

## Written evidence from The Law Society of Scotland [MEW0078]

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Equalities Law and Employment Law sub-committees welcome the opportunity to consider and respond to the UK Parliament call for evidence to the Menopause and the Workplace Inquiry<sup>1</sup>. The sub-committees have the following comments to put forward for consideration.

### Response to the Inquiry's questions

---

#### 1. What is the nature and the extent of discrimination faced by women experiencing the menopause?

Recent studies<sup>2 3</sup> on menopause conclude that the symptoms of menopause impact on women's ability to carry out their work and that they would like to see some adjustments being made to the working environment to alleviate some of the problems they face. They are also reluctant to discuss the issue with managers. There are relatively few reported cases of discrimination involving menopause (see below) but as menopause policies and training become more common, HR professionals and line managers are seeing more women raise this issue. There is also anecdotal evidence that employers may be inadvertently discriminating against women in the workplace because they are dismissive of the impact of the symptoms.

##### 1.1. How does this impact wider society?

The number of women who are menopausal and perimenopausal in the workplace is significant and these workers and their dependents are financially impacted if they are forced to give up work because of menopausal and perimenopausal symptoms. There is a misconception that this impacts women in their late 40s and 50s however perimenopause can impact women in a much

<sup>1</sup> [Menopause and the workplace - Committees - UK Parliament](#)

<sup>2</sup> <https://www.cipd.co.uk/about/media/press/menopause-at-work>

<sup>3</sup> <https://www.gov.uk/government/publications/menopause-transition-effects-on-womens-economic-participation>

younger age group. It can also last for several years. These workers have a great deal of experience which is likely to be lost to the economy if they are forced to give up work prematurely. Early menopause affects women of all ages – it is defined by the NHS as menopause occurring before the age of 45<sup>4</sup>, and can be a naturally occurring process as well as an impact of treatment for other conditions such as cancer.

## **2. What is the economic impact of menopause discrimination?**

We are not aware of specific statistics on economic impact but if a greater proportion of UK workforce are women over the age of 50, there will likely be a greater proportion of the UK workforce impacted by the menopause. Failure to address their issues will result in financial impact to the employer in terms of loss of productivity, an increase of absence days which impacts on productivity, and expense of recruiting in the event of women leaving the workforce. These workers have a great deal of experience which is likely to be lost to the economy, loss of revenue to the state and a burden on the state by way of benefit payments if they are forced to give up work prematurely.

## **3. How can businesses factor in the needs of employees going through the menopause?**

Businesses should have and implement policies for supporting all workers (not just menopausal workers). Supporting menopausal women should be a part of these policies to avoid labelling women of a certain age as specifically needing support. This policy should include making reasonable adjustments to support workers.

Businesses should educate and train managers in the symptoms of menopause, how to recognise and support menopausal workers without labelling them or making assumptions and recognising that everyone who experiences menopause has a different experience and/or a different range of symptoms and to make reasonable adjustments to support those going through the menopause and perimenopause. Businesses should also educate and advise all their workers regarding the menopause and perimenopause, the symptoms, and provide information on how they can support colleagues going through the menopause and perimenopause.

## **4. How can practices addressing workplace discrimination relating to menopause be implemented? For example, through guidance, advice, adjustments, or enforcement.**

Education and training particularly of managers is key. Guidance and advice should be available to all workers. Workers suffering from menopause must feel comfortable disclosing their symptoms. Adjustments should be made to working practices where necessary e.g. better ventilation flexible/home working. The Faculty of Occupational Medicine's 2016 guidelines on menopause and the workplace<sup>5</sup> recommend training that raises awareness of menopause at work and introduces an array of workable solutions.

<sup>4</sup> <https://www.nhs.uk/conditions/early-menopause/>

It is important to teach about the menopause and perimenopause within schools so that everyone in society has an awareness of it in order to normalise something that happens to women and to tackle the stigma around the menopause.

#### **4.1. What are examples of best or most inclusive practices?**

The education sector has been leading the introduction of menopause policies and training of staff. It is arguable that instead of separate policies menopause should be included in a wider agenda of fairness at work.

Educating all staff, including men. Ensuring any policies that are implemented cover women and any others impacted by the menopause e.g. someone who is trans or on hormone therapy. Men can be impacted if they are living with partners experiencing perimenopause and menopause. Educating and helping them to support partners is an important role an employer can play as well as ensuring they understand the issues some of their female colleagues may be experiencing.

#### **5. How should people who experience the menopause but do not identify as women be supported in relation to menopause and the workplace?**

Training, guidance and policies must specifically mention this issue which may not be obvious to all employers. All people suffering menopausal and perimenopausal symptoms must be included in protection against discrimination.

#### **6. How well does current legislation protect women from discrimination in the workplace associated with the menopause?**

The Equality Act 2010 (2010 Act) provides protection against discrimination. Protection under the 2010 Act against discrimination is available from day 1 of employment (or even before). There is no need for a period of qualifying service to make a claim. However, the protection offered by this Act does not extend to the self-employed. The main issue with the 2010 Act is that to make a claim under the 2010 Act the claimant must bring the claim under one of the existing protected characteristics and if that cannot be done the claim will fail. Menopause is not a protected characteristic. Claims are most likely to be brought based on the protected characteristics of sex, age or disability. Three examples from the case law are *Merchant v British Telecom plc* [2012] 1 WLUK 683 EAT where the claim was successfully based on sex discrimination and *Davies v Scottish Court Service* [2018] 5 WLUK 156 where a claim was successfully based on disability discrimination and *A v Bonmarch* (in administration) ET 4107766/2019 where a claim for harassment was based on sex and age discrimination. The 2010 Act has various gaps in the protection. Bringing a case under sex discrimination may be problematic for

---

<sup>5</sup> <http://www.fom.ac.uk/health-at-work-2/information-for-employers/dealing-with-health-problems-in-the-workplace/advice-on-the-menopause>

non-binary workers. Using age discrimination may be difficult for someone suffering from an early menopause. Neither of these protected characteristics offers a right to reasonable adjustments. Disability discrimination which is the only protected characteristic to offer a right to reasonable adjustments does not apply until the symptoms are severe enough to have an adverse effect on ability to carry out normal day to day activities and this protected characteristic does not provide protection from harassment and victimisation until the worker can be regarded as disabled.

Employees are also offered protection from unfair dismissal (including constructive dismissal) by the Employment Rights Act 1996. In bringing a case under the 1996 Act the main gaps in protection are that there must have been a dismissal before the protection applies and the protection only applies to workers who meet the strict definition of employee under that Act. The unfair dismissal provisions of the 1996 Act do not provide protection whilst still employed. There is a right for those who meet the definition of employee to request flexible working under the provisions of the 1996 Act but the employer has a range of reasons to refuse that request and the remedy for an unreasonable refusal of a flexible working request is relatively weak. There are also protections available under health and safety legislation however these are generally not enforceable by the individual. It can therefore be seen that the current legislation does not provide comprehensive protection.

### **6.1. Should current legislation be amended?**

The current legislation does not provide comprehensive protection. The 1996 Act remedies only apply on dismissal and the protection only applies to workers who meet the strict definition of employee under that Act. The 2010 Act has various gaps in the protection, which should be addressed. As identified above, there is no one protected characteristic which applies to all potential claimants, and the protections afforded under each characteristic differs. Disability discrimination which is the only protected characteristic to offer a right to reasonable adjustments does not apply until the symptoms are severe enough to meet the definition of disability and does not provide protection from harassment and victimisation until the worker can be regarded as disabled. One way to deal with the issue would be to amend legislation to treat menopause and perimenopause as a 'deemed disability'.

The issue could also be addressed by creating a new protected characteristic for menopause within the Equality Act. This should include a general protection against direct discrimination, indirect discrimination, harassment and victimisation as well as some sort of right to reasonable adjustments in the workplace for those with menopause and perimenopause symptoms. The process of "diagnosing" menopause is difficult. The range of symptoms is so wide and differing and in particular may be difficult to for medical professionals to confirm a person's perimenopausal status which is potentially when the greatest impact is felt. For some their personal experience is

that their menopause does not have a significant impact on their lives and therefore would not require protection. Menopause and perimenopause could be defined in any legislation as a range of physical or mental symptoms having a significant impact on normal daily living.

## **6.2. What further legislation is required to enable employers to put in place a workplace menopause policy to protect people going through the menopause whilst at work?**

ACAS already provides guidance, but an ACAS code of practice (or specific inclusion in existing codes) would be useful for employers and workers or inclusion in existing codes. Existing legislation may well be sufficient to offer protection as is demonstrated by the successful claims mentioned above. Training and education of workforce and managers is more important. Inclusion of menopause as a specific example embedded in general policies and guidance is desirable. This could be achieved by amendment of existing Health and safety legislation.

As outlined above, menopause could be added to the Equality Act 2010 as a protected characteristic. This could be defined as including perimenopause as well as menopause or else define “menopause” in such a way as it will include perimenopause. As noted above, there should be a requirement to show that there is a significant impact on normal daily living. While this requirement would be similar to the protected characteristic of “Disability” having a separate characteristic of menopause (or perimenopause and menopause) recognises the intersection between age, disability and sex. There should also be statutory guidance implemented for employers to follow.

## **7. How effective has Government action been at addressing workplace discrimination related to the menopause, and what more can the Government do to address this issue?**

Raising awareness is important. It is noted that the Scottish Government’s Women’s health plan<sup>6</sup> is step forward in tackling female specific health issues including menopause. The next step would be legislation underpinning some of those initiatives.

## **8. How effectively is the Government Equalities Office working across Government to embed a strategic approach to addressing the impact of menopause in the workplace?**

Although the Equalities office have clearly been active in promoting debate, it is not clear from their website what their role is in addressing this topic and this could be made more obvious.

<sup>6</sup> <https://www.gov.scot/publications/womens-health-plan/>

***September 2021***