Supplementary written evidence submitted by the Discrimination Law Association (MEW0093)

MEW0081

1. The Discrimination Law Association is a registered charity, a membership organisation established to promote community relations by the advancement of education in the field of antidiscrimination law and practice.
2. It is a national association with a wide and diverse membership. The membership currently consists of some 250 members (individuals and organisations). Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, but not exclusively, persons concerned with discrimination law from a complainant perspective.
3. The Discrimination Law Association welcomes the opportunity to provide further evidence to the Woman and Equalities Committee's (the Committee) call for evidence following the Government's letter dated 25 May 2022. In this letter, the Government sought to provide justification for not enacting s14 of the Equality Act 2010. Part of this justification was that it would introduce "unwelcome regulatory complexity and place new costly burdens on business and the public sector". The Committee has requested a further short piece of supplementary written evidence on this point, which we have provided below. We are grateful to the Committee for providing a short extension of time for the presentation of our evidence to accommodate the process of writing this up.
4. The DLA's position is that section 14 should be enacted. The current protection available to prove discrimination involving multiple characteristics (for example age and gender) is not adequate, we refer back to our evidence (attached again for reference) at paragraphs 56-61 which highlights the difficulty and uncertainty for intersectional /combined characteristic claims under current case law. If the Government considers that individuals who suffer discrimination on the basis of multiple grounds are already protected by existing law, then the justification for not bringing it into force does not hold much weight.
5. The DLA do not agree that the enactment of s14 would involve regulatory complexity or would place new costly burdens on businesses. It is noted that the Government have provided no evidence that it would be complex or costly to enact. Accordingly, it appears that the concept of 'regulatory complexity' is a is a myth based on uninformed fears and pandering to the concept of 'cutting red tape' rather than knowledge of the costs of enactment or the evidential process in the courts.

6. It is also noted that in 2009 the Government 2009 issued a consolation on the 'Equality bill: assessing the impact of a multiple discrimination provision'. A number of organisations responded to this consultation and we attach here the DLA's response at that time. We refer to the answers provided to that consultation in our response here (including reference to evidence in footnotes), and specifically with regards to the alleged burdens on the courts and businesses in Annex A. We have dealt with this issue comprehensively in this document and so have not repeated this here, save for pulling out a few key and additional points. We as that this document is considered as part of our response to this supplementary question.
7. It should be noted that businesses are already well aware of their responsibilities under the Equality Act, it does not appear this would require much, if any, further training or education. This could simply be added to ongoing training. Guidance on s14 could be provided in the same way it is provided in other type of discrimination, by EHRC Code of Practice and Guidance and HSE Guidance. There are systems in place for the drafting and dissemination of this guidance already.
8. Further it is not a justification to simply say that a claim brought on multiple grounds may be complex to resolve. That is not sufficient reasoning to deny equality and justice. The complexity is already there as a consequence of the existence of many individual strands. Intersectional cases will likely become less complex because the law will more naturally suit the facts and therefore we do not consider this would add additional complexity.
9. It is understood that the s14 amendment to the Equality Act Bill was introduced late in the day and as a consequence there was little parliamentary scrutiny. The DLA consider this should be given further consideration and with time for further Parliamentary scrutiny, it may be that the Government wish to consider not simply enacting s14, but expanding it beyond simply direct discrimination to include indirect and harassment as well as discrimination on the grounds of more than 2 characteristics.
10. In summary, the DLA disagree that the administrative or regulatory burden is sufficiently substantial to justify not enacting s14. Furthermore, the DLA consider that as part of its review of enacting s14, the Government should take the time to consider expanding this to include harassment and indirect discrimination as well as discrimination on the grounds of more than 2 characteristics.

July 2022

EQUALITY BILL: ASSESSING THE IMPACT OF A MULTIPLE DISCRIMINATION PROVISION : REPLY TO CONSULTATION

The Discrimination Law Association ("DLA") is a membership organisation and a registered charity established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for the complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

DLA has a varied membership of approximately 300. It brings together a broad range of specialized discrimination law practitioners, lawyers, legal and advice workers, policy experts, academics and concerned individuals, all united around a commitment to improving equality law, practice, education and advice for those who face discrimination.

INTRODUCTION

The Discrimination Law Association welcomes the Government's commitment as stated in the consultation paper that the law should provide appropriate protection against the harmful discrimination people experience. We also welcome recognition by the Government that some people can experience particular disadvantage because of a combination of protected characteristics, but current discrimination law framework does not always provide a remedy for *intersectional* multiple discrimination.

In our response to the Discrimination Law Review and in subsequent meetings with officials, the DLA has raised the issue of intersectional multiple discrimination and urged that protection against intersectional multiple discrimination should be included in the Equality Bill.

The DLA therefore welcomes the proposal to ensure the law protects people from direct discrimination based on the intersection of two combined characteristics. However, we are concerned that the Government is proposing to extend the law for this purpose only to direct discrimination and only in respect of 2 protected characteristics.

The DLA believes protection against intersectional discrimination:

a. **should apply to harassment and indirect discrimination**
b. **should apply to 2 or more intersecting characteristics and as a minimum, should apply to 2 or 3 intersecting characteristics.**

The reasons for the Government's proposed limitations appear to be:

(a) Few examples were given of direct discrimination based on more than 2 characteristics
(b) It would place an undue burden on businesses to extend protection further
(c) It would make the law unduly complex to extend protection further
(d) Little evidence was provided through the previous consultation of the need for protection against harassment or indirect discrimination based on intersectional grounds.

The DLA's membership has a unique breadth of experience in supporting and defending discrimination cases in the tribunals. We will answer each of the Government's objections, but in summary our response is:

(a) From our experience two groups who "experience particular disadvantage because of a combination of three characteristics" and who are in great need of protection under discrimination law are, for example, younger Muslim men and younger men of African/Caribbean ethnic origin. The views of our experienced practitioners is that extending protection would not create any additional burden on business or organisations, either in the courts or in day- to-day practice. The idea that there may be an extra legal burden is a myth based on uninformed fears rather than knowledge of the evidential process in the courts.
(b) The law would not become more complex. The complexity is already there as a consequence of the existence of many individual strands. Intersectional cases will become less complex because the law will more naturally suit the facts.
(c) Conclusions should not be drawn from any shortage of examples given in the previous consultation. There are many complex reasons for this. For example, harassment on intersectional grounds frequently occurs causing considerable distress to victims; however, without provision within current law to challenge harassment on intersectional grounds its occurrence is not litigated and rarely noted.

The consultation document prompts this question – "on what principle of justice or fairness should new legislation aimed at 'fairness' deliberately exclude protection against discrimination based on a combination of two or more characteristics, which are individually prohibited, because it would be burdensome for business?" The key issue is surely justice not whether business finds it burdensome to act equitably.

DIRECT DISCRIMINATION

The need

As already stated, the DLA welcomes the Government's proposal to extend legal protection to intersectional direct discrimination based on two intersecting characteristics. There has already been provided a large amount of evidence that this protection is needed and we do not intend to repeat this in full. However, by way of a few examples:

- the high profile case concerning the treatment of Moira Stewart, a BBC news reader, was generally accepted to be based on <u>age + sex</u>,
- *Bahl v The Law Society*, the case which revealed the legal loophole, concerned an allegation <u>race + sex</u> discrimination,

- Gay people who are assumed to have certain traits according to their gender – sexual orientation + sex.

Preventative action is no more onerous in the workplace

The DLA's members consider that preventative action in respect of intersectional discrimination is no more onerous for employers or service providers because:

a. **Intersectional groups are sub-groups of the separate single groups:** There are already a large number of discrimination strands (race, sex, age etc) which need to be taken into account by an organisation. If an organisation takes appropriate action to prevent discrimination against those with any of the individual characteristics, the action should in all normal circumstances protect against unintentional discrimination on a combination of grounds. For example, if an employer takes appropriate action to avoid discrimination against women and to avoid discrimination against black people, no separate action will be needed to prevent discrimination against black women. Black women are a sub set of the category 'women' as well as the category 'black people'. The employer's preventative action is the same. But if the employer does not take appropriate preventative action, it would be unjust that a particular sub-group of women or sub-group of black people should find themselves without legal protection.

b. **Action to prevent direct discrimination is 'neutral' good practice:** The main way to avoid direct discrimination is the same, whatever the characteristic (or combination of characteristics) at risk. For example, an employer wishing to avoid direct discrimination in recruitment or promotion, ensures it operates objective fair recruitment practices – advertising openly; objective selection criteria; scoring systems etc. These practices are neutral to the type of discrimination to be avoided. To avoid direct discrimination in redundancy selection, an employer ensures it has a selection pool, applies objective criteria, uses an appropriate marking system etc. Such systems prevent direct discrimination whether on grounds of 1 characteristic or intersectional characteristics. The same need for 'neutral' good practice based on objective criteria would apply to providers of services, landlords of rented accommodation, associations and bodies carrying out public functions.

There are no special difficulties with comparators

There seems to be some confusion in the use of the term comparator. In an Employment Tribunal case the tribunal will refer to the comparator as the person allegedly treated more favourably than the complainant. The consultation document seems to use the word comparator in referring to a person who is treated in the same way, or no less favourably, than the complainant. Of course, the fact that some people have been treated the same or no more favourably than the complainant may have some significance it does not answer the question why was the comparator (using the normal tribunal sense of the word) treated more favourably than the complainant.

In probably most direct discrimination cases, there is no comparator who apart from the impugned ground will have all the same characteristics as the complainant. So the analysis required by the court or tribunal is normally inferential. The court or tribunal 'infers' from the treatment of others in similar though not identical situations whether the impugned characteristic was a relevant cause of the treatment of the complainant. This involves in looking at the evidence generally and considering 'the reason why' the claimant has been treated as s/he has (referring, for example to the judgments of the House of Lords in *Shamoon v Chief Constable of the RUC*[1] and *Ahsan v Watt*[2]).

In a case where a hypothetical comparison is relied on, the amount of evidence required is no different in an intersectional case from a single strand case. Arguably less evidence is required than in an additive case, where the claimant needs to address each characteristic separately. It is irrelevant whether 2, or more, characteristics are involved.

Where an actual comparator is used, the evidence about the treatment of that comparator is the same

Where an actual comparator is identified in a direct discrimination case, the amount and nature of evidence regarding the treatment of that comparator is no different in an intersectional case from a single-strand case. What is explored is the similarity of the comparator's circumstances to the claimant's, regardless of the relevant characteristics (e.g. job title, start date, disciplinary record, material conduct) plus the employer's explanation for treating the comparator more favourably (e.g. longer service, greater seniority, better disciplinary record, better conduct). It is irrelevant whether 2 or more characteristics are involved.

No more comparators are available to the claimant in an intersectional claim than in an additive claim

The number of comparator categories available to the claimant in an intersectional discrimination claim are identical to the number available in an additive claim (see Appendix 1 at the end of this document). It is irrelevant whether 2 or more characteristics are involved.

INDIRECT DISCRIMINATION

The need

Indirect discrimination concerns situations where provisions, criteria or practices applied by public or private sector employers and service providers, by police or other bodies carrying out public functions, or by schools or hospitals or housing providers put certain groups at a disadvantage. Some practices inadvertently discriminate against people with combined characteristics. There seems no logical reason why the protection from indirect discrimination should not be extended to include intersectional characteristics.

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[1] [2003] IRLR 285.

[2] [2008] IRLR 243.

Confining indirect discrimination to impact on single characteristics treats groups as homogeneous and ignores the differences which create disadvantage. If there are any concerns about 'extending' protection, it should always be remembered that there is a defence to indirect discrimination, ie if employers or service providers can justify their practices.

Examples of intersectional indirect discrimination:

- Dress requirements – affect men of a particular religion or ethnicity or women of a particular religion or ethnicity. There have been numerous reported cases regarding dress requirements. To date, these have been run as indirect race discrimination or indirect religious discrimination, and no one has identified the potential problem following *Bahl* (race or religion + sex).
- Periods of unemployment are likely to be longer among certain intersectional groups (race + sex) (age + disability).
- Qualifications and experience as recruitment criteria which some combined groups may be less able to meet (race + sex; age + sex; race + age).

Is preventative action more onerous in the workplace?

Because of the multiplicity of protected characteristics under discrimination law, organisations have in any event to be careful to avoid provisions, criteria or practices which may disadvantage particular groups. For example, employers' primary approach to the risk of single-characteristic indirect discrimination is to ensure that all requirements used in job selection, promotion decisions, redundancy selection etc are justifiable. Ensuring that requirements and working practices are justifiable works across the board and is neutral to which groups would be affected. Fair and justifiable decisions regarding dress codes, minimum qualifications and experience for jobs will be the same whether avoiding single-characteristic claims or intersectional claims.

Is it more complex to bring or defend a case?

There is no reason at all the cases of intersectional indirect discrimination should be any more onerous than single characteristic cases. In both situations, it is simply a question (i) of researching impact and (ii) discussing justifiability.

Many research sources group statistics according to combined as well as single characteristics.

Where the evidence is unavailable, this is a problem for the claimant, not for the employer. The initial burden of proof to show adverse impact is on the claimant.

It may cause problems to omit indirect discrimination

Indeed, it may cause legal difficulties where intersectional discrimination claims are permitted for direct discrimination but not for indirect discrimination. This is because

the factual grounds for claims can cover both direct discrimination and indirect discrimination and move between the two according to the tribunal's fact findings.

For example, in *Azmi v Kirklees B.C*[3], the claimant claimed that the refusal to allow her to wear a veil to teach school children was both direct discrimination and indirect discrimination. The case would be highly confusing if she were permitted to argue that the direct discrimination was on grounds of the intersection of religion + sex, but the indirect discrimination was based only on a single characteristic.

HARASSMENT

The need

The DLA believes there is evidence of a strong need for protection against intersectional harassment. The Government states that examples were not given of intersectional harassment. In fact some examples were given, although they may not have been differentiated in the submissions. Here we reproduce some of the previously given examples as well as some new ones:

intersectional harassment, age + sex: In one case, a young female sales person complained of harassment in her job by a middle-aged female supervisor, who kept accusing her of flirting and even called her a 'whore' on one occasion. The client said she does not flirt. The supervisor did not harass other (older) female staff, so it was not a case purely of sex discrimination. Nor did she harass young male staff, so it was not a case purely of age discrimination. Clearly, the harassment was aimed at the client because she was a 'young woman' and it took the form of remarks which were unlikely to have been made to a young man or older woman. The client chose not to pursue this case.

intersectional harassment, sexual orientation + sex: In one case, a gay man was subjected to comments such as 'all gay men have AIDS and should live on an island'. This stereotype regarding AIDS tends to be applied to gay men and would not have applied to a lesbian or a heterosexual man.

In addition, the recent case of *English v Thomas Sanderson,* although brought solely on the basis of sexual orientation harassment, contains facts which in fact suggest harassment based on sexual orientation + sex. The type of remarks made is unlikely to have been addressed to a lesbian.

intersectional harassment, race + sex: A photograph of the face of a black woman superimposed on a gorilla postcard and e-mailed around the office with the words, 'Is this *(name of female work colleague)* on holiday?'

intersectional harassment, religion + sex + age: As already referred to, numerous examples of offensive remarks made to young Muslim men associating them with terrorism, calling them 'Osama' etc

[3] [2007] IRLR 484.

intersectional harassment, race + sex + sexual orientation: In a reported case, a tribunal found race and sex discrimination where a black man was sexually harassed by his supervisor. The case report suggests facts consistent with the harassment being on the intersectional grounds of race, sex and sexual orientation. (*Acharee v Chubb Guarding Services Ltd t/a Chubb Security Personnel* (2000) EOR Discrimination Case Law Digest, 43.)

Is preventative action more onerous in the workplace?

Plainly not. Good employers will already have preventative policies prohibiting harassment of any kind, whether on grounds of a characteristic prohibited in discrimination law or not. Organisations already have to take account of civil and criminal law prohibitions on harassment, regardless of what it is based on.

Is it more complex to bring or defend a case?

There is no basis in logic or fact why allowing intersectional claims based on harassment would be more onerous than permitting those based on direct discrimination.

Indeed, allowing intersectional harassment claims to be brought makes no difference at all. No comparators are required to prove harassment as opposed to direct discrimination. A harassment case in the court or tribunal primarily revolves around evidence regarding whether certain things were said and certain actions were carried out or not. The facts of harassment, once proved, usually self-evidently indicate the characteristic to which it is related. There is no difference whether the harassment is based on a single-strand or additive strands or intersectional strands.

Excluding intersectional harassment invites legal problems and test cases

The scope of the specific definition of harassment has been remarkably untested. Referring as it does to 'unwanted conduct' creating an offensive etc environment, there is scope for a great deal of overlap with direct discrimination scenarios.

In the context of 2-characteristic treatment, where it most naturally meets the definition of harassment, but arguably also meets the definition of direct discrimination, a claimant on your proposal would have to argue it was direct discrimination. This could involve identifying a real or hypothetical comparator which would not always be possible (see *English –v- Thomas Sanderson*). The result is likely to spawn a whole body of case law in the higher courts regarding the ambit of the definitions of direct discrimination and harassment relative to each other.

The need for a consistent approach between direct discrimination and harassment

On the government's proposal, a disciplinary warning issued to a black woman because of her combined characteristics of race + sex would be prohibited, but

horrendous harassment which is perpetuated for a reason related to her race + sex, and which leads to a nervous breakdown, may not be covered.

As discrimination cases tend to involve a sequence of acts of discrimination and/or harassment, inconsistency on when a combination of characteristics can be relied on and when they cannot, is likely to lead to difficulties as well as illogicality.

Example:

Marie, a black woman, is given a first written warning on 1st March 2009 and a final written warning on 3rd June 2009, both for allegedly poor performance. There is evidence that work colleagues, who are not black women, have performed in the same way as she, but have not been disciplined. She believes this is because her employer seems to be intimidated by assertive black women. There are white women and black men (as well as white men) who have not been disciplined in similar circumstances.

During May 2009, the manager who disciplined Marie made very unpleasant adverse comments about black women and about Marie's behaviour as a black woman. He made these remarks in front of staff who she supervises, thus undermining her ability to supervise.

Analysis and comments:

a. Under the government's proposal, Marie can claim that the warnings amounted to direct discrimination based on race + sex.

b. Racist/sexist comments/abuse are usually treated as within the definition of 'harassment'. So in the tribunal, Marie could use the evidence of the comments to help her prove that the warnings were direct discrimination based on the combined characteristics of race + sex, but she could not claim the remarks were themselves harassment based on the combined characteristics. But in the sequence of events, the remarks and their undermining of her supervisory ability, are an integral part of the story. Her choices would be either (a) not to complain about the remarks/undermining at all or (b) attempt to prove they were in themselves based on/related to race or in themselves based on/related to sex. This would be nonsensical in terms of the structure of the case and the way the events should sensibly be looked at.

DISCRIMINATION ON TWO OR MORE GROUNDS

Although the majority of cases concerned 2-characteristic intersectional discrimination, there are some very specific disadvantaged groups who are vulnerable to 3-characteristic intersectional discrimination, in certain contexts for example:

- young men of African/Caribbean background,
- young Muslim men,
- young men of Asian background who are perceived to be Muslim but may not be,
- Bengali Muslim women,
- young men with a mental health disability
- black lesbian women

The DLA understands the Government is very concerned with inclusion and the maintenance of community cohesion. The Government recognises the importance of setting legal norms to prevent discrimination and to build confidence in certain disadvantaged groups that they warrant full equal rights in this and their concerns will not be ignored. If 3-characteristic discrimination is not protected, the new legislation will fail to offer protection to some of the groups in respect of whom it is the Government's current priority to win and hold confidence as British citizens.

Since 11th September 2001 and 7th July 2005, it is well known that young men who are Muslim or who look Muslim have suffered discrimination in employment and in ordinary activities such as travelling on buses and trains, eating in cafes or enjoying recreational activities.. Our members report countless examples of offensive remarks, so-called jokes, and difficulties getting work by young Muslim men, young Asian men or young dark-skinned men.

Although the DLA believes there is no logic in limiting rights of redress for any form of intersectional discrimination (see arguments below), we urge the government as an absolute minimum to apply protection to 2 or 3-characteristic discrimination.

Is it more complex to bring or defend a case?

The DLA believes that it is no more onerous to permit 2-characteristic intersectional discrimination claims than single strand additive claims. Moreover, we believe it is no more onerous to permit 3-characteristic intersectional discrimination claims than 2- characteristic intersectional discrimination claims. The reasons are set out in the following analysis based on the practical experience of practitioners supporting and defending discrimination claims. Many of the points are further illustrated by the sample case study below.

The focus in the consultation paper on comparators in intersectional claims on three grounds is inappropriate

We have already explained how comparators are used in discrimination cases. To prove that discrimination is based on the combination of 3 characteristics, evidence of stereotyping is far more likely to be important. This is because there is not usually a

logical reason why an employer should discriminate specifically against those with a particular combination of characteristics if the employer was not going to discriminate against those possessing each characteristic singly. The most obvious explanation why an employer should react negatively to a combination of characteristics is because some stereotype is held about the sub-group in question.

The simplest example to illustrate this concerns young Muslim men. There is a great deal of evidence regarding harassment, offensive remarks and failure to recruit people with those three combined characteristics since September 11th. It is universally agreed that the reason for this was that those people specifically were regarded as terrorists. It is not a problem which appears to have faced young Muslim women or older Muslim men. One of our members reports precisely such a case. A young Muslim man in religious dress was taken on at a call centre. He was dismissed without being allowed to complete his probationary period despite his excellent track record with other employers. During his short employment, incidents occurred which revealed that some of his co-workers were afraid of him because of the terrorist stereotype. This appeared to be the true reason for his dismissal. The crucial evidence in his case was (i) that the employer could not provide examples of anything wrong with his work (ii) the incidents with his colleagues. None of this evidence was any more onerous than it would have been for single-characteristic direct discrimination. The case itself settled midway through the hearing, so the issue of intersectional discrimination was not legally tested.

The employer would have access to more negative defensive comparators than in single-strand claims

In the above example, a search for comparators hypothetical or otherwise is unlikely to be very important. But we note the consultation paper is concerned that fewer defensive comparators would be available to the employers (should they be relevant). (See Appendix 1 at the end of this document for a definition of 'negative defensive comparators'.) In fact, in intersectional discrimination claims, the organisation has plenty of negative defensive comparator categories available. Any person who does not share all of the claimant's characteristics and who has been treated equally badly by the employer is potentially enough to defeat the intersectional claim.

The employer would have access to fewer positive defensive comparators but this is balanced by the fact that it will be harder for the claimant to transfer the burden of proof in these claims

The question will be "what can be inferred from their treatment"? because of the nature of intersectional discrimination not much may be the answer, but equally unless there is evidence of stereotyping – see above – the claimant is unlikely to prove enough to reverse the burden of proof which would then cause the employer to have to explain their action (See Appendix 1 at the end of this document for the definition of 'positive defensive comparators'.) A tribunal or court is unlikely to accept there has been potential discrimination against a black woman based on, say, the intersection of race+sex, purely because a white man has been treated more favourably. The

tribunal/court is likely to require some other evidence indicating that both factors are operating intersectionally.

Employers' primary defence to direct discrimination claims is not usually defensive comparators in any event

Organisations' central defence to allegations of direct discrimination in practice is almost always that they have valid non-discriminatory grounds for treating the claimant as they have. For example, in a recruitment case, an employer may say the claimant had inadequate experience or interviewed badly. In a disciplinary case, the employer will point to the seriousness of the offence, the evidence indicating the offence had been committed and the disciplinary policy. None of these defences involve finding defensive comparators of any kind. In the end the best defence by far is a rational policy consistently applied. That is why an employer with a good equal opportunities policy will have little to fear from these proposed changes.

It is no more onerous to disclose relevant statistics

At first sight, a 3-characteristic case seems to require extra information on statistics in a discrimination questionnaire. In a case of alleged discrimination against a young black woman, whereas in a single characteristic case, the claimant might ask the race of other job applicants, the successful candidate and existing employees, in a 2- characteristic case, she would also be asking their sex. In a 3-characteristic case, she may also be asking their age.

But how much more onerous is this really?

(a) In additive or ordinary multiple discrimination, the claimant will be able to ask such questions anyway.

(b) Questionnaires ask for a large number of variables these are not purely confined to the protected characteristics. For example, most questionnaires will ask for statistics of employees by reference to start date, termination date, job title, grade, location, disciplinary action and so on as well as the protected characteristics. Moreover, there is nothing at present to stop a potential claimant asking for information on all three grounds using the questionnaire procedure. In terms of onerousness, it is neither here nor there whether one of the variables happens to be another protected characteristic.

(c) Good practice requires employers to monitor staff and job characteristics according to each of the protected characteristics in any event, because a single characteristic claim could be made on any of the grounds.

Case example

The following example illustrates why the law is no more complex for intersectional direct discrimination based on 3-characteristics and therefore no more burdensome for business.

Ahmed, a young Muslim man fails in his application for a job for which he is well suited. Certain comments were made and questions asked at interview which make him believe this is because he was perceived as a potential terrorist.

He brings a claim for intersectional discrimination based on the combined characteristics of sex (male) and religion (Muslim).

His comparator is the successful candidate who had fewer qualifications and less experience for the job. The successful candidate was Shahira, a Muslim woman, thus showing that the employer was not discriminating against Muslims per se.

However, the employer defeats Ahmed's claim by proving it recently recruited Saeed, another Muslim man. Saeed is aged 55. Ahmed believed Saeed was recruited because, as an older man, he did not fit the terrorist stereotype.

Ahmed's real case is that he was discriminated against because of the intersection of three protected characteristics, ie sex (male) + religion (Muslim) + age (young).

Analysis and commentary:

1. It must be contrary to public policy that Ahmed should be unable to succeed in his discrimination case on these facts. The most obvious 3-characteristic group requiring protection against discrimination is young Muslim men.

2. It must be contrary to public policy that Ahmed's chances of success are dependent on the random chance of whether the employer happens to have employed other (older) Muslim men. If the employer had not recently taken on Saeed, because Saeed happened not to have applied, Ahmed might have succeeded in his claim based on two characteristics (male + Muslim).

3. Once a comparator is identified, the factual investigation is the same, whether the discrimination is alleged to be based on 2 characteristics or on more than 2 characteristics. Many discrimination cases do not have any comparator. But where there is a comparator, all details of his or her work history / character / other qualities / relevant circumstances come under scrutiny in any event. This makes absolutely no difference to the quantity of evidence required in a case of 2 combined characteristics as opposed to in a case of 3 combined characteristics.

In this case, for example, the obvious comparator is the person who got the job, Shahira. In a 2-characteristic case, what matters is that Shahira does not share those 2 characteristics (ie is not a Muslim man). In a 3-characteristic case, what matters is that Shahira does not share those 3 characteristics (ie is not a young Muslim man).

The question then becomes why the employer favoured Shahira – eg she did a better interview. The evidence is identical whether it is a 2-characteristic or a 3- characteristic case. Neither is more onerous. In both situations, a detailed examination of the circumstances of the comparator is needed.

4. **Even if there are more comparators chosen by the Claimant in a 3+ characteristic discrimination case, the same individuals will be put forward by the employer in order to defeat a claim in a 2-characteritic case. Either way, the evidence is the same.**

In this example, in a 3-characteristic case, Ahmed might point to Saeed as well as Shahira as a comparator. In a 2-characteristic case, Ahmed would not want to draw attention to Saeed. Superficially, there would be less evidence required in the case.

But in practice, the result would be the same. Because although Ahmed would not draw attention to Saeed in a 2-characteristic case, the employer would, as it would defeat Ahmed's claim. Either way, the reason for appointing Saeed would need to be investigated.

5. **Comparators are likely to be less important anyway in intersectional claims.** Most intersectional claims are likely to be based on negative stereotypical assumptions. Evidence regarding comparators is likely to be of less benefit to claimants than in single characteristic claims. For example, if the employer in this case employs Muslim women and employs non-Muslim men, albeit with lesser qualifications and experience than Ahmed, it is still likely to require an element of extra evidence to establish a prima facie case that the discrimination is on grounds of combined characteristics. That extra evidence may be the remarks made at the interview, revealing negative stereotypical views held of young Muslim men. Evidence of remarks and common stereotypes will be identical whether based on 2- characteristics or 3-characteristics.

6. **If intersectional discrimination cannot be claimed, claimants will resort to additive or ordinary multiple discrimination, which will require more evidence.** In this example, if Ahmed is not permitted to bring a 3-characteristic claim and is aware of Saeed's existence, he will be forced to bring three separate discrimination claims, ie for sex, religion and age. Each of these will require its own evidence, argument and statistics. In fact it is likely to be a longer and more onerous claim than a combined intersectional claim.

ADDITIONAL COMMENTS, APPLICABLE ACROSS THE DEFINITIONS

Race discrimination is already intersectional

Far from the idea of intersectional discrimination being a new concept which must be handled in the workplace and in tribunals, we are already familiar with the concept of intersectional discrimination within the Race Relations Act 1976 (RRA). Indeed we are so familiar with using those concepts, that no one has noticed there is any particular problem. The RRA 1976 prohibits discrimination on grounds of colour, nationality, national origin or ethnic origin, or any combination of those characteristics. For example, a French national of African ethnic origin may claim he was discriminated against because of that combination of characteristics See *Ophanos v Queen Mary College*[4].

[4] [1985] IRLR 349.

If intersectional discrimination cannot be claimed, claimants will resort to additive discrimination claims, which may well require more evidence than an intersectional claim.

At para. 4.12, the government recognises that, if unable to bring multiple- characteristic claims, people will bring separate claims under each characteristic.

Extra characteristics do not require extra evidence; they merely give scope for a different and more efficient analysis.

At para 4.12 of the consultation paper, the government states that the impact of enabling claims of multiple discrimination to be brought would be to add one more claim to the existing cases already being brought. We would suggest this is less in the nature of an additional 'claim' and more a question of permitting a different analysis of the evidence.

For the reasons set out above, allowing intersectional discrimination cases, and allowing them for three or more combined characteristics as opposed to two, will make very little if any difference to the amount of evidence required to be produced and analysed for the tribunal/court. It will simply enable a different analytic argument to be made by the representatives and applied by the courts. As the analysis will better fit and make sense of the evidence, if anything, it will save time on wasted and futile arguments. The risk of more onerous and lengthy cases and the negative risks identified in the consultation paper are basically caused by the existence of multiple discrimination strands and the possibility of bringing *additive* discrimination cases, which as the government rightly says, cannot be precluded. The possibility of bringing intersectional claims would make very little difference in this respect, but would address real social problems and the reality of the disadvantage experienced by many people.

European Law and avoiding test cases

We believe there are strong arguments that EU law already prohibits intersectional discrimination and also that *Bahl v Home Office* was wrongly decided. For example, if someone is discriminated against because they are a black woman and not because they are a woman per se or a black person per se, there is nevertheless an element of race in the discrimination and an element of sex founding the discrimination. This is an area which invites test cases with consequent expense and uncertainty, unless legislation is clear from the outset. We understand one of the key purposes of the Equality Act is to put to an end all the anomalies and uncertainties which have arisen as a result of piecemeal amendments arising from test cases under EU law.

The logic behind the EHRC and the Government's inclusion strategy

The whole logic behind replacing separate Commissions with the EHRC was precisely that people cannot be pigeon-holed into single characteristics.

In a diverse society, disadvantage cannot be pigeon-holed in to single-characteristic groups. The government has acknowledged this general truth, e.g. by proposing a public duty to consider socio-economic inequality. It is contrary to the logic of this

expansion of means to tackle disadvantage wherever it may be found, to exclude those who are likely to be the most disadvantaged because they possess the characteristics of more than one typically disadvantage tagged group.

Fear of vexatious litigants

The tribunals and courts have case management systems to deal with vexatious cases. Quite apart from that, the risk of vexatious litigation arises equally whether single or multiple characteristic discrimination is permitted. Even if intersectional discrimination is not covered, there is nothing to stop an individual bringing separate claims on grounds of race and sex and age and so on anyway.

Appendix 1: NUMBER OF COMPARATORS

As we mentioned earlier there seems to be some confusion in the use of the term comparator. In an Employment Tribunal case the tribunal will refer to the comparator as the person allegedly treated more favourably than the complainant. The consultation document seems to use the word comparator in referring to a person who is treated in the same way, or no less favourably, than the complainant. Of course, the fact that some people have been treated the same or no more favourably than the complainant may have some significance it does not answer the question why was the comparator (using the normal tribunal sense of the word) treated more favourably than the complainant.

For clarity, in this response we have adopted the following nomenclature:

Comparator – This has its normal meaning, i.e. someone with different characteristics to the claimant who has been treated better in similar circumstances.
For example, a black worker fails to gain promotion. He believes this is due to race discrimination. He compares himself with a white worker with lesser qualifications and experience who has been promoted instead.

Positive defensive comparator (entirely our own phrase): someone with all the same characteristics as the claimant, who the employer says s/he has treated well.
For example, a black worker has failed to gain promotion. He believes this is due to race discrimination. But the employer has promoted other black people.

Negative defensive comparator (entirely our own phrase): someone who does not share *all* of the claimant's relevant protected characteristics, but who, nevertheless, the employer says s/he has treated equally badly. By definition, these would fall into the same categories as those available to the claimant as potential comparators.
For example: a black worker has failed to gain promotion. He believes this is race discrimination. As a comparator, he selects a white worker with similar qualifications and experience who has been promoted. To defend the case, the employer finds a white worker with similar qualifications and experience to the claimant who has also not been promoted.

This illustrates that the comparator groups available to the claimant and to the employer are exactly the same. The same applies for intersectional discrimination, as a matter of logic and as illustrated in the table below.

1. single strand: black woman claims race discrimination

claimant's potential comparators:
white women
white men

employer's potential 'negative defensive' comparators (ie it's not only black people they treat badly):
white women
white men

employer's potential 'positive defensive' comparators (ie they do treat black people well):
black women
black men

2. single strand: black woman claims sex discrimination

claimant's potential comparators:
black men
white men

employer's potential 'negative defensive' comparators (ie it's not only women they treat badly):
black men
white men

employer's potential 'positive defensive' comparators (ie they do treat women well):
black women
white women

3. intersectional: 2 characteristics – race+sex

discrimination claimant's potential comparators:
black men (consistent with sex discrimination or intersectional race+sex discrimination)
white women (consistent with race discrimination or intersectional race+sex discrimination)
white men (consistent with race discrimination or sex discrimination or intersectional race+sex discrimination)

employer's potential 'negative defensive' comparators (ie, it's not only black women they treat badly):
black men
white women
white men

employer's potential 'positive defensive' comparators (ie they do treat black women well):
black women

Conclusion from the above table:

a. One more claimant comparator category is available in 2-characteristic intersectional discrimination cases compared with single characteristic cases.
b. The same number of claimant comparator categories are available in intersectional discrimination cases as in additive discrimination cases, whatever the number of characteristics involved.

c. The number of comparator categories available to a claimant and to an employer as negative defensive comparators is identical in any type of case, however many characteristics are involved and whether intersectional or not.
d. The employer has fewer positive defensive comparator categories available in an intersectional discrimination case compared with an additive or single characteristic case. However, this is balanced by the fact that the claimant will find it far harder to prove discrimination has occurred on the intersectional ground in the first place. In such cases, as explained elsewhere, the argument is far more likely to revolve around any evidence of stereotyping and whether the employer has an 'innocent' reason for how it has treated the claimant, than around comparators on either side.

The above indicates that the mechanisms for proof and disproof of discrimination are in perfect balance, save that, as is long-established and constantly repeated by the higher courts, it is actually harder for a claimant to prove discrimination *in any type of case* than it is for an employer to disprove it, because the primary burden of proof is on the claimant.

ANNEX A Response Proforma

RESPONDENT NAME:	ADDRESS:
ORGANISATION: Discrimination Law Association	DATE: EMAIL:
DISCUSSION QUESTIONS	**RESPONSE**

Question A:
Do you agree with the conclusions set out in our Impact Assessment on the impact of multiple discrimination claims brought alongside single strands claims? If not, please explain why.

The Discrimination Law Association (DLA) considers that it is very difficult to estimate how many new claims would result from the introduction of this provision. We estimate that the majority of multiple discrimination claims which would be brought would have been brought as single ground discrimination cases if there was no multiple ground remedy (although they would have been much less likely to succeed than if able to be argued on combined grounds). Consequently, we would anticipate that no more than 5% more cases a year would be brought and of these we consider that only a few will come to trial.

Question B:
To what extent would you agree that the process for identifying a comparator in a multiple discrimination case would be no more onerous than in a single strand case?

When identifying a comparator, a claimant looks for someone who has been treated more favourably in similar circumstances. In a recruitment case, this may be the successful candidate. In a disciplinary case, this may be someone who has committed a similar offence but not been disciplined.

The comparator in a single strand case must be someone who does not share the relevant characteristic of the claimant.

The comparator in an intersectional case is someone who does not share *all* of the claimant's relevant characteristics
i.e. they may have one or the other but not both.

The consultation paper is wrong if it is saying that the relevant comparator in a 2-characteristic intersectional case

is only someone lacks the claimant's characteristics.

latter in our answer to Question F.

Question C:
Do you agree that the proposed multiple discrimination provision would not require businesses or organisations to do more to avoid the risk of a multiple discrimination claim than they need to do to avoid single-strand claims? If not, please explain why. Please include what additional steps you think they would need to take.

It logically follows that actions taken by a business or organisation to avoid discrimination based on single characteristics should also suffice to avoid multiple intersectional discrimination. For example, if a business wished to ensure it did not discriminate against women, such policy would have to include not discriminating against women whatever their age, ethnic origin, religion, sexual orientation etc.

Further, the main steps an organisation takes to avoid discriminating on single characteristics are good, objective and justifiable practices. These are no different according to whether the employer is avoiding discriminatory practices on the various single grounds or on intersectional grounds.

To avoid direct discrimination, the organisation avoids subjectivity in decision making. To avoid indirect discrimination, the organisation ensures it can justify its requirements and practices. To avoid harassment, the employer puts in appropriate safeguards.

Question D:
Do you agree with our assessment of how businesses and organisations will defend a claim, and the costs which will be incurred when they face a claim of multiple discrimination? If not, please set out how you think the process would differ from that described and how this would impact on the costs incurred.

We agree that the basic shape of intersectional discrimination claims will be the same as for single- characteristic claims.

Question E:
Do you agree with our conclusion that multiple discrimination claims should not take significantly longer to consider than single strand claims? Do you agree with our conclusions that cases including a multiple discrimination claim would not take

significantly longer to consider than cases only including single strand claims? If not, can you describe how much longer you

Question F:
In defending claims of discrimination, do you/does your organisation rely on evidence of the treatment of similar people within your organisation? How would a multiple discrimination provision impact on this? By limiting the combination to 2 characteristics, we consider that this approach will still be feasible. Do you agree?

We would make some observations on this question from our members' experience of running and defending numerous discrimination cases.

1. The proper and most important way for employers to defeat Claimant's cases is by providing a straight forward and clear non-discriminatory explanantion for the way the Claimant has been treated. In this respect, it is irrelevant whether the claim is based on 1 or a combination or 2 or 3 or more characteristics.

2. Although organisations do occasionally provide evidence of favourable treatment of others sharing the claimant's characteristics in order to defeat a claim, this is not invariably the case.

3. The other key reason why claims are defeated is because Claimants cannot establish a prima facie case which shifts the burden of proof. The greater the number of combined characteristics relied on, the harder it will be for the claimant to shift the burden of proof. So matters will not even get as far as the business's defence. This will be a problem for claimants but it will not be a problem for those defending claims.

Question G:
To what extent does your business or organisation demonstrate good practice in making sure you can point to the non discriminatory reasons for the decisions your business or organisation makes?

n/a

Question H:
Do you consider there would be any other costs involved in defending a claim of multiple discrimination which we have not addressed in these questions? Can you please describe what these costs might be?

No

Question I:
What would guidance need to cover to ensure that businesses and organisations are clear about what they do and do not need to do? What do you consider to be the best way to communicate this guidance? Where would you normally go for guidance on discrimination law?

The Equality and Human Rights Commission is appropriately placed to provide Guidance tailored to business needs and reflecting the needs of both small and large businesses.
Training should also be provided by organisations such as Business Link.

Question J:
Do you think our estimation of up to two hours for familiarisation time is correct? If not, how much time do you think would be needed to familiarise your business or organisation with this provision? Can you please describe the size of your business or organisation?

No, we do not think that two hours for this topic will be necessary. Businesses and organisations are going to have to offer re-training on this Act generally and this topic will constitute only a small increment to that. We believe that it would take less than one hour in this context. We would not expect that businesses would have to re-think all their HR systems rather that they should act to prevent all the primary grounds for discrimination occurring with an awareness that people can be picked out for discriminatory treatment because they belong to a sub-group of a protected characteristic.

Question K:
We think that the large majority of people who have experienced multiple discrimination are already bringing cases relying on single strand claims and if a provision for multiple discrimination were introduced, that approximately 7.5% of the existing caseload would include a claim for multiple discrimination. From your business or organisation's perspective, do you agree with this conclusion? If not, please explain why.

Yes.

Question L:
Were protection from multiple discrimination to be introduced, we estimate that there would be a 10% increase in the number of cases brought. From your business or organisation's perspective, would you agree with this conclusion? If not, please explain why.

We do not believe there would be an increase in cases brought at all. If people cannot bring intersectional claims, they will try a series of single-characteristic claims. It is just that the intersectional claims which are brought would be more tailored to the facts and more likely to succeed.

Question M:
We conclude that there is likely to be a 20% increase in the number of cases that include a multiple discrimination claim which businesses or organisations choose to settle. From your business or organisation's perspective, would you agree with this conclusion? If not, please explain why.

We do not think the number of cases involving intersectional discrimination as opposed to additive multiple discrimination will be as many as a 20% increase. We think claimants will still base claims on simpler single-characteristic grounds where this suffices.

Question N:
How can we work with businesses and organisations to discourage unmeritorious claims of multiple discrimination?

The theoretical risk of unmeritorious single characteristic and additive claims already exists and is no worse for intersectional claims. There are numerous protected characteristics which can found separate claims and can be run concurrently. However, evidence over many years does not lead to the conclusion that more than a tiny minority of vexatious claims are ever brought.. By far the greater difficulty, which has long been acknowledged by experts in the field, is the difficulty of proving individual cases of discrimination when it has actually occurred.

Question O:
What can Government do, either through guidance or other means, to help individuals to understand their rights in relation to multiple discrimination?

The Government can ensure that the Equality and Human Rights Commission produces appropriate, practical and tailored Guidance. Ensure training is provided through organisations such as Business Link and increase funding to legal advice services and for legal educational materials.

Question P:
Can you please describe how you think a multiple discrimination provision would affect your business or organisation? Please indicate the size of your business or organisation when answering this question.

N/a.

Question Q:
Do you consider that the proposed provision could have unintended consequences? If so, please explain what they are and how the risk could be reduced.

No. We think it is *failure* to cover intersectional discrimination fully as we propose that would have unintended consequences, i.e.

- leading to lengthy test cases and appeals
- creating dissatisfaction among excluded groups

Question R:
What benefits could the proposed provision have for you or your organisation?

The DLA believes permitting intersectional discrimination claims would be beneficial for numerous reasons:

1. It is socially important. Many of the most discriminated groups who are most alienated from society would not be deprived of a remedy and would see that society wished to provide a legitimate means of redress. We think it particularly important that, as a minimum, direct discrimination be prohibited for up to 3 characteristics, as young Muslim men and young black men are two specific groups who are particularly discriminated against and will justifiably feel alienated if they are excluded from protection.

2. It is easier for tribunals and parties to deal with a law which meets the factual circumstances, rather than trying to fit a square peg into a round hole.

3. It precludes the cost, uncertainty and disruption of test cases being taken to the ECJ.

Question S:
Do you think the provision we are proposing would fill the gap we have described?

No. It is a start but it does not go far enough. For the reasons we explain in our attached statement, we believe:

1. direct discrimination based on more than 2 characteristics should also be prohibited and, as a minimum, at least up to 3 prohibited characteristics.

2. harassment based on multiple characteristics should also be prohibited and, as a minimum, at least up to 3 prohibited characteristics.

3. indirect discrimination on multiple characteristics should also be prohibited and, as a minimum, at least up to 3 prohibited characteristics.