



## EQUALITY AND EQUITY – SAME BUT DIFFERENT – GUERNSEY’S NEW DISCRIMINATION LAW

**NOBODY WANTS TO BE LIKE EVERYBODY ELSE. GUERNSEY PRIDES ITSELF ON ITS DIFFERENCE. IT IS OUR USP WHEN IT COMES TO EMPLOYMENT LAW.**

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The Universal Declaration of Human Rights opens with “all human beings are born free and equal in dignity and rights”. This is one of the fundamental truths that sometimes gets eroded as we grow – thus precipitating the need for discrimination law. When we join the workforce, we want and expect equality in our employment. What we need though is equity. We are all the same, but fundamentally we are all different. Guernsey recognises those similarities but seeks to embrace those differences in its legislative approach to laws. The proposed new discrimination law is no exception. Guernsey is similar to the UK, to Jersey and to the IOM. But, it is different. Guernsey prides itself on that difference. Sometimes the differences are stark and sometimes more subtle and those differences can often be tantalisingly attractive for employers operating in Guernsey. With the introduction of new discrimination law in Guernsey on the horizon (due in May 2023), those differences are likely to receive a mixed reaction from Guernsey employers.

We explore three of the more topical “same...but different” aspects of the proposed Prevention of Discrimination (Guernsey) Ordinance, 2022 – those surrounding the definitions of carer status, religious belief and disability.



### Carer status

Guernsey is looking to lead the way in its introduction of the protected ground of “carer status” – emphasising the “difference” in a novel and practical way. The concept of “carer status”

is obviously not new – it a concept long recognised indirectly in the UK, Jersey and IOM, but it has not been granted specific stand-alone protection previously in discrimination legislation.

This is a trail-blaze in discrimination protection and removes the need for employees to rely on backdoor, indirect claims based on “association with disability”. The concept is very much the “same” but the difference lies in the stand-alone protection to be provided to carers in Guernsey. Naturally, though the devil is in the detail. The protection is expected to extend only to those persons who provide care or support on a “regular, continuing or frequent basis” to another person who lives with them or is a close relative of theirs who has a disability, and for whom they provide that care. For us employment lawyers, what constitutes a “regular, continuing or frequent” basis will no doubt create some interesting arguments, however at least given the proposed definition of disability, at least we won’t be arguing over whether or not the person cared for has a disability (see below).



### Religious belief

Rather than adopting the UK’s protected ground of “religion or belief” which applies to both religious and non-religious philosophical

beliefs, the States of Guernsey applied its “same but different” philosophy and determined that the protection accorded in Guernsey shall follow the Irish model and extend to “religious belief” but not to non-religious philosophical beliefs.

Whilst to some this may seem like a play on words, the impact of the little word “or” makes a huge difference to the extent of the protection.

**Whilst religion is clearly a belief, in the context of discrimination law, religion and belief are two very different concepts, with the exclusion of the latter representing a significant departure from the breadth of the protection offered in the UK and the IOM.**

Interestingly, Jersey does not (yet) provide any protection for beliefs - religious or otherwise

The maintenance of that difference is perhaps a welcome decision for employers in Guernsey who will not be subject to the raft of claims based on philosophical belief that have inundated the UK Tribunals. For example, reported cases in the UK include claims of “veganism” and “the fear of catching COVID-19” as philosophical beliefs, neither of which were found to be protected “beliefs”.



## Disability - COVID-19 and Long-COVID-19

The difference in Guernsey’s proposed definition of disability is less likely to be as warmly “welcomed” by employers. The States have voted to adopt a broad definition based on the social model of disability which switches the focus from whether an individual is “disabled enough” to the prevention of discriminatory acts. Disability will be defined by reference to an “impairment” which “lasts or is expected to last for not less than 6 months”. Relevantly to Covid-19, what is an impairment to be defined by a reference to “the presence in the body of organisms or entities causing or likely to cause chronic disease or illness”.

The definition of ‘disability’ is Guernsey’s crowning glory of “same but different”. The States deliberately elected to move away from the UK, Jersey and the IOM and create a definition almost identical to the Irish definition. What remains to be seen is whether in this post pandemic world is whether such a definition could see those suffering from COVID-19 or more likely, those experiencing “Long-COVID-19” will be protected from discrimination on the ground of “disability”.

**In October 2021, WHO released a definition of “post covid-19 condition”:**

**“Post COVID-19 condition occurs in individuals with a history of probable or confirmed SARS CoV-2 infection, usually 3 months from the onset of COVID-19 with symptoms that last for at least 2 months and cannot be explained by an alternative diagnosis. Common symptoms include fatigue,**

**shortness of breath, cognitive dysfunction but also others\* and generally have an impact on everyday functioning. Symptoms may be new onset following initial recovery from an acute COVID-19 episode or persist from the initial illness. Symptoms may also fluctuate or relapse over time”.**

Applying the proposed wording of the Guernsey definition of “impairment” and accepting the definition of “post COVID-19 condition”, there is a strong argument that “post COVID-19” would be caught by that definition and even an argument that any person who contracts COVID-19 has an impairment which has the potential “to last” for more than 6 months. Interestingly, ACAS (in the UK) have provided guidance which advises employers not to try and determine if Long-COVID-19 is a disability but rather focus on providing reasonable adjustments for their employees. Sounds a little like the Guernsey model, but introducing it by the back door.



## Conclusion

For many years, Guernsey has been more “different” than “same” when it comes to its employment (and in particular discrimination) laws. Since 2005, the only protected grounds have been related to sex (i.e. sex, marital status, sexual orientation and since 2016, pregnancy and maternity). The Discrimination Ordinance will be the single biggest piece of employment legislation to be introduced since the Employment Protection Regime was launched in 1998. The commitment to maintaining Guernsey’s USP will ensure that Guernsey’s discrimination laws are familiar to all but with tangible differences to ensure Guernsey maintains its distinctive legal landscape.

