

How do persons with disabilities, living in a small self-governing island (population 65,000), set about establishing anti-discrimination laws? And why, in a small island, are such laws needed? Thirdly, what on earth has this to do with bakerlaw in Toronto, when the island in question is a British Crown Dependency located the other side of the Atlantic, eighty miles south of England and twenty miles west of France?

It has taken thirteen years to get proposals for anti-discrimination legislation proposals agreed here in the island of Guernsey. At first sight, considering the snail like progress, readers may understandably wonder if our approach might have been improved.

But maybe, before I try to answer the “how”, we should start with the “why”.

Guernsey, probably like every other place on the planet, is not immune to discrimination to some degree.

Much of the discrimination experienced by persons with disabilities is systemic and exists, for example, in the way that buildings, roads, footpaths and public spaces are designed. Systemic discrimination is evident too in many of our public services such as education, transport and healthcare and also within systems of information and communication.

Even the heart of Guernsey’s democracy is not immune: there is an irony that only two of the one thousand three hundred wheelchair users in Guernsey were able to witness the parliamentary debate that led to agreement of the policies for our discrimination legislation. The public gallery is not accessible. Only in recent years has space for two wheelchair using members of the public been made available within the debating chamber itself.

If you are not a person with disabilities, it is possible to go about everyday life without noticing any of these things.

In addition to physical barriers, there are attitudinal barriers, based on prejudice, stigma, and stereotypes. Here in Guernsey we have yet a further hurdle – a general lack of awareness and appreciation of human rights. These issues are yet more barriers to developing policies and legislation to promote, protect and monitor rights.

In the past, many islanders with disabilities relied on charity and were segregated from society throughout their lives: remnants of segregated systems of education, employment and care still exist in the island today. Amongst islanders affected by disability, there was a sense of resignation that disadvantage is an inevitable consequence of physical or mental impairment. Very few had any expectation that society should change to accommodate their impairments.

And then, in the 1970s, along came the social model of disability (impairment + barrier = disability). Understandings around the world have slowly started to change. The development of the Convention on the Rights of Persons with Disabilities (the Convention), which has the social model as a founding principle, has helped to spread this understanding more widely. Even in little Guernsey, those affected by

disability are beginning to demand that their rights are promoted, protected, and monitored.

The emergence of the concept of the social model of disability leads to the tricky question of how we in Guernsey were to go about establishing anti-discrimination legislation and then on to the prickly subject of what form that legislation should follow.

In 2007 a small band of volunteers started up an umbrella disability organisation, [The Guernsey Disability Alliance \(GDA\)](#). Today, the GDA has a membership of over 40 member groups and about 100 individual members. The GDA worked with the government of Guernsey, firstly to establish the size of the issues ([2012 Disability Needs Survey](#)), and, from this, to develop Guernsey's first ever Disability and Inclusion Strategy.

In 2013, the Strategy was agreed by the States of Guernsey. Key Strategy workstreams include the development of disability discrimination legislation and extension of the UK's ratification of the Convention on the Rights of Persons with Disabilities to Guernsey: the first is a prerequisite of the second.

For decades, successive Guernsey governments had paid little more than lip service to initiatives such as the International Year of Disabled People. Extension of the UK's ratification of the Convention to Guernsey has symbolic and procedural importance. In effect, it is a promise that change is coming. This internationally announced promise, to realise the Convention, has meaning for islanders with disabilities because that promise is backed by independent monitoring and formal scrutiny by the United Nations.

During the development of Guernsey's Strategy, it was identified that there was no expertise within government that could help with discrimination legislation and that there were no resources to research which model Guernsey might adopt from elsewhere. The GDA volunteered to try to find a local lawyer who might help. Pretty soon it became clear that there was no on-island expertise in the commercial sector either. The GDA started its own research.

The GDA's investigations identified that many models existed, and that the approach taken to eliminating discrimination varied widely - as did effectiveness. One significant issue soon became apparent – how, and even whether, to define disability.

Some jurisdictions had made the mistake of applying medical model definitions that had been previously used in, say, social security legislation. These definitions are needs based (rather than rights based) and are logically and usually qualified both by how long someone has, or is likely to have, an impairment and by the severity of effect of that impairment. It was clear from the research that medical model definitions, when used in discrimination legislation, invite litigation about who is and who is not considered to be disabled and that they restrict and complicate the protection of rights.

Medical model definitions play to notions of the “truly” or “deserving” disabled. In effect, they require a court or tribunal to establish that a person fits a legal definition before the matter of the alleged discrimination can be considered. Such notions are not in line with the Convention, which requires governments promote the dignity and rights of persons with disabilities and challenge systems and policies that perpetuate medical and charity models of disability.

Under the UK Equality Act, for example, an impairment must have lasted or be expected to last for a year. Additionally, the impairment must affect ability to carry out day-to-day activities. This is despite the fact that it is possible for someone to experience substantial and even life changing discrimination because of a condition that is either short term or does not affect ability to do day-to-day activities. Under UK law, that person would have no remedy available to them.

However, the GDA’s subsequent proposal, that Guernsey’s legislation should either not define disability at all, or define it in broad and unrestricted terms, reduced some local commentators to a state of apoplexy.

Proving disability to a certain standard can be difficult, personally invasive and distressing and, actually, there is no evidential logic in such requirements. There are two main reasons offered by some advocates of medical model definitions. The first is that they believe the medical model provides a floodgate protecting against a potential tsunami of frivolous complaints based on minor health conditions. Some even suggested that broad unrestricted definitions would result in claims of discrimination from people experiencing the common cold. Apart from there being no evidence of this happening in any of the many jurisdictions that use broad, unrestricted definitions, this reasoning ignores that a successful claim of discrimination requires the claimant to demonstrate evidence of substantial discrimination.

The second reason given is a perceived need for employers to record absence due to sickness separately to absence due to disability. Actually, it is the application of a medical model definition that drives this need in the first place: such separation is not needed when using a social model definition.

An added complication in Guernsey was that many local lawyers and business folk were wedded to the idea of simply adopting UK legislation. The UK disability discrimination legislation, which employs a medical model definition of disability, came out poorly in the GDA’s review (and in subsequent independent professional assessment). But the GDA’s views were not treated seriously – in fact they were treated with derision by some.

The GDA then considered trying to persuade an expert from Canada to visit Guernsey to explain both to local business and to government why a Canadian style approach should be adopted.

Having already had some contact with the Canadian Human Rights Commission, we asked for its advice. The introduction to the Toronto based firm of bakerlaw came directly from the Commission.

It seemed incredible to us that someone with David Baker's reputation and expertise might agree to visit us but, then again, that's partly why he has the reputation for community-based work that he does.

David made presentations in Guernsey to audiences that included business organisations, politicians, and civil servants, as well as persons affected by disability.

The two most significant outcomes from David's visit to Guernsey were that his expertise lent authority to the arguments that the GDA had been making and, importantly, it gave members of the GDA confidence that the findings of their research were valid and that they were right to be pressing for the adoption of a social model approach.

Since David's visit, the UN Committee for the Convention on the Rights of Persons with Disabilities has published a number of General Comments. All have significance to discrimination legislation, but General Comment 6, published in 2018, is particularly helpful in noting:

*"Persons victimized by disability-based discrimination seeking legal redress should not be burdened by proving that they are "disabled enough" in order to benefit from the protection of the law. Anti-discrimination law that is disability-inclusive seeks to outlaw and prevent a discriminatory act rather than target a defined protected group..."*

A similar conclusion was reached years before in the Canadian Supreme Court (*City of Montreal v. Quebec Human Rights Commission*, May 3, 2000)

David would probably be the first to agree that while his visit marked a significant milestone, there was a great deal more to be done. For a variety of reasons, the powers that be in Guernsey could not be convinced to adopt Canadian legislation wholesale.

Lack of resource and political leadership, and a change of government, slowed progress between 2013 and 2016.

Then, in 2017, a decision was made to expand the discrimination legislation so that it would protect on multiple grounds. The detailed work needed to recommend a particular model of legislation was put out to tender and experts from the University of Galway, Ireland, were appointed to do that work. The result is that Guernsey's legislation will be based on legislation that exists in Ireland and Australia.

The initial proposals, drawn up by Government of Guernsey with the assistance of the experts from Ireland, were put out to consultation in the summer of 2019 and received very polarized responses. The mostly negative responses from the business sector appeared to be driven by some less than expert legal comment from UK and local solicitors, none of which was evidence based and very little of which took account of various applicable human rights agreements.

In the end, the proposals were amended to take account of the results of the consultation and the GDA had to reluctantly accept some compromises. The definition of disability to be used in Guernsey is not completely unrestricted

(impairment must last 6 months) but it is a significant improvement on UK legislation and indeed on the legislation which exists in our sister island, Jersey.

The past 13 years have frankly been tortuous for the GDA. However, we have been fortunate that there have been a few local volunteers able to devote years of their lives to ensure that Guernsey's legislation at least gets close to meeting internationally agreed standards. We are also very fortunate that a few experts, including David Baker, have been willing to travel and give of their time, knowledge and expertise. But, developing legislation to protect against discrimination should not have to rely on fortune and charity: surely there must be a better way.