favourably in the decision as to whom to recruit or promote in relation to employment.
- (4) In sub-paragraph (3) –
  - (a) 'recruit' means to offer employment to an individual as an employee, contract worker, voluntary worker or as a partner in a partnership;
  - (b) 'promote' means to offer employment to an individual as mentioned in clause (a) that is, in the context of the employer's business, more senior than the individual's current employment, whether or not accompanied by increased remuneration.

## 2C Charities

- (1) A person does not commit an act of discrimination prohibited by this Law only by restricting the provision of benefits to persons who share a protected characteristic if –
  - (a) the person acts in pursuance of a constitution; and
  - (b) the provision of the benefits is within sub-paragraph (2).
- (2) The provision of benefits is within this sub-paragraph if it is –
  - (a) a proportionate means of achieving a legitimate aim; or
  - (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.
- (3) If a constitution enables the provision of benefits to persons of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits –
  - (a) to persons of the class which results if the reference to colour is ignored; or
  - (b) if the original class is defined by reference only to colour, to persons generally.
- (4) It is not a contravention of Article 22 for a person, in relation to an activity that is carried on for the purpose of promoting or supporting a charity, to restrict participation in the activity to persons who share a protected characteristic.
- (5) The Commissioner does not contravene this Law only by exercising a function in relation to a charity in a manner which the Commissioner thinks is expedient in the interests of the charity, having regard to the constitution.
- (6) Sub-paragraph (1) does not apply to a contravention of Articles 9, 10, 11 or 16.
- (7) This paragraph does not apply to the protected characteristic of race in as far as it relates to colour.

- (8) In this paragraph –
- ‘charity’ means an entity that meets the charity test under Article 5 of the Charities (Jersey) Law 2014<sup>4</sup>;
- ‘Commissioner’ has the meaning assigned by Article 1 of that Law;
- ‘constitution’ has the meaning assigned by Article 2(4) of that Law.

## **2D Clubs restricted to persons who share a protected characteristic**

- (1) Article 25 shall not prohibit discrimination in relation to a club that has as its principal object providing benefits to people who share a protected characteristic by –
- (a) restricting its membership to those people;
  - (b) restricting the access by associates to a benefit, facility or service to those people; or
  - (c) allowing as guests only those people.
- (2) In deciding what the principal object of the club is for, regard shall be had to –
- (a) the essential character of the club;
  - (b) whether the people mainly enjoying the benefits of membership share the protected characteristic stated in the principal object; and
  - (c) any other relevant circumstance.
- (3) In respect of the protected characteristic of race sub-paragraph (1) does not apply if the persons who share a characteristic are described –
- (a) by reference to colour; or
  - (b) in a way that has the effect of excluding some members of that race on the basis of colour.

## **2E Pre-selection by employment agency**

- (1) An act of discrimination done by an employment agency, in selecting persons as suitable for a job vacancy, is not prohibited by this Law if it would not have been prohibited had it been done by the proposed employer.
- (2) It shall be sufficient, for the purposes of sub-paragraph (1), for an employment agency to prove –
- (a) that in so acting, it relied upon a statement made to it by the proposed employer that, by virtue of sub-paragraph (1), the act would not be prohibited; and
  - (b) that it was reasonable to rely upon the statement.

**2F Selection for domestic employment or work**

Articles 9(b) and 11(b) shall not prohibit a person discriminating against another person in connection with a position as an employee or contract worker where the duties of the position involve the performance of domestic duties (which may consist of the care of a person, whether adult or child) on premises where the first-mentioned person resides.

**2G Genuine occupational requirement**

- (1) A person (the 'relevant person') does not commit an act of discrimination to which this paragraph applies by applying in relation to work, a requirement for a person to have a protected characteristic, if the relevant person can show that, having regard to the nature or context of the work –
  - (a) it is an occupational requirement;
  - (b) the application of the requirement is a proportionate means of achieving a legitimate aim; and
  - (c) the person to whom the relevant person applies the requirement, does not meet it (or the relevant person has reasonable grounds for not being satisfied that the person meets it).
- (2) This paragraph applies to an act of discrimination prohibited by one or more of the following provisions –
  - (a) Article 9(a) and (b);
  - (b) Article 10(b) and (c);
  - (c) Article 11(b); and
  - (d) Article 12(1)(a) or (2)(a) or (3)(a) or (b).
- (3) The reference in sub-paragraph (1) to 'work' is a reference to employment, contract work or a position as a partner.
- (4) In the case of a requirement to be of a particular sex, sub-paragraph (1) has effect as if, in clause (c), the words from '(or' to the end of the clause were omitted.

**2H Vocational training**

Article 15 shall not prohibit an act which is prohibited by Articles 9, 10 or 21 or would be prohibited by any of those Articles but for the operation of this Schedule.

**2I Provision of care in carer's home**

Articles 22 and 24(1) shall not prohibit a person from discriminating against another person in the arrangements under which the first-mentioned person (whether or not for reward) takes into his or her home, and treats as members of his or her family, children, elderly persons or persons requiring a special degree of care.



**2J Disposal, etc. of premises**

- (1) Article 24 shall not prohibit the private disposal of premises by an owner occupier, and for the purposes of this paragraph –
  - (a) a disposal is a private disposal only if the owner-occupier does not –
    - (i) use the services of an estate agent for the purpose of disposing of the premises, or
    - (ii) publish (or cause to be published) an advertisement in connection with their disposal.
- (2) In sub-paragraph (1) –
  - (a) ‘estate agent’ means a person who, by way of profession or trade, provides services for the purpose of –
    - (i) finding premises for persons seeking them, or
    - (ii) assisting in the disposal of premises; and
  - (b) ‘owner-occupier’ means a person who, whether solely or jointly with another person –
    - (i) owns the premises, and
    - (ii) occupies the whole of them.
- (3) Article 24 shall not prohibit anything done by a person in relation to the disposal, occupation or management of part of small premises if –
  - (a) the person or a relative of that person resides, and intends to continue to reside, in another part of the premises; and
  - (b) the premises include parts (other than storage areas and means of access) shared with residents of the premises who are not members of the same household as the resident mentioned in sub-paragraph (3)(a).
- (4) Premises are small if –
  - (a) the only other persons occupying the accommodation occupied by the resident mentioned in sub-paragraph (3)(a) are members of the same household;
  - (b) the premises also include accommodation for at least one other household;
  - (c) the accommodation for each of those other households is let, or available for letting, on a separate tenancy or similar agreement; and
  - (d) the premises are not normally sufficient to accommodate more than 2 other households.
- (5) Premises are also small if they are not normally sufficient to provide residential accommodation for more than 6 persons (disregarding the resident mentioned in sub-paragraph (3)(a) and members of the same household).
- (6) ‘relative’ of the resident referred to in sub-paragraph (3)(a) means –

- (a) spouse or civil partner;
  - (b) partner;
  - (c) parent or grandparent;
  - (d) child or grandchild (whether or not legitimate);
  - (e) the spouse, civil partner or partner of a child or grandchild;
  - (f) brother or sister (whether of full blood or half-blood); or
  - (g) a person mentioned in clause (c), (d), (e) or (f) whose relationship is to the person mentioned in clause (a) or (b).
- (7) In sub-paragraph (6), a reference to a partner is a reference to the other member of a couple consisting of two people who are not married to, or civil partners of, each other but are living together as if they were.
- (8) The Minister may by Order amend sub-paragraph (4) or (5).
- (9) Article 24 shall not prohibit a person discriminating against another in connection with the disposal of premises by –
- (a) a religious body; or
  - (b) a charitable or voluntary body,
- to members who share the protected characteristic of race.
- (10) The exception in sub-paragraph (9), does not apply in relation to colour.”.
- (3) In Part 2 –
- (a) in paragraph 3 after the word “Law”, in paragraph 7(1) after the word “finance,” in paragraph 7(2) after the words “the subject,” in paragraph 10(1) after the words “an establishment in Jersey,” and in paragraph 10(3) after the word “applies,” there shall be inserted the words “so far as it relates to the protected characteristic of race,”;
  - (b) paragraphs 4, 5, 8, 9, 11, 12, 13 and 14 shall be deleted.
- (4) After Part 2 there shall be added the following Part –

### **“PART 3**

#### **EXCEPTIONS TO PROHIBITED ACTS: SEX AND RELATED CHARACTERISTICS**

##### **15 Sex: admission to schools**

- (1) Article 21(1), so far as relating to the protected characteristic of sex, does not apply in relation to –
- (a) a single-sex school; or
  - (b) admission as a boarder to a school to which this paragraph applies.
- (2) A single-sex school is a school that –
- (a) admits pupils of one sex only; or

- (b) on the basis of the assumption in sub-paragraph (3), would be taken to admit pupils of one sex only.
- (3) That assumption is that pupils of a different sex are to be disregarded if –
  - (a) their admission to the school is exceptional; or
  - (b) their numbers are comparatively small and their admission is confined to particular courses or classes.
- (4) In the case of a school that is a single-sex school by virtue of sub-paragraph (3)(b), Article 21(2)(a), so far as relating to the protected characteristic of sex, does not prohibit confining pupils of the same sex to particular courses or classes.
- (5) Article 21(2)(a), so far as it relates to the protected characteristic of sex, does not apply in relation to boarding facilities at a school to which this paragraph applies.
- (6) This paragraph applies to a school (other than a single-sex school) that has some pupils as boarders and others as non-boarders and which –
  - (a) admits as boarders pupils of one sex only; or
  - (b) on the basis of the assumption in sub-paragraph (7), would be taken to admit as boarders pupils of one sex only.
- (7) That assumption is that pupils of a different sex admitted as boarders are to be disregarded if their numbers are small compared to the numbers of other pupils admitted as boarders.

## **16 Sex: single sex services**

- (1) A person does not contravene Article 22, so far as it relates to the protected characteristic of sex, by providing separate services for persons of different sexes if –
  - (a) a joint service for people of different sexes would be less effective; and
  - (b) the limited provision is a proportionate means of achieving a legitimate aim.
- (2) A person does not contravene Article 22, so far as it relates to the protected characteristic of sex, by providing separate services differently for persons of different sexes if –
  - (a) a joint service for persons of different sexes would be less effective;
  - (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for different sexes; and
  - (c) the limited provision is a proportionate means of achieving a legitimate aim.

- (3) A person does not contravene Article 22, so far as it relates to the protected characteristic of sex, by providing a service only to persons of one sex if –
  - (a) any of the conditions in sub-paragraph (4) is satisfied; and
  - (b) the limited provision is a proportionate means of achieving a legitimate aim.
- (4) The conditions are that –
  - (a) only persons of that sex have need of the service;
  - (b) the service is also provided jointly for persons of different sexes and it would be insufficiently effective were it to be provided only jointly;
  - (c) a joint service for persons of more than one sex would be less effective and the extent to which the service is required by persons of different sexes makes it not reasonably practicable to provide separate services;
  - (d) the service is provided at a place which is, or is part of a hospital or another establishment for persons requiring special care, supervision or attention;
  - (e) the service is provided for, or is likely to be used by, 2 or more persons at the same time and the circumstances are such that a person of one sex might reasonably object to the presence of a person of a different sex;
  - (f) there is likely to be physical contact between a person to whom the service is provided and another person and that other person might object if they were not both of the same sex.
- (5) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

**17 Sex: segregation in religious services**

- (1) A minister of religion does not contravene Article 22, so far as it relates to the protected characteristic of sex, by providing religious services that satisfy sub-paragraph (2) and are –
  - (a) separate for people of different sexes;
  - (b) separate for people of different sexes and also different in content as between the sexes;
  - (c) for people of a particular sex only;
  - (d) services at which people of different sexes are treated differently in terms of where they may sit or stand or the way in which or extent to which they may participate.
- (2) The religious services mentioned in sub-paragraph (1) must –
  - (a) be provided for the purposes of an organised religion;
  - (b) be provided at a place that is (permanently or for the time being) occupied or used for those purposes; and

- (c) be necessary to comply with the doctrines of the religion or to avoid conflict with the strongly-held religious convictions of a significant proportion of the religion's followers.

(3) In this paragraph –

‘minister of religion’ means a person who –

- (a) performs functions in connection with the religion; and
- (b) holds an office or appointment in, or is accredited, approved or recognized for purposes of, a relevant organization in relation to the religion;

‘relevant organization’ means an organization, other than one with a sole or main purpose that is commercial, with one or more of the following purposes –

- (a) to practise the religion;
- (b) to advance the religion;
- (c) to teach the practice or principles of the religion;
- (d) to enable people of the religion to receive benefits, or to engage in activities, within the framework of that religion;
- (e) to foster or maintain good relations between persons of different religions.

**18 Sex and certain related characteristics: recruitment to a role in organised religion**

- (1) An act of discrimination is not prohibited by Article 9 where an employer aims to recruit a person for the purposes of an organised religion and requires the person recruited –

- (a) to be of a particular sex;
- (b) to have a particular sexual orientation; or
- (c) to be or not to be a transgender person.

- (2) The discrimination permitted by this paragraph –

- (a) must be a proportionate way of complying with the doctrines of the religion or avoiding conflict with the strongly-held religious convictions of a significant proportion of the religion's followers;
- (b) must relate only to the recruitment of persons required to conduct religious services as an essential part of their role and not to the employment of other persons or the provision of services.

**19 Sex: financial and insurance arrangements**

- (1) Parts 3 and 5 shall not prohibit a person discriminating against a person, so far as it relates to the protected characteristic of sex, in relation to the terms on which an annuity or policy of insurance is offered to, or may be obtained by, that person, if the discrimination

is reasonable in the circumstances, having regard to any statistical or actuarial data on which it is reasonable for the person to rely.

- (2) Article 22 shall not prohibit the provision of a relevant financial service, so far as it relates to the protected characteristic of sex, if the provision is in pursuance of arrangements made by an employer for the service-provider to provide the service to the employer's employees, and other persons, as a consequence of the employment.
- (3) In this paragraph 'relevant financial service' means –
  - (a) insurance or a related financial service; or
  - (b) a service relating to membership of or benefits under a personal pension scheme.

## **20 Sex: communal accommodation**

- (1) An act of discrimination is not prohibited by this Law in relation to the protected characteristic of sex only because of anything done in relation to –
  - (a) the admission of persons to communal accommodation;
  - (b) the provision of a benefit, facility or service linked to the accommodation.
- (2) Sub-paragraph (1)(a) does not apply unless the accommodation is managed in a way that is as fair as possible to people of different sexes.
- (3) In applying sub-paragraph (1)(a), account must be taken of –
  - (a) whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided; and
  - (b) the frequency of the demand or need for use of the accommodation by people of different sexes.
- (4) Communal accommodation is residential accommodation that includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex.
- (5) Communal accommodation may include –
  - (a) shared sleeping accommodation for people of different sexes;
  - (b) ordinary sleeping accommodation;
  - (c) residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.
- (6) A benefit, facility or service is linked to communal accommodation if –
  - (a) it cannot properly and effectively be provided except for those using the accommodation; and

(b) a person could be refused use of the accommodation in reliance on sub-paragraph (1)(a).

(7) This paragraph does not apply for the purposes of Part 3 unless such arrangements as are reasonably practical are made to compensate for –

(a) in a case where sub-paragraph (1)(a) applies, the refusal of use of the accommodation;

(b) in a case where sub-paragraph (1)(b) applies, the refusal of provision of the benefit, facility or service.

## **21 Sex and gender reassignment: sport and competitions**

(1) An act of discrimination is not prohibited by this Law in relation to the protected characteristic of sex if it relates only to the participation of another as a competitor in a gender-affected activity.

(2) A person does not contravene Articles 22 to 24 in relation to the protected characteristic of gender reassignment, only by doing anything in relation to the participation of a transgender person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity –

(a) fair competition; or

(b) the safety of competitors.

(3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of another sex as competitors in events involving the activity.

(4) In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.

## **22 Pregnancy and maternity: health and safety risk**

(1) An employer who suspends without pay or reassigns to different duties an employee who has the protected characteristics of pregnancy or maternity for the reasons set out in sub-paragraph (2) does not contravene Article 10, so far as it relates to the protected characteristics of sex, pregnancy or maternity, unless the employer would have treated an employee without those protected characteristics suspended or reassigned for those reasons more favourably.

(2) The reasons are that it is not reasonably practical –

(a) for the employee to continue working in her usual employment according to a risk assessment undertaken in

- accordance with Article 3 of the Health and Safety at Work (Jersey) Law 1989<sup>5</sup>; and
- (b) for the employer to allocate the employee to other duties, alter her duties or make appropriate changes to the working environment.
- (3) For the purpose of this paragraph a woman has the protected characteristics of pregnancy and maternity from the start of her pregnancy until 18 weeks after the birth of her child.
  - (4) For the purpose of this paragraph the protected characteristics include breast feeding.

### **23 Pregnancy and maternity: recruiting to a limited-term contract**

An employer who fails to recruit a person does not contravene Article 9 so far as it relates to the protected characteristics of sex, pregnancy or maternity where –

- (a) the employer aims to recruit a person on a limited term contract to undertake a project of work that is required to be completed within a particular time frame and has no plans to renew the contract; and
- (b) the person who is not recruited is pregnant and the likely timing of her absence on maternity leave would interfere with completion of the project.

### **24 Pregnancy and maternity: maternity pay**

An employer who meets the employer's obligations under Part 5A of the Employment (Jersey) Law 2003<sup>6</sup> does not contravene Article 10 so far as it relates to the protected characteristics of sex, pregnancy or maternity by paying an employee less than she or another employee would have been entitled to for an equivalent absence on sick leave.”.

## **9 Gender Recognition (Jersey) Law 2010 amended**

Article 15 of the Gender Recognition (Jersey) Law 2010<sup>7</sup> is repealed.

## **10 Citation and commencement**

These Regulations may be cited as the Discrimination (Sex and Related Characteristics) (Jersey) Regulations 201- and shall come into force on 1st September 2015.



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- <sup>1</sup> *chapter 15.260*
  - <sup>2</sup> *chapter 15.260*
  - <sup>3</sup> *chapter 05.255*
  - <sup>4</sup> *chapter 15.070*
  - <sup>5</sup> *chapter 05.300*
  - <sup>6</sup> *chapter 05.255*
  - <sup>7</sup> *chapter 12.320*