

Written evidence from The Discrimination Law Association [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 contribute to the Committee's call for evidence. In preparing our submission we asked our membership for their contributions on the questions asked by the Committee, and on 7 September 2021 held a meeting, attended by 65 people to discuss Menopause Discrimination in the Workplace and to gather contributions on the questions in respect of which DLA's evidence may be of most use. We also requested written contributions from the membership. We are grateful to the Committee for agreeing to a short extension of time for the presentation of our evidence to accommodate this process and writing up.

4. We have not offered evidence on every question asked by the Committee.

5. We have confined our evidence to the following questions:

- What is the nature and the extent of discrimination faced by women experiencing the menopause?
- How does this impact wider society?
- How can businesses factor in the needs of employees going through the menopause?
- How can practices addressing workplace discrimination relating to menopause be implemented? For example, through guidance, advice, adjustments, or enforcement.
- How should people who experience the menopause but do not identify as women be supported in relation to menopause and the workplace?
- How well does current legislation protect women from discrimination in the workplace associated with the menopause?
- Should current legislation be amended?
- 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?

6. We deal with those questions as follows.

The nature and extent of discrimination faced by women experiencing menopause? How does this impact wider society?

7. Menopause, unlike pregnancy or maternity, is not a well understood life stage in the workplace. As a result it is not surprising that currently it is not well provided for at work, whether in terms of culture, training or policies. DLA believes it is important to contextualise this comment by saying that the concept of "the workplace" or "work" is not a gender neutral concept. Historically working practices and structures have been designed around the life cycle of men rather than women. One impact that this has is to perpetuate gender roles within society by facilitating the working life of men, and not facilitating the working life of women, so that women have fewer economic opportunities than are available to men. This can be seen when considering retention rates in work after childbirth. Discrimination at the menopause stage of life also has an effect on retention of women in work. It is

important, in DLA's view, that menopause should not be viewed as analogous to an illness or impairment. It is an important part of a woman's life cycle.

8. We received presentations from the Menopause Society and from Menopause at Work which was to the same effect in relating to the understanding of the nature and extent of Menopause in the workplace: 80% of women are menopausal by the age of 54 and this means that it is likely that a woman will have around a third of her life after the menopause. More than 75% of women will experience menopausal symptoms and that 1/3 of women will experience long term symptoms. DLA adds that a woman can expect a substantial part of her economically active life to be after menopause.

9. The main problem, in the view of these organisations, was in relation to access to information and advice on the menopause. Management of menopause may be by medication such as Hormone Replacement Therapy, or alternatives to HRT, but also by lifestyle modifications including diet and exercise. The DLA notes that whilst it can be said therefore that there may be actions which a woman can take to mitigate effects of menopause, the autonomy of a woman must be respected and consideration of how workplaces can accommodate the needs of women experiencing menopausal symptoms should not start from the premise that the woman must take all responsibility for the management of the effects of menopause. To do so would be to behave as if a woman who does not take HRT or engage in mitigating lifestyle changes is responsible for both the effects of menopause in her case, but also for any discrimination stemming from a failure to accommodate her lifecycle needs.

10. The evidence is that 70% of women are in paid employment and women constitute 47% of the UK workforce (according to ONS statistics from 2017). There are 4.3 million women aged 50 and over in employment. Over the last 30 years employment for women aged 55-59 has increased from 49% to 69% and for women aged 60-64 from 18% to 41%. This must in part reflect steps taken to eliminate age discrimination in relation to retirement but also the increasing economic pressures on women to continue to work. The DLA points out that the time that women remain economically active after menopause will accordingly be likely to increase.

11. The obvious point is that many women will experience peri-menopause and menopause whilst in employment. In determining the impact of "discrimination" on women due to menopause it is important to have a clear idea of what we mean by discrimination. The starting point should be, DLA suggests, the internationally recognised concepts of discrimination under the Convention on Elimination of Discrimination Against Women (see below at paragraphs 42-43).

12. The DLA points out that a concept of discrimination which is confined to direct and indirect discrimination, harassment and victimisation under the Equality Act 2010 is unlikely to capture the true impact of the way workplaces are designed on women during the menopause. A key feature of equality law is that like cases be treated alike and that unlike cases be treated differently. The way in which, historically, workplaces and work practices have been designed creates barriers for women affected by the menopause. The model of work has traditionally been based on masculine needs and on the tacit assumption that a worker will be a male worker.

13. If the fact that the needs of women with menopause are different to the needs of those without the menopause is taken into account, the impact of failing to accommodate those needs can be taken into account. That failure is a form of discrimination.

14. The scale of the discrimination can be measured by the responses that have already occurred to it. In 2019 Acas produced guidance on [Menopause at work](#). This recommended that employers need to have policies and conduct training for managers, to ensure that managers understand how the menopause can affect workers; to train managers on how to have a conversation with a worker raising a menopause related concern. It emphasised the need for training on what support and changes might be appropriate for the worker. Finally it recommended that there be training on the law relating to menopause.

15. The reference to the law is a reference to the main types of protection which currently exist in relation to menopause. These are the Equality Act 2010 and the Health and Safety at Work Act 1974 (and Management of Health and Safety at Work Regulations 1999).

16. On a very conservative theoretical estimate of the impact of menopause, from statistics from 2015, and assuming that only 10% the 1,742,000 working women between 50 and 54 experience severe symptoms which affect their work, an annual cost has been calculated of £7,276,334 per year has been estimated.¹ The statistic that ¼ of this fastest growing demographic contemplate leaving work due to menopause² also illustrates the size of the economic problem and in reality the direct workplace cost of menopause is likely to be far higher.

17. The problem therefore is not simply a problem of the impact of less favourable treatment on women with menopause, it is a problem of the needs of a group in society being different to those for whose benefit society has traditionally been structured. To avoid the impact of failure to retain women experiencing menopause in the workforce and to ensure that they can be as productive as men of a similar age, accommodations for this life phase need to be made.

18. Thus the nature of the discrimination faced by women due to menopause breaks down into the following areas:

1. That workplaces are not designed to take account of the female lifecycle properly, resulting in ignorance of the menopause, peri-menopause and its effects, and in working practices which create barriers for women at work

2. Less favourable treatment, indirect discrimination and harassment.

19. Although there is plentiful evidence of category 2 discrimination being a problem, it is likely that category 1 discrimination in reality causes more difficulties for women.

20. As to the impact on wider society, there is a problem for employers which is similar to that surrounding maternity. Because the workplace is not sufficiently designed with the lifecycle needs of women consciously in mind, there are problems of retention of talent at a life point at which very often leadership roles are being taken in organisations.

21. Ignorance in the workforce about menopause and reticence for anyone to speak about menopause has an obvious impact on society more broadly than the workplace. Attitudes to women at common menopausal ages tend to be based on this ignorance. A woman's self image whilst going through this life stage can be profoundly affected by that same reticence, ignorance and misattribution of signs (menopausal symptoms are very often taken to be signs of depression for example). Throughout a woman's life cycle the image she will have as to what to expect at this stage of life will be profoundly affected by the way in which it is or is not socially permissible to talk about menopause.

22. Finally, men's attitudes to the capacities and abilities of women undergoing menopause will be profoundly affected (and often adversely affected) by the social prohibitions or permissions surrounding this part of a woman's life.

How can businesses factor in the needs of employees going through the menopause?

23. In order to avoid discrimination under the Equality Act 2010, a business should ensure that its workforce have access to good information on the nature of the menopause and peri-menopause.

¹ The effects of menopause transition on women's economic participation in the UK Research report July 2017 Joanna Brewis, Vanessa Beck, Andrea Davies and Jesse Matheson University of Leicester cited by the Menopause Society.

² As Sally Leech of Henpicked: Menopause at Work, told DLA's meeting 7 September 2021.

24. Many of the accommodations that a woman might need (but not all) will result from the employer's duties under the Health and Safety at Work Act 1974. As Acas pointed out the employer must minimise, reduce or where possible remove workplace health and safety risks for workers. This requires a review of the workplace to ensure that menopausal symptoms are not worsened by the workplace or work practices.

25. The factors recommended by Acas should be assessed: temperature in the workplace; materials used in a uniform (whether it might make the woman feel too hot or worsen skin irritation for example); suitable places for the worker to rest; easily available toilet and washroom facilities; and easily available cold drinking water.

26. However DLA notes that whilst generic steps can be taken, the individual nature of the experience of peri-menopausal symptoms and menopause should also be factored in by the employer. This is why the DLA recommends that a duty to make accommodations in individual cases should be implemented. Common symptoms of peri-menopause and menopause can vary in severity from woman to woman and include those listed in the Acas document. Many of those symptoms are capable of affecting a woman's confidence (for instance hot flushes, tiredness, mood swings, anxiety and panic attacks, struggling to remember).

27. The employer must create a culture in which women feel able to disclose menopausal symptoms at work to their employer. There are a number of ways in which DLA considers this could be achieved. Some involve legislation, and some involve training and awareness raising.

28. For the public sector employer there is already a duty under section 149 of the Equality Act 2010 to have due regard to the need (a) to eliminate unlawful discrimination under the Equality Act 2010 (b) to promote equality of opportunity between men and women (and between those of one age group and another). For these employers consideration should already be given to the ways in which women can be given an equal opportunity to participate in the workplace with men, having regard to the needs of women that differ from those of men. Here the needs of women resulting from their life cycle must be taken into full consideration. The design of the workplace as an inclusive workplace for women as well as men should be given due regard. A public sector employer which does not have a menopause policy, cannot, in the view of DLA, be giving due regard to the need to achieve equal opportunities between men and women.

29. For these, and other, employers, action can be taken now in order to minimise unlawful discrimination against women, by considering use of positive action under s158 Equality Act 2010. This permits the employer to take any action which is a proportionate means of achieving the aim of meeting the needs of women that are different from the needs of men at that life stage. Moreover that section can also be used to enable or encourage women affected by menopause to participate in work where there is a reasonable belief that participation in work is disproportionately low for women affected by the menopause. It does not permit the employer to do anything which is otherwise unlawful under the Act (for example discriminating against men).

30. Menopause at Work and Henpicked both expressed the view that employers need to train and inform managers at all grades on menopause, and how to talk about it.

31. Employers need to start from where it appears society is in terms of how acceptable it is to talk about issues surrounding menopause and recognise that some women will find it difficult to speak about how it is affecting them. It is not realistic to behave as if that reticence is not a potential factor.

31.1. Hence employers with the resources should, in the view of DLA, have the opportunity available to women who wish to bring to the employer's attention an issue connected with the workplace, to have a mediated contact with the employer in order to ensure that they have someone with whom the

worker feels confident enough to speak about their experience of the workplace and menopause, and their consequent needs.

31.2. How this is to be done is itself a difficult issue. Women should not be forced down the route of treating this as a health issue, with the overtone that menopause is a type of defect of health.

Something along the lines of a confidential counsellor or adviser or champion might be a way of facilitating initial contact and building confidence in the woman to take her needs to management.

32. Employers should also ensure that their guidance enables women to know what they can do themselves and how the employer will facilitate this should a woman choose to take these steps. For example if a job involves the need for physical strength, the ways in which a woman experiencing menopause can contribute to preserving e.g. muscle mass³

33. Finally the employer must ensure that there is proper training on how discrimination in relation to menopause may result in unlawful discrimination under the Equality Act 2010. Currently there is no clear obligation to take this step and greater clarity would be a welcome step.

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

34. Guidance on current law could go some way towards eliminating unlawful discrimination in the workplace. However the history of purely voluntary codes of guidance does not suggest that this will be very effective in eliminating or reducing discrimination related to a characteristic.

Voluntary code?

35. Thus in 1999 a voluntary non-statutory code “age diversity in the workplace” was launched⁴. This was short lived and not particularly effective in reducing the incidence of age discrimination in the workplace. It was followed in 2006 by the Employment Equality (Age) Regulations 2006 (SI 2006/2408), and subsequently the Equality Act 2010.

A Statutory Code from the Equality and Human Rights Commission?

36. A slightly stronger way in which such practices can be implemented is via the writing of a Statutory Code of Practice by the Equality and Human Rights Commission under its powers in section 14 of the Equality Act 2006. This can contain provisions designed to ensure or facilitate compliance with the Equality Act 2010 or to promote equality of opportunity. A failure to comply with a provision of Code does not of itself make a person liable to criminal or civil proceedings but, by section 15(4) of the Equality Act 2006, it is admissible in evidence in proceedings and it must be taken into account by a tribunal in any case in which it appears to the tribunal to be relevant.

37. Thus the EHRC could be invited to produce a statutory Code on the existing law as it applies to menopause.

Above approaches not sufficiently comprehensive

38. Whilst this would make provision for cases in which the symptoms of menopause amounted to a disability within s6 of the Equality Act 2010, and could make provision for indirect sex discrimination based on menopause or discrimination based on age and sex in respect of menopause, it would not, as matters stand be able to deal with workplace adjustments that might be needed where menopause does not amount to a disability but has an impact on performance within the workplace. It could not, in

³ Whilst there will be many contexts in which this would apply, the 2020 Menopause Policy of Humberside Fire and Rescue illustrates this approach at p 8, para 11:

https://humbersidefire.gov.uk/uploads/files/Menopause_Policy_.pdf

⁴ <https://www.eurofound.europa.eu/publications/article/1999/new-code-of-practice-targets-age-discrimination-in-employment>

other words, meet the need to design the workplace to meet the needs of individual women affected by the menopause.

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

39. The question is predicated on the point that the person experiences the menopause. Medically, peri-menopause and menopause are sometimes defined in relation to various hormone deficiency effecting the person. In all cases however the changes in hormone levels are the marker, we understand, for the characteristic we describe as “menopause” (which should at all points include peri-menopause).

40. There is no reason why a person who does not identify as a woman but who experiences the menopause should not have the same protection as everyone else who experiences the menopause.

41. Those who have this combination should receive inclusive support in relation to the menopause in the workplace as they too are affected by the male-design of the workplace which does not take account of the needs of those who experience menopause but do not identify as women.

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

42. The starting point for the answer to this question must be the tests laid down in international law in relation to sex discrimination: The Convention on the Elimination of all Forms of Discrimination against Women notes in its preamble:

1. Discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the ... economic ... life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity (Recital);

43. CEDAW goes on to provide for the elimination of “discrimination against women”, which means any restriction made on the basis of sex which has the effect of impairing the enjoyment or exercise by women on a basis of equality of men and women of human rights in the economic or any other field (Article 1). This is the definition we have used when considering whether discrimination has taken place in respect of the design of work and the workplace. CEDAW then states that the states parties shall take all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (Article 3). It then requires the states to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” (Art. 5). Article 5 is another important principle in considering whether work and the workplace are to be considered a neutral starting place or a starting point predisposed in favour of male life cycles. It is submitted that traditionally work and the workplace have been based on stereotyped role for men and women. Article 11 requires the elimination of discrimination against women in the field of employment in order to ensure on a basis of equality of men and women the same rights (a) to work; (b) to the same employment opportunities; (c) to the right to job security; (d) to protection of health and to safety in working conditions

44. It is against these measures that the current legislation should be tested. The DLA suggests that if this is done it is clear that, in respect of the life cycle of women, these aims are not being achieved. Whilst there is theoretical protection, there is not real practical and effective protection against discrimination based on the life cycle feature of menopause.

45. A brief survey of cases in the employment tribunals mentioning “menopause” or “menopausal” since February 2017 shows that there have been around 44 decisions. DLA is aware of one earlier case, which is mentioned below.

46. Further research shows that the decisions mentioned in the Annex to this evidence, and to which links are given, are the ones in which there has been any extended discussion of menopause or menopause discrimination on various grounds.

47. These 18 cases show that most cases reaching judgment have been treated under the model of disability discrimination. Cases have also involved intersectional cases of age and sex discrimination, and sex discrimination.

48. Some of the cases illustrate the limitations of the current legislation. The case of [Mrs A Sokolova v Humdinger Ltd: 1805866/2020](#) para 55-73 illustrates the lack of a concept of reasonable adjustment in relation to menopause discrimination. The claim for indirect sex discrimination failed on the basis that the provision criterion or practice was reasonably necessary to achieve the employer’s aim. If the claimant had been able to access the concept of reasonable accommodations for menopause, she arguably would have been able to obtain a remedy.

49. *Direct Discrimination based on sex:* The limitations of showing direct sex discrimination in relation to menopause echo the difficulties in showing direct discrimination in respect of pregnancy, prior to the case of **Webb**. Because menopause is not treated as a necessary indicator of female sex, women have to show that they have experienced less favourable treatment in comparison with a man in comparable circumstances. In the 2012 case of **Merchant**, the claimant was dismissed for capability reasons, but the reason for the reduction in performance resulting in dismissal were health issues relating to menopause. The claimant had to rely on an hypothetical comparator: a man who had significant performance concerns and an underlying health problem understood to effect his concentration at times and relevant to this poor performance. The manager decided that because his wife and the HR adviser had gone through menopause, no further investigations were needed to understand the claimant’s menopausal condition or prognosis. The employer did not refer the claimant for medical reports when he would have done so in the case of a man exhibiting similar symptoms to ascertain whether they contributed to the claimant’s poor performance and before making a decision on dismissal. The manager took the view that menopause health problems did not require the same approach as other non-female specific health conditions.

50. This approach caters for the situation in which the employer fails to treat the woman in the same way as a man with a health problem is treated. However it does not fully capture the discrimination which takes place where menopausal symptoms result in absence, and that is treated in the same way as health conditions which are not specific to women are treated.

51. *Indirect discrimination:* Thus the claimant who objects to her menopause related absences contributing to sickness trigger points in an absence procedure can only complain about *indirect* discrimination. She must complain that the neutral absence policy rule places her and all women with menopause at the disadvantage of having to take sickness absence. However because the model of indirect discrimination is being used it is open to the employer to justify the use of the sickness absence policy as a proportionate means of achieving a legitimate aim. It is strongly arguable that this is a defect in legal coverage because it reflects an attendance requirement level from a workforce which is set so as to accommodate the likely needs of men, but not of women, who may have need of higher trigger points to ensure that they remain in the workforce.

52. It is questionable whether an employer ought to be able to take into account absences which are advised to be for the medical reason of menopause related symptoms, and to be able to justify the imposition of sanctions on a woman because she is going through this part of the female life cycle.

53. Judged against the standards of international law, referred to above, it is suggested that the ability to justify indirect sex discrimination due to the interaction of an employer's rules and the menopause is not acceptable as it requires a tribunal to treat the current workplace and work requirements of an employer as factors which are not conditioned by gender.

54. DLA takes the view that an employer should not be able to justify disadvantaging a woman as a result of menopause unless there are no accommodations that could be made in the individual case to remove the particular disadvantage she suffers as a result of menopause.

55. At present however there is no requirement for an employer to have taken all accommodations for the menopause in the individual case which are reasonable.

Multiple discrimination approaches under current law

56. Proving multiple discrimination, without the introduction of section 14 of the Equality Act 2010, is difficult in the light of **Law Society v Bahl** in which the Court of Appeal decided that each ground (race and gender) must be considered separately and a judgment be made in relation to each, so a case would fail if the claimant could not show that any aspect of her treatment related to only one ground. An example of a successful intersectional claim in relation to menopause is **A v Bonmarche Ltd (in administration)**: 4107766/2019. This has been referred to as an example of how intersectional claims can work. However this was a case in which the respondent did not oppose the claim. In reality many cases in which multiple characteristics are involved are difficult to prosecute because of the difficulty created by Bahl and the failure of the government to implement section 14 of the Equality Act 2010. The absence of this provision effectively creates uncertainty in cases in which a claimant wishes to argue that she has been directly discriminated against because of her age and her sex (as a result of menopause).

57. Age, however, can be treated as a circumstance in a claim based solely on sex. For the most part direct discrimination claims in relation to menopause can be brought as sex discrimination claims. That approach does not, it is suggested, fully capture the discrimination that is at work. It is plainly less favourable treatment because of sex but with the added discrimination of treatment based on age.

58. *Indirect discrimination and multiple characteristics*: Although in one case the effects of two different provisions were held to be capable of being combined in relation to their effect on two different protected characteristics, s 19 is not much more successful at capturing the impact of a single rule which creates a particular disadvantage for a group defined by sex and age, than section 13.

59. *Disability*: Plainly the treatment of menopause as a disability requires women to show that they satisfy the criteria in section 6 of the Equality Act 2010. Given the model adopted in relation to disability, this requires women to identify as having an "impairment". Some concern is expressed that this requirement has a chilling effect on accessing protection from discrimination based on menopause.

60. The test for whether a person is disabled is complex and often involves considerable time and resources being expended in employment tribunals by all parties on the question of whether the claimant is a disabled person. Claimants, often unrepresented, will fear that their personal details will form part of an online judgment in perpetuity. Often claimants are put off bringing claims for these reasons.

61. The DLA believes that while some discrimination can be met by the existing rights, the coverage is inadequate and requires considerable work to establish status.

Should current legislation be amended

62. In order to provide evidence on this point the DLA considered whether the protection against discrimination that is required could be provided by wholly non-legislative means or by means of

secondary legislation alone. DLA also considered the extent to which such protection would be likely to be effective.

Non-legislative means of filling the lacunae

63. The attraction of non-legislative means to ensure protection is that it would not be necessary to subject these means to the extent of parliamentary scrutiny that primary legislation would require. These means would also have the attraction of speed, familiarity for those seeking to apply the law. However DLA concluded that whilst a great deal of protection can be provided by the existing law, it does not counteract the impairment of the right of women to enjoy access to the workplace and working practices in the same way as men, which is created by current policies and practices. That could only be achieved by the introduction of a right to reasonable accommodation for menopause (without the need to prove that the menopause amounts to a disability).

64. *Non-legislative means:* The DLA considers that the Equality and Human Rights Commission could be encouraged to issue a Code of Practice on avoiding menopause discrimination. This would have the aim of ensuring that (a) employers understood how the rights of those with menopause may be breached in a way that amounts to unlawful sex, age and or disability discrimination under the Equality Act 2010 (b) providing a description of when someone has menopause and what good practice would be surrounding ascertaining whether someone has menopause, (c) giving examples that would assist employers and employees to know how to alter the design of workplace policies and practices so as to accommodate the needs of all workers. Such statutory guidance could then be taken into account by a tribunal hearing cases of discrimination based on the treatment of someone who has menopause.

65. In the discussion of menopause on 7 September 2021, the Menopause Society and Henpicked: Menopause in the Workplace, expressed the view that the main problem, as they saw it, was lack of information concerning menopause for both employer and employee.

66. Plainly other non-legislative means could be adopted to try to achieve a situation in which employers have good sources of information for their managers on menopause and the needs of those with menopause, on the appropriate ways in which employees can be encouraged to talk about menopause related needs. However for the reasons already given the DLA is sceptical that voluntary means alone are sufficient. A political judgment may need to be made as to whether there are risks attached to amending primary legislation in this field.

67. *Wholly non-legislative means are not comprehensive.* As referred to above, DLA considers that wholly non-legislative means are not sufficient.

68. If the aim of ensuring that the workplace is designed to take account of the life cycle needs of women, in the same way that it currently does for the male life cycle is to be achieved a duty to make reasonable accommodations to remove disadvantages caused by workplace practices or policies to those with the menopause must be implemented.

Amendment required: to deal sufficiently with individual needs arising from menopause

69. There is no provision in relation to the disadvantage to an individual at the moment which achieves this effect unless she can show that she is a disabled person within s 6 of the EA 2010.

70. There is therefore an argument for amending the EA 2010 by creation of the protected characteristic of menopause. This would cover those who experience symptoms caused by the onset of menopause (peri-menopause) and those who have the menopause. Special provision would be needed to ensure protection for those who do not identify as women but who experience menopause/perimenopause.

71. Should this be done by primary or secondary legislation?

72. *Using secondary legislation:* One suggestion made in the DLA's consultation on this point was that menopause might be created as a deemed disability. This would have the advantage of permitting those with disability to access the existing rights. This is perhaps the simplest way of ensuring full coverage. It can also be achieved by secondary legislation. It has the downside that many women will not wish to identify as persons with disabilities simply due to going through this part of their lifecycle. The way in which it would work, however, would be using the regulation making powers under Schedule 1 paragraph 7 of the Equality Act 2010. These have been used to deem certain conditions as *not* constituting disabilities. However they permit the Secretary of State to make provision for *persons of prescribed descriptions* to be treated as having disabilities. The necessary regulations would be extremely simple. Anyone with the characteristic of menopause (defined as menopause or perimenopause) would be deemed as having a disability.

73. It is a political question whether such an approach would be acceptable, but DLA's view is that this is likely to be thought of as an unattractive solution which does not treat menopause as a normal part of a lifecycle and adopts the deficit model which has been used to define disability.

A separate protected characteristic

74. The DLA proposes that effective and appropriate coverage can only be ensured by the creation of a protected characteristic of menopause. This would require amendment to primary legislation.

75. *Definition:* An individual with menopause would need to establish that at the relevant time she had menopause or peri-menopausal symptoms. This could be achieved by a GP's note, but it must be open to the claimant to prove the characteristic by other means. Those means should not however incorporate the type of threshold test seen in relation to disability cases.

76. The proposed definition inevitably creates a problem of knowledge for the employer (as well as the worker). Many symptoms of menopause can appear to be symptoms of some other conditions, such as depression. An employer who can reasonably be expected to know that the individual has menopause, should be fixed with knowledge of menopause for the purposes of determining whether unfavourable treatment was on the basis of menopause. The employer should be provided with an opportunity to prove that it could not reasonably have been expected to know that the symptoms were those of menopause and in those circumstances the claimant individual would struggle to prove that unfavourable treatment was caused by menopause.

77. The Statutory Code which would be needed to explain the law would be able to provide sufficient examples for employers, employees and tribunals to understand how this requirement for knowledge would operate fairly and effectively. It would also mitigate the risk that it is only those who are more vocal about the causation of their symptoms who are protected by illustrating situations in which, despite a lack of assertion by the individual with menopause, the employer should have been aware that the individual had this characteristic.

78. The burden of proof would rest on the individual to show that they have the characteristic. This might readily be done where there is medical evidence that a symptom is considered to have been caused by menopause. However it should be open to an individual to be able to assert that the combination of features of their case demonstrate that they have the characteristic without the need for medical evidence being supplied.

A right equivalent to (but not replacing) direct discrimination.

79. The DLA suggests that section 13 sex discrimination should remain available to someone claiming unfavourable treatment because of menopause but as an alternative. The individual would

be able to rely on less favourable treatment because of sex where menopause is a proxy for sex, but would be able to rely on a new right. The relevant discrimination would arise where:

A treats B unfavourably because of menopause [defined widely enough to include peri-menopause].

80. The new right would enable those who do not identify as female but who have menopause to have protection from unfavourable treatment on this basis. They would not however be able to claim s13 discrimination because of sex where the treatment is based on menopause. That should not create a lacuna in the law because all less favourable treatment is a subset of unfavourable treatment. (This is because a reasonable worker would always be able to say that they have been subjected to a detriment where they have been treated less favourably than another in materially the same circumstances because of an irrelevant characteristic). Those who have rights under s 7 (gender reassignment) would therefore be able to argue s 13 discrimination on this basis using a comparison between a person with s7 characteristics and a person without.

81. *The characteristic should allow access to indirect discrimination:* DLA suggests that the new characteristic should also permit an individual to argue that they have been subjected to the unjustified application of a provision criterion or practice which places those with menopause at a particular disadvantage, and which placed them at that disadvantage.

82. *One proposal for a modified justification provision in s19 of the Equality Act 2010 in relation to menopause:* The burden of proof that a provision criterion or practice is justified should remain on the employer. However a PCP which creates the particular disadvantages mentioned should only be justified if the employer also shows that it has taken all reasonably practicable steps of accommodation to remove the disadvantage to the individual claimant.

83. The difficulty with this approach is that it requires the individual to show that people with menopause are as a group disadvantaged by the provision criterion or practice about which complaint is being made. That creates a problem of proof which may be unnecessarily difficult to overcome. Given that the effects of menopause vary between individuals, an employer could always require proof that the provision, criterion or practice disadvantages those with menopause compared with those without menopause in comparable circumstances.

84. The DLA therefore takes the view that this is an unsatisfactory approach.

85. Those with menopause should be able to argue that a provision, criterion or practice is unlawful in the same way as those arguing indirect discrimination in respect of other protected characteristics under the Equality Act 2010.

86. *A right to accommodation for menopause:* This new provision would be a right for a person with menopause to be able to claim accommodations for the effects of menopause. Because the aim of the legislation is to ensure that the workplace and policies are designed to achieve equal access for men and women and others experiencing menopause, the duty should be stronger than the duty to make reasonable adjustments.

87. The duty should be expressed as a duty to take all reasonably practicable steps that are proportionate (i.e. appropriate and reasonably necessary) in order to remove any menopause related disadvantage to the claimant caused by the employer's arrangements.

88. The duty would arise when the employer knows or ought reasonably to know that the employee has menopause and that knows or ought reasonably to know that the employee experiences a menopause related disadvantage as a result of the employer's working arrangements (i.e. provisions criteria or practices applied to the employee).

89. The existing mechanisms for protection from harassment (section 26) and from victimisation for a protected act (section 27) would be sufficient for protection against menopause discrimination.

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?

90. It is open to employers to put in place a workplace policy to protect people going through the menopause whilst at work already.

91. Public sector employers are under a duty to have due regard to the needs of those who experience the menopause (women and certain gender reassignment people) which are different from the needs of others. They are also obliged to have due regard to the need to promote equality of opportunity between men and both women and the subset of gender reassignment cases affected by this issue). It is difficult to see why any public sector employer would fail to have a menopause policy, or how a public sector employer could justify failure to have one under the section 149 Public Sector Equality Duty.

92. Private sector employers have a duty to take reasonable steps to protect employees from health and safety risks associated with the employment. Menopause presents specific risks and employers need to have policies in place for that reason alone. DLA suggests guidance be provided by HSE in a similar way to that in which it provides guidance on Health and Safety related to mental health, employee wellbeing and in respect of new or expectant mothers. This would place an obligation on employers to conduct risk assessments for those with menopause and provide templates and guidance on carrying these out. It would also ensure that if a duty to make accommodations was introduced, employers would be required to have assessed the needs of the individual with the characteristic of menopause.

93. Private sector employers will also run the risk of claims for sex/age discrimination and or disability discrimination if they fail to have policies which enable managers to ask the right questions and have regard to accurate information about the menopause.

94. In terms of legislation, no legislation is necessary to enable employers to put in place a workplace menopause policy.

95. DLA's suggestion, however is that in employers over a certain size (DLA suggests 20 employees)⁵, there should be a requirement to have a menopause policy which addresses (a) ensuring good information is available for managers and employees about menopause and symptoms of perimenopause (b) the (existing or new) legal rights of employees in respect of adjusting the workplace/work policies to accommodate working with menopause (such as rights to request flexible working, and the other matters set out in the Acas guidelines) (c) good means of communication (including confidential or mediated means as appropriate) of the needs of those working with menopause to management (d) indicative adjustments/accommodations that might be made to deal with menopausal symptoms.

⁵ The DLA believes that if there are concerns politically over the impact on small businesses of a regulatory requirement, some such figure would be sensible. The DLA has discussed the correct figure and offers this simply as one suggestion. The WEC, if attracted by this argument, might want to consider the initial restrictions under the Disability Discrimination Act 1995, section 7 (20 employees). Although this did not last very long it provided some reassurance initially to small businesses. S. 7 was omitted from 3.7.2003 for certain purposes and from 1.10.2004 otherwise by virtue of The Disability Discrimination Act 1995 (Amendment) Regulations (S.I. 2003/1673).

ANNEX

Some Tribunal cases referring to Menopause,

[Ms M Davies v Scottish Courts and Tribunals Service: 4104575/2017](#) over the last 2 – 3 years, the onset of menopause which resulted in very heavy bleeding (generally referred to as flooding). The claimant became severely anaemic due to the heavy bleeding, and also felt “fuzzy”, emotional and lacking in concentration at times. Para 72, symptoms relied upon; depression, cystitis, gynaecological issues which cause excessive bleeding, anaemia and is peri-menopausal. anxious and upset; suffers short term memory loss and 5 becomes confused; bleeds heavily and needs to attend the toilet frequently to change sanitary protection and she becomes weak, dizzy and disorientated because of the anaemia. Para 54 R conceded that C was a disabled person. **(Disability)**

[Mrs D Gallagher v Marks & Spencer plc: 2406039/2020](#) A case of menopausal symptoms resulting in depression. **(Disability)**

[Ms K Greenfield v London Underground Ltd: 2201181/2020](#) illustrates the difficulty of separating menopause related absences and disability related absences. **(Disability)**

[Ms S Morris v Lauren Richards Ltd: 3301633/2020](#) – harassment related to menopause **(Disability)**

[Mrs D Daley v Optiva: 1308074/2019](#) found **disability** by reason of menopause symptoms and underactive thyroid. (see para 43 ff) **(Disability)**.

[Mrs L M Sloan v Dumfries and Galloway Health Board: 4100022/2020](#) indirect **sex** discrimination, **age** discrimination in relation to **age** band for menopause – said to be 50-65, see discussion at para 211 ff.

[Miss J Donnachie v Telent Technology Services Ltd: 1300005/2020](#) **(Disability)**: Menopause – Symptoms of Menopause (including anxiety and problems with concentration); and/or b. Raynaud’s Syndrome. Considers at para 22: no reason why, in principle, ‘typical’ menopausal symptoms cannot have the relevant disabling effect on an individual. The descriptions of the potential impact of symptoms on day-to-day activities in the EHRC Code of Practice seems to me to be particularly relevant to the Claimant’s situation. I have little hesitation in concluding that the effect of her menopausal impairment on her day-to-day activities is more than minor or trivial. The range of her daily activities and her ability to undertake them when she would wish with the rhythm and frequency she once did is markedly affected as set out above. It would undoubtedly be even more so were she was not taking HRT.

[Miss K Rose v The Commissioner of Police for the Metropolis: 3203055/2019](#) para 91 and following **(Disability)**. Q = did the symptoms have a more than minor or trivial effect?

[Miss Ibolya Kun v Cambridge University Hospital NHS Foundation Trust: 3201544/2018](#) paras 14-15: disabled by virtue of heat sensitivity. **(Disability)**

[Ms A McMahon v Rothwell & Evans LLP and R Pundick: 2410998/2019](#) Successful on menopause as disability, failed on merits. Discussion of menopause as disability from paragraph 108. **(Disability)**

[**A v Bonmarche Ltd \(in administration\): 4107766/2019**](#) ET found that R treated C less favourably than R would treat someone who was not female of menopausal **age**. (Cross sectional finding).

[**Mrs K Newbould v The Commissioner of Police for the Metropolis: 2205178/2018**](#) (whether C experienced comments as menopause harassment relating to **sex**).

[**Mrs D Lingard v Leading Learners Multi Academy Trust: 2401985/2017**](#) initial symptoms associated with menopause, but developing into General Anxiety Disorder (discussion para 183). (**Disability**)

[**Ms K Williams v All Health Matters Ltd: 2303349/2018**](#) whistleblower detriment, being asked whether anxiety was caused by menopause.

[**Mrs H Lee v The Chief Constable of Essex Police: 3201274/2019**](#) (disability; assertion of menopausal state since 2017, but no supporting medical evidence see para 24). (**Disability**)

[**Mrs Linda M Gallacher v Abellio ScotRail Ltd: 4102245/2017**](#) (**age** and **sex** discrimination; para 162ff; ET view: menopause is a consequence of **age** and **sex**. (case failed on causation)).

[**Mrs A Sokolova v Humdinger Ltd: 1805866/2020**](#) indirect **sex** discrimination PCP requiring wearing of buttoned up overalls – failed on reasonably necessary aspect of justification alone (see paras 55 to 73).

[**Marchant v British Telecommunications plc: 1401305/11**](#) ET found direct **sex** discrimination had occurred when an employer had failed to treat an employee's menopause in the same way as it would treat a male's medical conditions when applying its performance management policy. Comparison of menopause symptoms treatment with that of male sickness by R.

Thus the treatment of menopause has largely been by reference to disabling effects, followed by sex discrimination or sex and age discrimination.

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