KEY POINTS

What is the issue?
Practitioners have a professional obligation to address the lack of equality protections and legislation in our main offshore jurisdictions.

What does it mean for me?
We must be ethical actors or risk the integrity of our industry.

What can I take away?
A knowledge of the state of equality in Guernsey and how gaps in legislation may best be filled.

Listening to the winds of change

JACOB J MEAGHER AND MICHAEL WHITBREAD SET OUT THE CASE FOR GUERNSEY EQUALITY LEGISLATION

In the article 'The Laws of Love' that appeared in this publication earlier in 2020,[1] Guernsey was given a 'four-star green' rating in its treatment of lesbian, gay, bisexual and transgender (LGBT+) people, and people with disabilities, celebrating their 'rights' to protection in criminal, family, employment, provision of goods and service and taxation matters.

In the authors' view, there is still some way to go; small progress has been made in Guernsey, but no great advances.

SMALL STEPS FORWARD

Thankfully, after much protracted consultation and bit of burying of the past, Guernsey has begun to move forward in some respects, and the States of Guernsey (the Bailiwick's legislative body) has dropped its original proposal to provide for some discrimination protection in the year 2026,[2] and has embarked on a more discerning course. The proposal now is to bring in protection from discrimination on the basis of disability and LGBT+ status, along with other significant grounds, in the first tranche, currently expected to be in force by 2022.

STEP members may well wonder why we as an industry should be concerned that Guernsey currently lacks any protections akin to the UK *Equality Act 2010* (the Act) and associated employment law or human rights protections. Senior members of our profession remind us to avoid 'assumptions that your client is straight and/or that they would not be interested in LGBT+ rights'.[3] It would be reckless to advise clients to settle a trust in a jurisdiction for the purpose of protecting familial financial relationships where the laws of that jurisdiction did not recognise nor protect or support the modern realities of the family unit, including LGBT or disabled family members. To quote from the article:

> *'As an advisor, if you want to provide a 360-degree service to your clients, then you must be aware of the differences in the way [they are and might be] treated across the world, even if you [consider yourself to practise from] a liberal country.'*

The other important aspect is the attraction and retention of talent and industry attrition. Within the first 12 months of employment, in most cases, no claim can be brought against an employer either for unfair dismissal or constructive unfair dismissal. Because Guernsey lacks an omnibus discrimination law and the primary means by which to ventilate a claim for (say) LGBT+, disability or race discrimination in employment is by way of an unfair dismissal claim, no claim for discrimination can be made before 12 months in role is served.

For constructive dismissal to be recognised, typically the employee must

Jacob J Meagher TEP *is a Partner at Aria Grace, and* ***Michael Whitbread*** *is a lawyer practising in the Channel Islands*

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leave the employment immediately upon the working conditions becoming objectively intolerable. They cannot wait until their 12 months has passed before making a claim. Employees lacking sufficient service who are discriminated against at work on these grounds are effectively left with no legal remedy. This obviously includes job applicants.

The position is diametrically opposed to the Act, in which discrimination protection applies from the moment a position is advertised, and is at odds with Guernsey's own protection from sex discrimination under its *Sex Discrimination (Employment) (Guernsey) Ordinance, 2005*.[4] Practitioners may be dismissed, denied employment, refused a promotion or suffer any other detriment on account of being LGBT+, black or disabled, and currently have no recourse by way of a discrimination claim in Guernsey.[5]

THE CURRENT LAW

The current law seems to have been written by a legislature in a state of myopia; there is no 12-month qualifying period for complaints of discrimination on the grounds of sex, pregnancy, marital status or gender reassignment. One may, however, be dismissed between month one and 12 (or denied a role in the first place) for perceptions of one's sexuality (and related marital status), identifying as or being transgender (but not on the grounds of gender reassignment), and disability. Although the industry might claim that such discrimination does not occur, the fact that it can occur without legal consequence is a travesty, and that rumours can circulate in onshore recruitment agencies does the island and its main industry a great disservice.[6]

That there is no scheme for making discrimination complaints on the grounds of race, LGBT+ status or disability has the obvious consequence that there is no docket of complaints nor historical case law to survey. The situation is the opposite of the adage, 'If you build it, they will come'. If no means to complain is provided, it is at least disingenuous, and at worst, capricious, to argue that there is no need.

Likewise, it is currently lawful for Guernsey service providers to discriminate and refuse service upon any grounds. Many jurisdictions must come to terms with the zeitgeist and enact or repeal culturally pernicious laws. That the Guernsey Committee for a New Discrimination Ordinance only went so far as to recommend that by 2022 employers and service providers should not be able to discriminate on the grounds of race or disability[7] leaves much to be desired.

A NOTE ON UNIVERSALITY AND EXTERRITORIALITY

There may be some who read the above and do not lament the Bailiwick's prevarication and limited adoption of any protections. Less regulation means better business, some say.

A word of warning then: most of those in the on-island professional services industry are members of, and have their positions by virtue of, professional qualifications and regulated status. Whether one has let one's English and Welsh solicitor's practising certificate lapse or not,[8] one is still subject to the Solicitors Regulation Authority (SRA) *Code of Conduct*. The reporting obligations therein require any English and Welsh solicitor on the roll to promptly self-report to the SRA or report a colleague[9] for a serious breach of conduct, and includes Principle 6: the 'requirement to act in a way that encourages equality, diversity and inclusion'.

Principle 6 has incorporated the entirety of the Act into a solicitor's core professional obligations, and these are minimal obligations. Breach of these, i.e. any of the conduct discussed above, amounts to a serious matter and admitted solicitors have a reporting obligation.[10] They can be struck off or subject to sanction, regardless of whether they have long left the mainland.

Rule 15 of STEP's *Code of Professional Conduct* demands that a member:

> *'shall act at all times in a non-discriminatory way, and shall observe the requirements of human rights and non-discrimination legislation to which he or she is subject. Except where differential treatment is permitted by law, a Member shall not discriminate with respect to partnership or employment of other practitioners or other persons or in his or her professional dealings, activities and provisions of professional services'.*

One would be hard-pressed to argue that any of the above conduct demonstrates adherence with STEP's values, even if it occurred prior to month 12 of employment, or in the provision of a service. This is even before considering Guernsey's international obligations.[11]

It is the authors' view that Guernsey should listen to the winds of change that have thus far been blowing since, at the very latest, the 1969 UN *Convention on the Elimination of All Forms of Racial Discrimination*. Both as STEP members and as an industry, we should ensure adherence not only to best practice as TEPs, but also in our obligations to uphold basic equality and discrimination protections as well, regardless of whether national law omits it.

#BUSINESS PRACTICE #LEGISLATION #CAREER AND PERSONAL DEVELOPMENT

1 James Quarmby TEP, 'The laws of love', *STEP Journal* (Vol 28 Iss2), pp.65-67 **2** bit.ly/2ZqOinN **3** See note 1, p.65 **4** Noting that there is no 12-month qualifying period for complaints of sex discrimination (i.e. gender reassignment). **5** The *Employment Protection (Guernsey) Law 1998* provides that a one-year qualifying period applies to all claims, bar 'pregnancy, health and safety, membership of a trade union, for asserting a statutory right, refusal to work on Sundays (shop workers)'. **6** The States Committee for Employment & Social Security's *Proposals for a New Discrimination Ordinance* (2.2020/41) reports of actual instances of discrimination and racism experienced by islanders. **7** And/or that a person is an unpaid carer or a disabled person provided that they live with or are closely related to them. **8** Likewise, for those practitioners whose admissions are by virtue of the English and Irish Inns, the NZ Law Society or under the Australian Uniform Laws, disciplinary sanction applies up until one removes oneself from the Roll and depends not on the practising certificate. **9** See Outcomes 10.3-4, or if that individual is a professional and not SRA regulated, then report them to another approved regulator. **10** See SRA, *Guidance on the SRA's Approach to Equality, Diversity and Inclusion* (issued 23 July 2019, reviewed 25 November 2019); SRA, *Reporting Concerns: Our post-consultation position* (issued January 2019) **11** In 1969, the UN's *International Convention on the Elimination of All Forms of Racial Discrimination* was extended to Guernsey. Although it is a requirement of this Convention that people should be legally protected from racial discrimination, 55 years later the Convention has not been implemented into domestic law.