

# **STATES OF JERSEY**



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

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**Lodged au Greffe on 30th January 2018  
by the Minister for Social Security**

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**STATES GREFFE**





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

### REPORT

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#### SECTION 1 – BACKGROUND

The [Discrimination \(Jersey\) Law 2013](#) (the “Discrimination Law”) currently protects people in Jersey against discrimination on the grounds of race, age, sex, sexual orientation, gender re-assignment, pregnancy and maternity. The Minister for Social Security (“the Minister”) is proposing to amend the Discrimination Law by Regulation to introduce protection against discrimination on grounds of disability. The Discrimination Law prohibits discrimination in a number of areas including recruitment, paid work, voluntary work, goods and services, partnerships, professional bodies, education, training, public premises, clubs and associations.

In general, the Discrimination Law provides for a consistent approach to discrimination across all of the characteristics. However, there is also enough flexibility to allow for exceptions and other specific provisions to apply to each protected characteristic where this is required. This brings the advantage of an overarching Law that governs discrimination as well as individual tailoring to each characteristic. It has also allowed a phased approach to implementation, with public consultation at each stage, to spread any potential administrative burden for employers, service providers and other individuals over a number of years.

#### Types of discrimination

The Discrimination Law sets out 4 types of discrimination:

- A person **directly** discriminates against another person if he or she treats that person less favourably than another person because of a particular characteristic. For example, an employer will directly discriminate if they dismiss an employee who has been diagnosed with a mental health condition because of assumptions they make about how that person will behave in the workplace.
- A person **indirectly** discriminates against another person where they apply a provision, criterion or practice, which the person cannot show to be a proportionate means of achieving a legitimate aim, that disadvantages (or would, if applied, disadvantage) people with a particular characteristic. An employer who requires job applicants to have a driving licence, for example, may be indirectly discriminating against people with epilepsy. Many people with epilepsy are able to drive normally, but a significant number are unable to do so. The issue will be whether there is a genuine need to have a driving licence for that particular position.

- **Victimisation** protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result. An employee who claims that her employer is failing to promote employees with disabilities, for example, will be able to claim victimisation if the employer dismisses her as a result.
- **Harassment** involves unwanted conduct which relates to a protected characteristic that violates the dignity of the victim or creates an intimidating or offensive environment. For example, an employee who is subjected to name-calling in relation to his disability will be able to claim harassment.

The draft Regulations would extend the definitions of direct and indirect discrimination to address the specific requirements relating to disability discrimination (see pages 8–9 of this report).

### **Enforcement and remedies**

The Employment and Discrimination Tribunal (“the Tribunal”) will hear complaints about acts of disability discrimination. Where both parties agree, complaints will first be referred for conciliation by the Jersey Advisory and Conciliation Service (“JACS”) or mediation via the Community Mediation Service. A complainant will need to demonstrate to the Tribunal that, on the balance of probabilities, he or she has been discriminated against on grounds of disability. If the Tribunal finds that a complaint has been proved, it may –

1. make an order declaring the rights of the complainant and the respondent;
2. order compensation of up to £10,000 for any financial loss and up to £5,000 for hurt and distress, subject to an overall limit of £10,000; and
3. recommend that the respondent takes certain action to reduce the adverse effect of the act of disability discrimination on the particular complainant.

## **SECTION 2 – DISABILITY DISCRIMINATION**

### **People with disabilities in Jersey**

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

According to the strategy report, 14% of the Island’s population are disabled, which is 13,900 people in Jersey<sup>2</sup>. With an ageing population, these numbers are expected to increase, given that at least 51% of Islanders aged over 85 are disabled. In addition, two-thirds of all households in Jersey are estimated to include at least one person with a functional impairment (difficulty carrying out everyday tasks due to a sensory, physical or mental impairment), which is around 35,000 individuals<sup>3</sup>.

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

1. have support to communicate and access information
2. have greater access to the Island

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

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

<sup>3</sup> See the Health and Life Opportunities Survey, p.19 <http://bit.ly/26AM2a8>

3. have good health and wellbeing
4. have access to education, employment and enriching activities
5. have equal rights and experience equality.

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

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

In terms of Jersey's international obligations, it is important that we have legislation in place in order to demonstrate that Jersey is a jurisdiction that promotes modern standards of respect for individuals' rights and equality. There has been consistent and overwhelming support for the introduction of legislation in Jersey to address discrimination issues generally.

### **Disability discrimination in Jersey**

It is difficult to assess the prevalence of disability discrimination in Jersey because, with no legislation to protect people, people are less likely to report unacceptable discriminatory acts. However, there is evidence that disability discrimination occurs.

In the latest Jersey Opinions and Lifestyle Survey (JOLS 2017<sup>4</sup>), the States of Jersey Statistics Unit asked if people considered that they had been discriminated against on various grounds within the past 12 months. Almost a quarter (23%) of adults felt they had been discriminated against in the previous 12 months. For 3% of people, the discrimination was reported to be on grounds of disability, compared to 8% reporting feeling discriminated against on grounds of race or nationality, 8% on grounds of age and 6% on grounds of gender. The proportions were similar to those reported last time this question was asked in the 2012 Jersey Annual Social Survey.

Citizen's Advice Jersey provides advice on non-employment-related discrimination, such as in relation to goods, services and housing. During 2017, 40 clients requested and were provided with the advice service. Five of those clients asked for advice in relation to disability discrimination. By comparison, during the same period, 15 clients requested advice about race discrimination, 8 clients requested advice about sex discrimination, and 8 clients requested advice about age discrimination.

JACS provides advice on discrimination in employment and recruitment. During 2017, JACS received one enquiry relating to disability discrimination. By comparison, JACS recorded the following enquiries in relation to the characteristics that are already protected under the Law; 64 enquiries relating to race discrimination, 141 enquires relating to sex discrimination, and 45 enquiries relating to age discrimination.

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<sup>4</sup> [www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Opinions%20and%20Lifestyle%20Survey%202017%20report%2020171130%20SU.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Opinions%20and%20Lifestyle%20Survey%202017%20report%2020171130%20SU.pdf)

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

The introduction of protection against disability discrimination will contribute to the aims and objectives of the States of Jersey as stated in the States' Strategic Plan for 2015–2018<sup>5</sup> which reports that one of the goals of the Council of Ministers is to “*Help people in Jersey achieve and maintain financial independence and safeguard the most vulnerable in our community.*”.

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

In addition, one of the 3 strategic aims of the Social Security Department is: “*to help people to achieve and maintain financial independence*”. One of the Department’s responsibilities in relation to this aim, as stated in the Department’s 2017 Business Plan<sup>6</sup>, is to prepare “*Discrimination legislation, which protects people from unfair or unequal treatment*”.

## **SECTION 3 – OTHER JURISDICTIONS**

### **UK**

The Disability Discrimination Act was introduced in the UK in 1995. It was amended and extended several times during 1997 to 2010, in particular to implement the EU Equality Directive<sup>7</sup>, before being subsumed into the Equality Act 2010<sup>8</sup>. The UK legislation takes account of the particular ways in which disabled people may be disadvantaged, both in the workplace and in the provision of goods and services. As well as protection against direct and indirect discrimination, the Equality Act includes protection against unfavourable treatment because of something arising in consequence of a disability.

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

### **Northern Ireland**

As in the UK, the Disability Discrimination Act<sup>9</sup> was introduced in 1995. The Act now only applies in Northern Ireland because England, Scotland and Wales are covered by the Equality Act 2010. The Act has been amended a number of times by regulations implemented in Northern Ireland<sup>10</sup>. The Act protects disabled people in employment, access to goods, facilities and services, and when buying or renting land

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<sup>5</sup> [www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20States%20of%20Jersey%20Strategic%20Plan%202015-18%2020150430%20VP.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20States%20of%20Jersey%20Strategic%20Plan%202015-18%2020150430%20VP.pdf)

<sup>6</sup> [www.gov.je/SiteCollectionDocuments/Government%20and%20administration/BP%20Social%20Security%202017%20business%20plan%20RB.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/BP%20Social%20Security%202017%20business%20plan%20RB.pdf)

<sup>7</sup> 2000/78/EC

<sup>8</sup> [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents)

<sup>9</sup> [www.legislation.gov.uk/ukpga/1995/50/contents](http://www.legislation.gov.uk/ukpga/1995/50/contents)

<sup>10</sup> See NI Assembly Briefing Paper for more details

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

or property. Discrimination occurs where a disabled person is treated less favourably than someone else for a reason relating to the person's disability and this treatment cannot be justified, as well as where there is a failure to make a reasonable adjustment for a disabled person.

### **Isle of Man**

The Disability Discrimination Act 2006<sup>11</sup> makes it unlawful for a service provider to discriminate against disabled people when providing that service. It also places a duty on service providers to make reasonable adjustments in the provision of services to disabled people. The Act will come into force in phases over a 4 year period.

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

The Isle of Man's Equality Bill 2016<sup>12</sup> will be phased in over a 2 year period to replace the Disability Discrimination Act. All of the provisions are expected to come into force by January 2020.

### **Guernsey**

In 2013, the States of Guernsey approved "The Disability and Inclusion Strategy". The strategy aims to improve the quality of life of disabled islanders and their carers through changing attitudes towards disabled people and carers, so that they can be active and engaged socially, economically and culturally. One of the projects within that strategy is to introduce protection against disability discrimination. The Committee for Employment and Social Security, which assumed responsibility for the implementation of the Strategy following the reorganisation of government in May 2016, has committed to present to the States of Guernsey detailed policy proposals for this legislation by 2020.

### **The European Union**

As a result of the Equality Framework Directive<sup>13</sup> in 2000, all member states of the European Union must provide protection against discrimination in relation to disability. The Directive is of limited scope, in that it applies to employment but it does not apply to the provision of goods and services which is left to individual member states to regulate.

The Directive states that: "*The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability. This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to*

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<sup>11</sup> [www.legislation.gov.im/cms/images/phocadownload/Acts\\_of\\_Tynwald/Primary\\_2006/Disability%20Discrimination%20Act%202006.pdf](http://www.legislation.gov.im/cms/images/phocadownload/Acts_of_Tynwald/Primary_2006/Disability%20Discrimination%20Act%202006.pdf)

<sup>12</sup> [www.tynwald.org.im/business/bills/Bills/Equality\\_Bill\\_2016-amended.pdf](http://www.tynwald.org.im/business/bills/Bills/Equality_Bill_2016-amended.pdf)

<sup>13</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

*undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”.*

The United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”) is an international convention that requires States Parties to protect and safeguard all human rights and fundamental freedoms of persons with disabilities and sets out what human rights mean in the context of disability. The Convention seeks to realise the right of disabled people to be treated as full and equal citizens, and to change attitudes and approaches to people with disabilities. Once the disability strategy and disability discrimination legislation are in place, the Council of Ministers may seek to extend ratification of the convention to Jersey.

## **SECTION 4 – CONSULTATION OUTCOMES**

### **Public consultation**

The Minister consulted during September to November 2017, inviting comments from stakeholders on a set of draft Regulations and a number of policy issues, including –

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

In total, 178 responses were submitted as part of this consultation from a wide range of stakeholders, including employers and their representatives, trade unions, individuals, and representatives of organisations and charities that support people with a disability. In addition to this, more than 70 stakeholders attended public and private meetings in October 2017 to discuss the issues raised in the consultation paper. The Minister was very grateful for the detailed comments provided by respondents, and for the efforts that were made to collect the views of certain groups in the community. The Minister has considered the comments submitted by each respondent and this process has informed her decisions.

The consultation revealed general support for the overall approach taken in the draft Regulations. The gradual implementation of the Discrimination Law has been a success in Jersey, and its extension to the protected characteristic of disability will be an important step forward. A summary of the consultation outcomes will be presented as a Report to the States Assembly.

## **SECTION 5 – THE DRAFT REGULATIONS**

### **Scope of the protection**

Inserting ‘disability’ as a protected characteristic into the Discrimination Law by Regulations means that disability discrimination would be prohibited in all of the areas that the Discrimination Law currently covers, which include recruitment, paid work, voluntary work, education, training, partnerships, professional bodies, clubs and associations, premises and the provision of goods, facilities and services.

### **Definition of disability**

The draft Regulations would define ‘disability’ as a new protected characteristic in Schedule 1 of the Discrimination Law, which sets out the definitions of all of the protected characteristics. This was the most complex matter to address in the legislation.

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. People with disabilities and their representatives tended to prefer a social model, which recognises that it is disempowering to describe a disability as something

that is inherently ‘wrong’ with an individual, acknowledging the role of societal barriers in creating the impairment that we recognise as a disability.

Our definition takes elements from both the medical and social models. There is a requirement for a long-term impairment, but the definition does not 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 that is covered by the Discrimination Law.

As described in the report on the consultation outcomes, a number of minor changes were agreed following consultation, including a definition of a ‘long-term’ impairment. While debate could continue on what might be the ‘right’ definition of disability, in the interests of ensuring that disabled people are protected as soon as possible, the Minister considers that the proposed definition is clear, workable in practice, easily understood by those with little experience of disability and it strikes the right balance certainty and flexibility.

#### **Direct discrimination – exception for more favourable treatment**

The draft Regulations would provide 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.

This is distinct from the existing provisions for positive action that apply to all of the protected characteristics. The 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. 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.

#### **Direct discrimination – Discrimination arising from a disability**

The draft Regulations would extend the scope of direct discrimination so that it includes treating a disabled person unfavourably because of something arising in consequence of the person’s 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. However, the draft Regulations will not require anyone to disclose the fact that they are disabled at any stage in the recruitment process.

## **Indirect discrimination – Failure to make reasonable adjustments**

Much of the disadvantage suffered by disabled people is imposed by barriers and obstacles inadvertently placed in their way. The draft Regulations extend the description of 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 substantial disadvantage, factors will be taken into account such as the cost of any steps, the size and nature of the business, the extent to which any steps would be effective, and the extent to which the business could reasonably have foreseen the need for the adjustment in question.

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 have proposed that the requirement to make adjustments to physical premises should come into force with effect from 1st September 2020 to give businesses more time to plan any changes that may be needed.

Although some of the consultation respondents would have preferred a longer lead-in period, the Minister decided that a 2-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 the Tribunal will be entitled to take that into account.

## **The exceptions**

Exceptions describe the circumstances in which an act will not be treated as a prohibited act of discrimination. The Discrimination Law currently includes some general exceptions that will apply to all of the protected characteristics. These include where an act is done to comply with another Law, in circumstances where there is an occupational requirement for a protected characteristic, and in circumstances where there is a need for positive action, for example, to overcome previous disadvantage.

The draft Regulations would introduce some additional exceptions that are specific to disability and which were generally supported in the consultation. These include exceptions that deal with financial and insurance services and sport and competitions. More detail is provided in the **Appendix** to this Report.

## **Collective responsibility under Standing Order 21(3A)**

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Minister for Social Security, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

## **Financial and manpower implications**

**Policy development, advice, conciliation and enforcement** – For 2018, a Discrimination Law budget of £110,000 is available, which makes provision for the development of the legislation, guidance and publicity, free public training courses provided by JACS, advisory and mediation services provided by Citizen's Advice Jersey, as well as to cover any additional Tribunal costs that might arise from dealing with disability discrimination complaints (e.g. additional staff or resources). The Judicial Greffe holds a separate budget for the Tribunal Service which includes dealing with complaints under the Discrimination Law. Other than a subsidy to enable JACS to provide free public training courses on disability discrimination, JACS will continue to provide an independent advisory and conciliation service from its annual grant of £363,118 for 2018.

**Department of the Environment** – It is not expected that the draft Regulations will result in a significant increase in the number of applications requiring permission under the [Planning and Building \(Jersey\) Law 2002](#). Where applications are required, it is expected that the cost of dealing with those will be covered by the application fees prescribed for planning and building applications.

**Department for Infrastructure** – The Department will undertake an audit of the public property portfolio to assess its suitability in relation to the forthcoming legislation. An initial assessment of a sample of public buildings indicates that a significant investment, potentially running into some millions of pounds over a period of time, will be required to implement improvements. A prioritised and cost investment strategy will be brought forward for consideration in the next Medium Term Financial Plan from 2020.

**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 new protected characteristic 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 have been relatively few discrimination complaints to the Tribunal to date, and no Tribunal hearings in relation to discrimination complaints against the States Employment Board.

## APPENDIX TO REPORT

### Exceptions for disability discrimination

<b>Reference</b>	<b>Exception</b>	<b>Description/purpose of exception</b>
Paragraph 42	<b>States policy or Ministerial Decision</b>	The exception provides that a person does not discriminate where they act in accordance with a States policy or a Ministerial Decision that applies criteria for the purposes of promoting employment or other opportunities for disabled people, or providing access to facilities and services for disabled people. For example, the Social Security ‘access to work’ pilot scheme which provides disabled people with grant funding for aids or equipment to enable them to work. The Law already provides similar exceptions in relation to age and race (place of birth or length or residency).
Paragraph 43	<b>Goods and services – Public service vehicles</b>	The exception provides that a person who provides passenger transport services or private hire vehicles does not discriminate if they do not make adjustments to vehicles. This is a narrow exception that does not apply to the wider concept of discrimination. The exception would not allow general discrimination against passengers on the grounds of disability (e.g. a refusal to provide appropriate assistance, or to transport a guide dog without good reason). The public bus route is already required by contract to be 100% wheelchair-accessible and, by January 2019, all Public Rank and Private Hire taxi/cabs must be accessible.
Paragraph 44	<b>Building Bye-laws</b>	This limited exception provides that a person does not discriminate if they fail to remove or alter physical features of premises which cause a disadvantage to a disabled person, only where that failure arises from a requirement to comply with Building Bye-laws and any official guidance on those Bye-laws. For example, a person wishes to install a wheelchair ramp but, in order to be built at an appropriate gradient, the length of the ramp would encroach on to a public highway; and so in order to comply with the Building Bye-laws, the person could not build the ramp. Detailed technical guidelines on ‘Access to and use of public buildings’ incorporate UK best practice on the accessibility of buildings.
Paragraph 45	<b>Admission to schools</b>	The exception provides that the selection of pupils according to ability will not be an act of discrimination in relation to school admissions. This is a limited exception which only applies to the application of selection criteria that are aimed at selecting pupils of high aptitude or ability and there will be a duty for schools to make reasonable adjustments in the way in which those criteria

<b>Reference</b>	<b>Exception</b>	<b>Description/purpose of exception</b>
		are applied. For example, adjustments may be needed to an entrance exam ensure that the exam is conducted in an accessible way, without compromising the level of ability or aptitude required.
Paragraph 46	<b>Financial and insurance arrangements</b>	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, <u>only</u> 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. A financial services provider can be challenged if a person thinks that a risk assessment is arbitrarily based on disability rather than on relevant information from a reliable source.
Paragraph 47	<b>Sport and competitions</b>	The exception 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. Paralympic rules. The Discrimination Law already provides exceptions relating to sport and competitions in relation to race, sex, gender re-assignment and age.

## **Explanatory Note**

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These Regulations amend the Discrimination (Jersey) Law 2013 (“Law”) so as to make unlawful acts of discrimination on grounds of disability.

*Regulation 1* provides that the Law is amended in accordance with these Regulations.

*Regulation 2* sets out circumstances in which acts relating to a disabled person do and do not constitute direct discrimination. An act of “positive” discrimination is not direct discrimination. “Direct discrimination” is where a disabled person is treated more favourably because of his or her disability than another person. However, treating a disabled person unfavourably as a consequence of the disability is direct discrimination unless the treatment is a proportionate means of achieving a legitimate aim.

*Regulation 3* adds “disability” to the list of characteristics (along with race, sex, sexual orientation, gender reassignment and age) in relation to which a person may indirectly discriminate against another.

*Regulation 4* inserts a new Article 7A in the Law so that failure to make reasonable adjustments to prevent a disabled person from being put at a substantial disadvantage compared to non-disabled persons is an act of indirect discrimination. The failure can relate to a provision, criterion or practice of a person, physical features of premises or the provision of an auxiliary aid or service. The new Article sets out what factors may be considered in determining what is reasonable, including practicality, effectiveness and cost.

*Regulation 5* amends Schedule 1 to the Law by adding “disability” to the Law as a protected characteristic and makes provision for what that means, namely having one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect a person’s ability to engage in any activity in respect of which an act of discrimination is prohibited under the Law. Provision is made for severe disfigurement to be treated as having such an adverse effect. Addiction to a substance is generally not a disability, nor is a tendency to set fires, steal or to abuse (whether physical or sexual) of other persons.

*Regulation 6* repeals paragraph 2F of Part 1 of Schedule 2 to the Law. Paragraph 2F sets out exceptions to specific acts of discrimination which are prohibited under the Law concerning contract work or employment involving the performance of domestic duties (including child or adult care) in the residential premises of the employer or person offering contract work.

*Regulation 7* sets out some exceptions to specific acts of discrimination which are prohibited under the Law where the discrimination is against a disabled person. Indirect discrimination against a person is allowed where the discrimination concerns acts done pursuant to States’ policies or Ministerial decisions for the purpose of promoting opportunities for disabled people or providing disabled people with access to facilities or services. Indirect discrimination is also allowed where it involves failure to make reasonable adjustments in relation to (a) commercial transport of passengers in public service vehicles; or (b) anything which is required to comply with the Building Bye-laws (Jersey) 2007 or guidance on compliance with those Bye-laws. Indirect discrimination is also allowed in relation to admission arrangements for selecting pupils of high ability or aptitude for schools; in relation to terms of annuities, insurance policies or other financial services; or in relation to sports or competitions where the act done complies with international rules.

*Regulation 8* sets out the title of these Regulations and provides that they will come into force on 1st September 2018, except for the provision in the new Article 7A (see *Regulation 4* above) which makes failure to make reasonable adjustments caused by physical features of premises an act of indirect discrimination. This provision comes into force on 1st September 2020.





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

### **Arrangement**

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#### **Regulation**

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

*Made*

*[date to be inserted]*

*Coming into force*

*[date to be inserted]*

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

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

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

### **2      Article 6 amended**

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

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

### 3 Article 7 amended

In Article 7(4) for the full-stop after sub-paragraph (e) there shall be substituted a semi-colon and then added the following sub-paragraph –

“(f) disability.”.

### 4 Article 7A inserted

After Article 7 there shall be inserted the following Article –

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

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

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

## 5 Schedule 1 amended

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

### “8 Disability

- (1) Disability is a protected characteristic.
- (2) A person has the protected characteristic if the person has one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect a person's ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law.
- (3) For the purposes of paragraph (2), if a person has more than one impairment, the impairments may be taken together to determine whether they can have the adverse effect referred to in paragraph (2).
- (4) For the purposes of paragraph (2), a long-term impairment is an impairment which –
  - (a) has lasted, or is expected to last, for not less than 6 months; or

- (b) is expected to last until the end of the person's life.
- (5) An impairment which consists of a severe disfigurement is to be treated as having an adverse effect as described in paragraph (2) except where the disfigurement consists of –
  - (a) a tattoo; or
  - (b) a piercing of the body for decorative or other non-medical purposes, including any object attached through the piercing for such purposes.
- (6) In relation to the protected characteristic –
  - (a) a reference to a person who has the protected characteristic is a reference to a disabled person;
  - (b) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
  - (c) a reference to persons who share a particular protected characteristic is a reference to persons who have the same disability.
- (7) Addiction to alcohol, nicotine or any other substance is not a disability, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment.
- (8) None of the following is a disability –
  - (a) a tendency to set fires;
  - (b) a tendency to steal;
  - (c) a tendency to physical or sexual abuse of other persons.”.

## 6 Schedule 2, Part 1 amended

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

## 7 Schedule 2, Part 5 inserted

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

### “PART 5

#### EXCEPTIONS TO PROHIBITED ACTS: DISABILITY

##### 42 Disability: act done pursuant to States' policy or Ministerial decision

An act of discrimination is not prohibited by this Law in so far as it relates to the protected characteristic of disability, if it is done pursuant to a policy adopted by the States or by Ministerial decision where the implementation of that policy applies criteria for the purposes of –

- (a) promoting employment or other opportunities for disabled people;  
or

- (b) providing access by disabled people to facilities and services.

**43 Disability: goods, facilities and services**

- (1) A person does not contravene Article 22 by discriminating against a person under Article 7A where the contravention relates to the carrying of passengers for hire or reward in a public service vehicle.
- (2) In this paragraph ‘public service vehicle’ has the same meaning as in Article 1 of the Motor Traffic (Jersey) Law 1935<sup>3</sup>.

**44 Disability: building bye-laws**

A person does not contravene anything in Parts 3, 4, 5 or 6 by discriminating against a person under Article 7A where –

- (a) the contravention arises from compliance with any provision of the Building Bye-laws (Jersey) 2007<sup>4</sup> or any guidance on compliance with those Bye-laws issued by the Minister with the function of making them; and
- (b) the contravention arises from failure to remove or alter or otherwise change a physical feature of premises causing the substantial disadvantage referred to in Article 7A(2).

**45 Disability: admission to schools**

- (1) A person does not contravene Article 21(1), so far as relating to the protected characteristic of disability, only by applying arrangements for selective admission to a school.
- (2) In sub-paragraph (1), ‘arrangements for selective admission’ mean arrangements which provide for some or all of a school’s pupils to be selected by reference to general or special ability or aptitude, with a view to admitting only pupils of high ability or aptitude.

**46 Disability: financial and insurance arrangements**

- (1) Parts 3 and 5 do not prohibit a person discriminating against a person, in so far as such discrimination relates to the protected characteristic of disability, in relation to the terms on which an annuity or policy of insurance is offered to, or may be obtained by, that person, if the discrimination is reasonable in the circumstances, having regard to any statistical or actuarial data on which it is reasonable for the person to rely.
- (2) Article 22 does not prohibit a person discriminating against another person, in so far as such discrimination relates to the protected characteristic of disability, in the provision of a relevant financial service, if the provision is in pursuance of arrangements made by an employer for the service-provider to provide the service to the

employer's employees, and other persons, as a consequence of the employment.

- (3) In this paragraph 'relevant financial service' means –
- (a) insurance or a related financial service; or
  - (b) a service relating to membership of or benefits under a personal pension scheme.

#### **47 Disability: sport and competitions**

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

### **8 Citation and commencement**

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

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- <sup>1</sup> *chapter 15.260*  
<sup>2</sup> *chapter 15.260*  
<sup>3</sup> *chapter 25.200*  
<sup>4</sup> *chapter 22.550.05*