

Written evidence from Cloisters Chambers [MEW0082]

Members of Cloisters chambers welcome the opportunity to give evidence to the WEC.

We have concentrated on the following questions:

1. How can businesses factor in the needs of employees going through the menopause?
2. How can practices addressing workplace discrimination relating to menopause be implemented? For example, through guidance, advice, adjustments, or enforcement.
3. How should people who experience the menopause but do not identify as women be supported in relation to menopause and the workplace?
4. How well does current legislation protect women from discrimination in the workplace associated with the menopause?
5. Should current legislation be amended?
6. 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?

1. Businesses

1. Businesses need to ensure that the workforce has access to good information on menopause, peri menopause and its effects, and should build on the existing health and safety law requirement to take reasonable steps to reduce or minimise risks for workers. The work by ACAS on menopause should be built upon and informed by the NICE Guideline, *Menopause: diagnosis and management 2015 (updated Dec 2019)*. Businesses should ensure that proper risk assessments are conducted which indicate whether modifications to workplace practices and policies should be introduced.

2. Businesses should ensure that training at all levels should be given on how discrimination arising from menopause can arise and how unlawful discrimination under the Equality Act 2010 can be avoided specifically in relation to menopause.

2. Implementation

3. Guidance is likely to prove ineffective as an implementation method and should not be regarded as sufficient. Whatever implementation method is adopted, guidance will of course be needed.

Voluntary codes and schemes tend not to be adequate responses in areas involving treatment which undermines the equality of the sexes. At both an EU level and nationally such codes and schemes have needed to be followed up by legislation (see for example the Code of Practice on measures to combat sexual harassment (Commission Document C(91) 2625, 27 November 1991 and the UK voluntary age discrimination code “age diversity in the workplace”, 1999).

4. We consider that practices addressing workplace discrimination relating to menopause require:

(a) provision of information to employer and worker alike on the nature and effects of menopause;

(b) guidance on how to avoid discrimination under existing law and expansion on the existing Statutory Code issued by the EHRC under the Equality Act 2010 explaining the rights of those experiencing menopause;

(c) the introduction of a right to require adjustments to workplace arrangements for individuals experiencing menopause (regardless of whether their symptoms constitute a disability under existing law);

(d) a statutory Code of Practice to explain how to avoid discrimination which may be taken into account by a tribunal where relevant.

3. Those who do not identify as women but experience menopause

5. Discrimination based on the effects of menopause may be suffered by those who do not identify as women, and who have the characteristic of gender reassignment. They should be protected by having the right to adjustments to workplace arrangements. There is no reason why someone who experiences menopause should not have the same protection as all others who experience menopause.

4. Current legislation's effectiveness

6. The effectiveness of current legislation measured against international standards such as CEDAW is poor.

7. Protection against sex discrimination should be real and effective and not theoretical. The current patchwork of protection is insufficient. Cases have tended to be dealt with in the first instance employment tribunals and normally the vehicle for a claim has been disability discrimination. Those women whose symptoms are so bad that they qualify as a disabled person can obtain protection, including reasonable adjustments, against discrimination based on menopause. Cases have also involved age and sex, and sex taken on its own.

8. Menopause is a life cycle stage associated with being or having been biologically a woman. The current legal protection does not recognise the asymmetrical nature of that life cycle. Men do not experience menopause unless they have previously been biologically female. In the same way that special provision was needed for pregnancy, special provision is needed for menopause. It is wrong for a woman to have to compare her life cycle phase to a man's sickness in order to obtain protection against discrimination. At present this is what she must do in the same way that a woman used to be required to compare her pregnancy to a man's sickness (*Turley v Allders Department Stores* [1985] ICR 703). We regard this comparison as demeaning.

9. Where a woman wishes to complain that her menopause absences are being taken into account in the company sickness policy, the employer has the opportunity to justify this as a provision criterion of practice that serves a legitimate aim. The woman has to bring the claim as a claim either of disability discrimination (see above) or as indirect sex discrimination. It should not be possible to justify menopause discrimination as it is indissociable from being or having been a woman, and hence should stand as a proxy for sex.

10. The current law does not in an indirect sex discrimination claim, require the employer to have made all adjustments that could have been made to avoid the discriminatory impact of its arrangements where the reason for the particular disadvantages is menopause in a woman.

11. Requiring a woman to prove that she is disabled before granting protection will be seen by some women as unpalatable as it requires the woman to identify an "impairment". There is no good reason why a woman should have to classify a normal life stage as an impairment in this way. In any event the Equality Act 2010 definition of disability under section 6 requires an often long and convoluted process of proof, which can have a chilling effect on access to rights.

5. Should current legislation be amended?

12. We take the view that it should. Alternatives to amendment are ineffective or unacceptable. Whilst the Commission could be encouraged to produce a Statutory Code, this does not remedy the current lacuna in the law that women need to have the workplace and practices designed so as to take account of women's needs which differ from those of men. The only way that this can be effectively done is to introduce a right to claim adjustments arising out of menopause.

13. We would support the creation of a protected characteristic of menopause to which would be attached a right not to be unfavourably treated (similar to the protection given under section 18 in relation to pregnancy and maternity), and to which a right to reasonable adjustments would be attached (similar to that in sections 20 and 21 Equality Act 2010). The right to be protected against unfavourable treatment would arise where A treats B unfavourably because of the characteristic of menopause. That characteristic would need to be defined so as to take into account peri-menopausal symptoms.

14. The characteristic should also be one of the characteristics to which section 19 (indirect discrimination) should apply and the rights to protection against harassment (section 26) and victimisation (section 27) should also apply.

6. Further legislation for menopause policies.

15. What is required is a duty on employers to establish a menopause policy, and good conduits of information between the employer and the person experiencing menopause. Those employers subject to the public sector equality duty should already have these policies as they have a duty to have due regard to the need to promote equality between different groups and also to take account of the needs of members of one protected characteristic group which are different to the needs of those outside that group. Thus where a public sector employer is failing to have such policies it is arguably in breach of section 149 of the Equality Act 2010.

16. We support a suggestion that employers of any reasonable size, say 30 workers/employees, should be required to have a menopause policy addressing the provision of information on menopause; communications about menopause needs; the existing or new legal rights of a person at work with menopause; and the other matters set out in the existing ACAS guidelines. The policy should also deal with reasonable adjustments for menopause as (a) a means of lessening the sex discriminatory impact of existing workplace arrangements (b) indicative examples of the individual right to adjustments for a person experiencing menopause (if such a new right is introduced).

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