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**ORIGINAL ARTICLE**

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# A bloody mess? UK regulation of menopause discrimination and the need for reform

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## Abstract

This article considers the regulation of menopause-related discrimination in the workplace. Many menopausal women experience profound workplace inequalities, often connected with the intersection of ageism and sexism. The United Kingdom Parliament's Women and Equalities Committee (WEC) recently recommended that the government consult about a new protected characteristic, 'menopause', and that Section 14 of the Equality Act 2010 (EqA) on dual discrimination be brought into force. The government has rejected these recommendations, asserting that menopausal women are sufficiently protected under the EqA's existing provision. This article presents an alternative perspective, arguing that there is insufficient legal protection from menopause discrimination, with it fitting poorly within age, sex, and/or disability discrimination, and there being no facility for intersectional claims. The WEC is correct: Section 14 should be implemented, 'menopause' should be a protected characteristic, and, beyond that, the EqA needs wider reform to provide greater protections from discrimination, beyond inflexible identity categories that fail to allow for complex intersecting structural oppressions.

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## 1 | INTRODUCTION

There is growing interest in the menopause, and menopause discrimination, particularly in the United Kingdom (UK).<sup>1</sup> With a growing number of older women in the workplace,<sup>2</sup> the menopause now affects the lives of most working women.<sup>3</sup> Indeed, almost half of the UK workforce will go through the menopause in the later stages of their careers, making it a profound workplace and economic issue.<sup>4</sup> The UK government's 2019 'roadmap' on gender made a commitment to promote women's reproductive health across the life course and to tackle women's workplace inequalities.<sup>5</sup> A 2015 report to the government on the recruitment and retention of older workers observed that the potential impact of the menopause on women's working lives should be 'taken more seriously'.<sup>6</sup>

The menopause is when a woman's periods stop, due to reduced hormone levels, and she is no longer able to reproduce.<sup>7</sup> It is fundamentally an intersectional experience, located at the nexus of age and sex.<sup>8</sup> The concept of intersectionality originated in the work of Kimberlé Crenshaw, who demonstrated how Black women experience sexism differently from white women and racism differently from Black men, and that race and sex interact to produce complex inequalities in life and law.<sup>9</sup> Her work, and the burgeoning field that has emerged from it, has shown that multiple discrimination is not merely additive but rather involves complex axes of power complicated by 'forms of inequality which are routed through one another, and which cannot be untangled to reveal a single cause'.<sup>10</sup>

<sup>1</sup> D. Jermyn, "Everything You Need to Embrace the Change": The "Menopausal Turn" in Contemporary UK Culture' (2023) 64 *J. of Aging Studies* 101114; S. Orgad and C. Rottenberg, 'The Menopause Moment: The Rising Visibility of "the Change" in UK News Coverage' (2023) *European J. of Cultural Studies*.

<sup>2</sup> B. Francis-Devine and G. Hutton, *Women and the UK Economy* (2024) House of Commons Briefing Paper No. CBP06838, at <<https://researchbriefings.files.parliament.uk/documents/SN06838/Sn06838.pdf>>.

<sup>3</sup> C. Atkinson et al., 'Menopause and the Workplace: New Directions in HRM Research and HR Practice' (2021) 31 *Human Resource Management J.* 49.

<sup>4</sup> J. Brewis et al., *The Effects of Menopause Transition on Women's Economic Participation in the UK* (2017), at <[https://www.menopauseintheworkplace.co.uk/wp-content/uploads/2020/04/menopause\\_report.pdf](https://www.menopauseintheworkplace.co.uk/wp-content/uploads/2020/04/menopause_report.pdf)>.

<sup>5</sup> Government Equalities Office, *Gender Equality at Every Stage: A Roadmap for Change* (2019), at <<https://www.gov.uk/government/publications/gender-equality-at-every-stage-a-roadmap-for-change>>.

<sup>6</sup> R. Altmann, *A New Vision for Older Workers: Retain, Retrain, Recruit* (2015) 10, at <<https://www.gov.uk/government/publications/a-new-vision-for-older-workers-retain-retrain-recruit>>.

<sup>7</sup> The menopause also affects some transgender men and gender non-binary individuals. See K. Throsby and C. Roberts, 'Bodies of Change: Menopause as a Biopsychosocial Process' in *Menopause Transitions and the Workplace: Theorizing Transitions, Responsibilities and Interventions*, eds V. Beck and J. Brewis (2024) 20.

<sup>8</sup> K. Riach and G. Jack, 'Women's Health in/and Work: Menopause as an Intersectional Experience' (2021) 18 *International J. of Environmental Research and Public Health* 1; WEC, *Menopause and the Workplace: First Report of Session 2022–23* (2022) para. 83, at <<https://publications.parliament.uk/pa/cm5803/cmselect/cmwomeq/91/report.html>>.

<sup>9</sup> K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990) 43 *Stanford Law Rev.* 1241.

<sup>10</sup> E. Grabham et al., 'Introduction' in *Intersectionality and Beyond: Law, Power and the Politics of Location*, eds E. Grabham et al. (2009) 1, at 1.

Research relating to reproductive health has highlighted the gendered, racialized, and disablist nature of health inequalities.<sup>11</sup> There is also a growing body of literature that demonstrates that older women experience ageing through a gendered lens, and discrimination at the intersection of ageism and sexism, which informs their health and wellbeing.<sup>12</sup> Older women are culturally devalued by gendered ageism in later life: '[T]he Global North is characterised by gendered ageism evidenced by the myriad of stereotypes about mid-life women being "past it", "over the hill" and/or "hysterical".<sup>13</sup> This is particularly marked in the workplace,<sup>14</sup> where women can feel compelled to attempt to mask the signs of ageing in order to continue to be perceived as competent.<sup>15</sup> Research has also revealed the intersectional nature of menopause experiences in the workplace<sup>16</sup> – notably, 'the ways in which menopause is experienced through multiple axes of power that presume a normative embodiment; that is to say, built around a series of age-related, gendered and ableist, and work status (such as full-time) ideals'.<sup>17</sup>

Most women experience some menopausal symptoms, with varying degrees of frequency and severity.<sup>18</sup> The most common symptoms are: hot flushes in the daytime; night sweats; vaginal dryness and discomfort during sexual intercourse; reduced/loss of libido; disturbed sleep; anxiety and/or depression; mood changes including low mood, anxiety, mood swings and low self-esteem; and problems with memory or concentration ('brain fog'). Menopausal symptoms can begin months or even years before a woman's periods stop (the 'perimenopause') and can continue for four or more years after her final period.<sup>19</sup> Older women's efforts to mask their ageing in the workplace<sup>20</sup> can be undermined by the visible, physical signs of the menopause, such as a sudden flooding of menstrual blood, flushes to the face and sweats, and menopausal irritation and forgetfulness, all of which can be impossible to conceal.<sup>21</sup>

According to a recent survey of over 2,000 menopausal women in the UK,<sup>22</sup> 77 per cent experienced one or more 'very difficult' symptoms, 69 per cent experienced menopause-related

<sup>11</sup> O. Hankivsky, 'Women's Health, Men's Health, and Gender and Health: Implications of Intersectionality' (2012) 74 *Social Science & Medicine* 1712; K. Gueta, 'Exploring the Promise of Intersectionality for Promoting Justice-Involved Women's Health Research and Policy' (2020) 8 *Health & Justice* 1.

<sup>12</sup> P. A. Rochon et al., 'Gendered Ageism: Addressing Discrimination Based on Age and Sex' (2021) 398 *Lancet* 648.

<sup>13</sup> Atkinson et al., op. cit., n. 3, p. 52.

<sup>14</sup> K. Haynes, 'Body Beautiful? Gender, Identity and the Body in Professional Services Firms' (2012) 19 *Gender, Work & Organization* 489, at 504.

<sup>15</sup> V. Cecil et al., 'Gendered Ageism and Gray Hair: Must Older Women Choose between Feeling Authentic and Looking Competent?' (2022) 34 *J. of Women & Aging* 210.

<sup>16</sup> Atkinson et al., n. 3; L. A. Whiley et al., "'A Part of Being a Woman, Really": Menopause at Work as "Dirty" Femininity' (2023) 30 *Gender, Work & Organization* 897; V. Beck and J. Brewis (eds), *Menopause Transitions and the Workplace: Theorizing Transitions, Responsibilities and Interventions* (2024).

<sup>17</sup> Riach and Jack, op. cit., n. 8, p. 2.

<sup>18</sup> NHS, 'Overview: Menopause' NHS, 17 May 2022, at <<https://www.nhs.uk/conditions/menopause>>.

<sup>19</sup> Brewis et al., op. cit., n. 4.

<sup>20</sup> C. Butler, 'Managing the Menopause through "Abjection Work": When Boobs Can Become Embarrassingly Useful, Again' (2020) 34 *Work, Employment and Society* 696; B. Steffan, 'Managing Menopause at Work: The Contradictory Nature of Identity Talk' (2021) 28 *Gender, Work & Organization* 195.

<sup>21</sup> M. Hickey et al., 'No Sweat: Managing Menopausal Symptoms at Work' (2017) 38 *J. of Psychosomatic Obstetrics and Gynaecology* 202.

<sup>22</sup> A. Bazeley et al., *Menopause and the Workplace* (2022), at <<https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=9672cf45-5f13-4b69-8882-1e5e643ac8a6>>.

difficulties with anxiety or depression, 84 per cent experienced trouble sleeping, and 73 per cent experienced 'brain fog'. Furthermore, 44 per cent said that their ability to work had been affected, 61 per cent said that they had lost motivation at work due to their symptoms, and 52 per cent said that they had lost confidence.

Menopausal women experience extremely variable workplace support. Many managers fail to understand or appropriately support those women whose symptoms are causing them problems at work, on occasion bullying and harassing them and/or subjecting them to inappropriate performance management and disciplinary procedures.<sup>23</sup> A 2019 survey conducted by the British United Provident Association (BUPA) and the Chartered Institute for Personnel and Development (CIPD) found that three in five menopausal women reported that they were negatively affected at work.<sup>24</sup> In 2022, BUPA told the UK Parliament's Women and Equalities Committee (WEC) that '[a]lmost a million women have left their job because of menopausal symptoms'.<sup>25</sup>

Though many cases are settled out of court,<sup>26</sup> UK employment tribunal case law on menopausal issues has expanded considerably in recent years. In 2017, there were five employment tribunals relating to the menopause and a further seven that mentioned it; in 2021, there were 23 Employment Tribunal cases relating to the menopause and a further 207 that mentioned it.<sup>27</sup>

As Naomi Cahn, writing from the United States (US), has noted, the 'concept of menopause justice is just gaining traction', with the UK leading the way.<sup>28</sup> There is currently no specific UK regulation relating to the menopause and/or menopause discrimination. According to the WEC, workplaces are 'failing women going through the menopause',<sup>29</sup> with particular implications for women in senior roles, given that they are more prevalent in the menopausal age group.<sup>30</sup> The WEC recently conducted a wide-ranging consultation on the menopause in the workplace, concluding that menopausal women are currently insufficiently protected from menopause discrimination in law. The WEC recommended that the dormant Section 14 (dual discrimination) in the Equality Act 2010 (EqA) be brought into force, and that the government consult on a new protected characteristic, 'menopause'.<sup>31</sup> The government has rejected the

<sup>23</sup> C. Hardy et al., 'Work Outcomes in Midlife Women: The Impact of Menopause, Work Stress and Working Environment' (2018) 4 *Women's Midlife Health* 1; V. Beck et al., 'Women's Experiences of Menopause at Work and Performance Management' (2021) 28 *Organization* 510.

<sup>24</sup> BUPA, *Supporting Employees through Menopause* (2020), at <<https://www.bupa.co.uk/~media/files/mms/bins-04797.pdf>>; CIPD, 'Majority of Working Women Experiencing the Menopause Say It Has a Negative Impact on Them at Work' CIPD, 26 March 2019, at <<https://www.cipd.org/uk/about/press-releases/menopause-at-work>>; CIPD, 'Menopause at Work: Guide for People Managers' CIPD, 4 October 2023, at <<https://www.cipd.org/uk/knowledge/guides/menopause-people-manager-guidance/>>.

<sup>25</sup> BUPA, 'Written Evidence from BUPA [MEW0046]', evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022) para. 7.

<sup>26</sup> Doyle Clayton, 'Why Is Menopause a Workplace Issue?' Doyle Clayton, 2 June 2021, at <<https://www.doyleclayton.co.uk/resources/news/Menopause-workplace-issue>>.

<sup>27</sup> D. Murray, 'Tribunals Triple in Less than 2 Years' *Menopause Experts*, 1 June 2022, at <<https://menopauseexperts.com/tribunals-triple-in-less-than-2-years>>.

<sup>28</sup> N. Cahn, 'Justice for the Menopause: A Research Agenda' (2021) 41 *Columbia J. of Gender and Law* 27.

<sup>29</sup> WEC, 'An Invisible Cohort: Why Are Workplaces Failing Women Going through Menopause?' WEC, 23 July 2021, at <<https://committees.parliament.uk/committee/328/women-and-equalities-committee/news/156760/an-invisible-cohort-why-are-workplaces-failing-women-going-through-menopause>>.

<sup>30</sup> Altmann, op. cit., n. 6; J. Patterson, 'It's Time to Start Talking about Menopause at Work' *Harvard Business Rev.*, 24 February 2021, at <<https://hbr.org/2020/02/its-time-to-start-talking-about-menopause-at-work>>.

<sup>31</sup> WEC, op. cit., n. 8.

WEC's recommendations, claiming that menopausal women are adequately protected by current laws.<sup>32</sup>

This article first outlines how the menopause affects women, with a focus on the workplace. Then the current legal mechanisms for addressing menopause discrimination are considered. This is followed by a discussion about the need for reform. The overall argument is that menopausal women are currently under-protected in UK law, primarily because of a lack of specific menopause-related protections and the absence of opportunity to make intersectional discrimination claims based on age and sex and/or disability. There is an urgent need for legal reform, specifically mandatory menopause-specific regulations, bringing Section 14 (dual discrimination) of the EqA into force, creating a new protected characteristic ('menopause'), and broadening the EqA's approach to (in)equality beyond a narrow list of discrete identity categories.

## 2 | THE MENOPAUSE IN THE WORKPLACE

Recent UK studies have identified key systemic barriers to support for menopausal women in the workplace, including 'male-dominated workplaces, male line managers, fear of negative responses, stigma, discrimination, embarrassment or believing menopause is inappropriate to discuss at work'.<sup>33</sup> Menopausal women have also described being 'brushed aside, made fun of, criticised, bullied or become subject to performance management and ongoing capability monitoring'.<sup>34</sup> This does not affect older (cisgender) men, since they do not go through a biological menopause. Older menopausal women's denigration in these ways is attributable to intersectional loss of social status, both because of gendered ageism and because the menopause is associated with loss of reproductive power, for which (younger) women continue to be culturally valued in many societies.<sup>35</sup> Menopausal women are often stigmatized in the workplace, having to undertake additional emotional and physical labour to manage their 'object' bodies in ageist and sexist workplace contexts.<sup>36</sup>

Workplace practices, systems, and environments can potentially either mitigate or exacerbate menopausal symptoms.<sup>37</sup> For example, symptoms can be heightened by 'overly warm offices, lack of access to toilets or cold water, or uniforms which can exacerbate hot flushes if made of synthetic materials, or cause embarrassment if light-coloured given the possibility of menstrual flooding'.<sup>38</sup> Many employers 'have been slow to recognise that women of menopausal age may need specific considerations and many employers do not yet have clear processes to support women coping

<sup>32</sup> Department for Work & Pensions, 'Menopause and the Workplace: How to Enable Fulfilling Working Lives – Government Response' *Gov.uk*, 18 July 2022, at <<https://www.gov.uk/government/publications/menopause-and-the-workplace-how-to-enable-fulfilling-working-lives-government-response>>.

<sup>33</sup> Hardy et al., op. cit., n. 23, p. 28.

<sup>34</sup> Atkinson et al., op. cit., n. 3, p. 52.

<sup>35</sup> T. M. Calasanti and K. F. Slevin, *Age Matters: Re-Aligning Feminist Thinking* (2013); G. Greer, *The Change: Women, Ageing and the Menopause* (2019).

<sup>36</sup> Whiley et al., op. cit., n. 16.

<sup>37</sup> G. Jack et al., 'Menopause in the Workplace: Building Evidence, Changing Workplaces, Supporting Women' (2021) *Maturitas* 63.

<sup>38</sup> Atkinson et al., op. cit., n. 3, p. 49.



with menopausal symptoms'.<sup>39</sup> The recent survey of over 4,000 menopausal women in the UK found that one in ten had left a job due to their symptoms and eight in ten reported that their employer neither provided information, nor trained staff about the menopause, nor put in place a menopause absence policy.<sup>40</sup>

A raft of guidance for employers has been developed in recent years,<sup>41</sup> primarily coming from menopause advocacy groups, such as the British Menopause Association,<sup>42</sup> professional organizations, such as the British Occupational Health Foundation, the CIPD, the Faculty of Occupational Medicine (FOM), the Royal College of Midwives (RCM), and the Royal College of Nursing; and multiple different trade unions, including the Associated Society of Locomotive Steam Engine-men and Firemen (ASLEF), the Broadcasting Entertainment, Cinematograph and Theatre Union (BECTU), the Fire Brigades Union (FBU), National Association of Schoolmasters Union of Women Teachers (NASUWT), the National Union of Rail, Maritime and Transport Workers (RMT), the National Union of Teachers (NUT),<sup>43</sup> the Trades Union Congress (TUC), the Transport Salaried Staffs' Association (TSSA), the Transport & General Workers Union (TGWU/T&G), UNISON, the Union of Shop, Distributive and Allied Workers (USDAW), UNITE, and Wales TUC Cymru.<sup>44</sup> This guidance has focused on five main areas: legislation (equality laws and health and safety regulations); workplace policies (relating to sickness absence, flexible working, and health and well-being); information and training (such as for human resources (HR) staff, managers, and trade union representatives); workplace support for menopausal women (such as via HR, occupational health, welfare officers, managers, supervisors, trade union representatives, and employee counselling programmes); and the physical work environment (such as workplace temperature control and ventilation, appropriate fabrics for uniforms, accessible cold drinking water, and toilets).<sup>45</sup>

However, despite this vast array of guidance and recommendations, it is not clear whether/how they are being implemented, nor how effectively. In the case of smaller organizations, there are concerns that they are either being partially implemented or not at all.<sup>46</sup> It is also not mandatory to have such guidance, and even if an employer does, there are no sanctions for failure to comply with it.

### 3 | LEGAL MECHANISMS FOR ADDRESSING MENOPAUSE DISCRIMINATION

This section considers the legal mechanisms in the UK that relate to menopause discrimination – first, the EqA (sex, age, and disability discrimination; the public sector equality duty; and Section 14 ('dual discrimination')) and, second, health and safety regulations.

<sup>39</sup> FOM, *Guidance on Menopause and the Workplace* (2016) 1, at <<https://www.fom.ac.uk/wp-content/uploads/Guidance-on-menopause-and-the-workplace-v6.pdf>>.

<sup>40</sup> Bazeley et al., op. cit., n. 22.

<sup>41</sup> C. Hardy et al., 'Menopause and Work: An Overview of UK Guidance' (2018) 68 *Occupational Medicine* 580.

<sup>42</sup> British Menopause Association, *Menopause and the Workplace Guidance: What to Consider* (2022), at <<https://thebms.org.uk/wp-content/uploads/2022/04/07-BMS-TfC-Menopause-and-the-workplace-03B.pdf>>.

<sup>43</sup> The NUT is now the National Education Union (NEU).

<sup>44</sup> Hardy et al., op. cit., n. 41.

<sup>45</sup> Id., p. 584.

<sup>46</sup> Id., p. 586.

## 3.1 | Equality Act 2010

### 3.1.1 | Overview

The EqA provides protection from direct and indirect discrimination, victimization, and harassment on the grounds of nine protected characteristics, including age, disability, and sex. Under the Section 13(1) of the EqA, direct discrimination occurs when ‘A treats B less favourably than A treats or would treat others’. Indirect discrimination is, according to Section 19 of the EqA, when

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if –
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

### 3.1.2 | Sex discrimination

Sex discrimination has been claimed in several recent cases, sometimes in conjunction with age and/or disability discrimination.<sup>47</sup> One of the most notable cases is *Merchant v. BT*,<sup>48</sup> in which a woman claimed for both unfair dismissal and direct sex discrimination, after she had been dismissed by her long-standing employer for poor performance. She claimed that her performance had been affected by menopause-related anxiety and loss of concentration. The woman’s manager had said that he had not followed normal health-related work procedures, including seeking medical investigation, because he did not consider this necessary, believing that he had sufficient understanding of the menopause based on his knowledge of the experiences of his wife and his female colleague (the HR adviser). The Employment Tribunal held that ‘there were not reasonable grounds for that belief’<sup>49</sup> and that the manager had ‘wholly improperly made a generalised assumption about how women experience the menopause ... He felt he needed to know no more.

<sup>47</sup> *Mrs H. Lee v. The Chief Constable of Essex Police*, ET 3201274/2019; *Ms M. Rooney v. Leicester City Council*, ET 2600242/2019 and ET 2600243/2019; *Mrs L. M. Sloan v. Dumfries and Galloway Health Board*, ET 4100022/2020; *Ms A. McMahon v. Rothwell & Evans LLP and R. Pundick*, ET 2410998/2019. See also *Ms L. Best v. Embark on Raw Ltd*, ET 3202006/2022, in which a woman successfully claimed harassment on the grounds of the protected characteristic sex after her employer asked her if she was menopausal.

<sup>48</sup> *Merchant v. BT* [2012] ([2012] 1 WLUK 683; Case No. 1401305/11 Employment Tribunals 2012 WL 13167970).

<sup>49</sup> *Id.*, para. 82.



This would tend to suggest that he did not take menopause seriously.<sup>50</sup> The woman's claim succeeded. In terms of discrimination, the Employment Tribunal held that her employer had failed to take the menopause seriously as an underlying health condition and to refer her for medical investigation. This amounted, the Employment Tribunal determined, to sex discrimination, as her employer would not have taken this approach to other conditions with a hypothetical male comparator.

By contrast, in *Burchall v. Project One*,<sup>51</sup> a woman unsuccessfully claimed direct sex discrimination and harassment related to sex, seeking to rely, in part, on *Merchant*, arguing that the performance issues that had resulted in her dismissal were caused by the menopause and a 'lad-dish culture'<sup>52</sup> at work. Her claim was dismissed, as she had never told her employers that she was going through the menopause and had never raised the menopause in relation to her performance issues, which allegedly existed before it commenced. The Employment Tribunal did not preclude sex discrimination claims in relation to the menopause, finding only that the facts in this particular case did not support the claim being made. The employer could not be expected to respond, the Employment Tribunal held, to a condition of which it was not aware. Significantly, the Employment Tribunal held that because the employer had no policy that required it to investigate health-related issues, it had not failed in its duty to the employee by not doing so.<sup>53</sup> Had there been a menopause policy in place, this might have put the woman's claim in a different light. This is significant, because it can mean that employers have a vested interest in not having a menopause policy against which their actions might be judged in subsequent claims.

A key problem with direct sex discrimination claims is the issue of a comparator (Section 23 of the EqA); that is, a woman needs to be able to show that she has been treated less well than a man experiencing a 'similar' condition. The problem is, of course, identifying a male health condition that is analogous to a woman's menopause. Arguably, there is no similar complex, variable, frequently visible, ongoing health problem experienced by all middle-aged men, meaning that no comparator is available.

In addition to direct discrimination, menopausal women can also encounter indirect discrimination, such as through policies and procedures that inadvertently fail to take their needs into account. For example, as acknowledged in the WEC review,

[S]ickness policies can be particularly challenging for menopausal women and employees. The DLA [Discrimination Law Association] explained that a claimant whose menopause-related absences have counted towards a 'trigger point' for a performance review/disciplinary action could claim this was indirect sex discrimination. However, the DLA also noted that it is open to the employer to assert that the use of the sickness absence policy was a proportionate means of achieving a legitimate aim. They stated that:

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

<sup>50</sup> *Id.*, para. 89.

<sup>51</sup> *Ms L. Burchall v. Project One Consulting Ltd*, ET 1302063/2019.

<sup>52</sup> *Id.*, para. 102.

<sup>53</sup> *Id.*, para. 110.

likely needs of men, but not of women, who may have need of higher trigger points to ensure that they remain in the workforce.<sup>54</sup>

Such male-privileging sickness policies can result in indirect discrimination. So too can environmental standards (relating to workplace temperature, adequate light, air circulation, and access to cold drinking water), uniform policies, and so on that are not attuned to the potential needs of menopausal women.

### 3.1.3 | Age discrimination/age and sex and/or disability discrimination

Age discrimination has been claimed in several menopause employment tribunal cases, often in conjunction with sex and/or disability discrimination (each having to be proven separately).<sup>55</sup> In *A v. Bonmarche Ltd*,<sup>56</sup> a woman successfully claimed for both direct age and sex discrimination and harassment based on age and sex. She had been a long-standing senior supervisor. When she disclosed that she was going through the menopause, her manager began to 'demean and humiliate her', publicly ridiculing her for being menopausal and 'joking' about it to other staff, calling her a 'dinosaur'.<sup>57</sup> He encouraged other staff to apply for her job during a restructure, even though her post was unaffected. Following sick leave, she was on a phased return to work involving reduced hours, but her manager put her on full-time hours instead. She resigned, having 'lost all confidence and ... suffered a mental breakdown'.<sup>58</sup> The Employment Tribunal held that she had experienced both direct discrimination (finding that her manager had 'had treated the claimant less favourably than he would treat someone who was not a female of menopausal age')<sup>59</sup> and harassment (finding that her manager had 'had created a hostile environment for her and that this was related to her status as a woman going through the menopause'),<sup>60</sup> and awarded her £28,000 (£10,000 for loss of earnings and £18,000 for the injury to her feelings).

In relation to direct age discrimination, there is, as with direct sex discrimination, a major problem with the need for a comparator. To prove that she has been directly discriminated against based on her (older) age, a woman must show that a younger woman would not have experienced similar discrimination. If a younger woman going through the menopause prematurely had also suffered discrimination, this could undermine her claim for direct age discrimination.<sup>61</sup>

Many claims for age and sex discrimination involve intersectionality, given that the menopause mostly affects older women, and the stigma associated with it is inter-implicated with gendered ageism. Many menopausal older women experience discrimination based on stigma attached to being older women (or for younger women the stigma by association) at the intersection of ageism and sexism. In *Merchant v. BT*, the claimant's male manager had stereotyped her menopause

<sup>54</sup> WEC, op. cit., n. 8, para. 79.

<sup>55</sup> *A. v. Bonmarche Ltd (in Administration)*, ET 4107766/2019; *Ms S. Morris v. Lauren Richards Ltd*, ET 3301633/2020; *Mrs D. Daley v. Optiva*, ET 1308074/2019; *Sloan*, op. cit., n. 47.

<sup>56</sup> *A.*, id.

<sup>57</sup> *Id.*, para. 5.

<sup>58</sup> *Id.*, para. 11.

<sup>59</sup> *Id.*, para. 13.

<sup>60</sup> *Id.*, para. 10.

<sup>61</sup> WEC, op. cit., n. 8, para. 78.

experiences with those of the two women whom he had used as reference points, failing to take into account her specific lived experience. Treating all (older) menopausal women as the same discounts the uniquely personal and particular intersectional nature of their menopause experiences. It is likely that *A v. Bonmarche Ltd* involved intersectional discrimination; that is, the claimant suffered direct discrimination not simply because she was first an older person and second a woman, but because she was an *older woman*, with all of the gendered ageism attached to that particular social status. In other words, it was not because of her age *plus* sex, but because of the combined intersection of both her age *and* sex. However, given that the EqA does not allow for such a claim, the woman concerned had no choice but to claim for age and sex discrimination separately, even though the Employment Tribunal, in application, considered them together (though many tribunals do not). Consequently, many menopausal women must ‘shoe-horn’<sup>62</sup> their claims into single categories that do not accurately represent the actual intersectional discrimination that occurred. On some occasions, they may not even be able to make a claim at all.

### 3.1.4 | Disability discrimination

This section considers disability discrimination in three main ways: first, in relation to case law that has determined whether menopausal symptoms amount to a disability; second, in relation to intersectionality and the need for contemporaneous disclosure for claims to succeed; and third, in relation to the disadvantaging of menopausal women with caring responsibilities in tribunal decision making.

#### *Disability-related menopause claims*

Disability discrimination, both direct and indirect, is frequently cited in menopause-related claims.<sup>63</sup> Many of the guidance documents on the menopause in the workplace reference disability discrimination,<sup>64</sup> and the FOM has observed that ‘[s]evere menopausal symptoms and their consequences may combine to have a substantial adverse effect on normal day to day activities – potentially meeting the legal definition of a disability under the Equality Act’.<sup>65</sup> Under Section 20 of the EqA, there is a duty upon employers to make reasonable adjustments for a disabled employee by taking ‘such steps as it is reasonable to have to take to avoid the disadvantage’. Disability discrimination claims often relate to an employer’s failure to make such reasonable adjustments for women experiencing menopausal symptoms.<sup>66</sup>

However, employment tribunals have inconsistently ruled over whether menopausal symptoms amount to the ‘substantial’ disability threshold required by the EqA.<sup>67</sup> In *Donnachie v. Telnet*

<sup>62</sup> WEC, op. cit., n. 8, para. 76.

<sup>63</sup> *Morris*, op. cit., n. 55; *Daley*, op. cit., n. 55; *Miss J. Donnachie v. Telnet Technology Services Ltd*, ET 1300005/2020; *Lee*, op. cit., n. 47; *Ms M. Davies v. Scottish Courts and Tribunals Service*, ET 4104575/2017; *Ms L. Monaghan v. ASA International Ltd T/A ASA Recruitment*, ET 4110584/2019 and ET 4114949/2019; *Rooney*, op. cit., n. 47; *Ms K. Greenfield v. London Underground Ltd*, ET 2201181/2020; *McMahon*, op. cit., n. 47.

<sup>64</sup> Hardy et al., op. cit., n. 23.

<sup>65</sup> FOM, op. cit., n. 39, p. 3.

<sup>66</sup> WEC, op. cit., n. 8, para. 80.

<sup>67</sup> A. Hill, ‘Menopause at Centre of Increasing Number of UK Employment Tribunals’ *Guardian*, 7 August 2021, at <<https://www.theguardian.com/uk-news/2021/aug/07/menopause-centre-increasing-number-uk-employment-tribunals>>.

*Technology*,<sup>68</sup> the Employment Tribunal made a preliminary ruling that the claimant's severe menopausal symptoms – which included 'hot flushes, disturbed sleep, fatigue, memory and concentration problems and anxiety'<sup>69</sup> – constituted a disability under the EqA. The Employment Tribunal judge considered the definition of a disabled person under Section 6(1) of the EqA – specifically, that there had to be a 'substantial and long-term adverse effect' on a person's ability to carry out 'normal day-to-day activities' – and concluded that 'I see no reason why, in principle, "typical" menopausal symptoms cannot have the relevant disabling effect on an individual'.<sup>70</sup>

Very often, the issue is the extent to which menopausal symptoms are sufficiently severe to meet the EqA thresholds. In *Rose v. The Commissioner of Police for the Metropolis*,<sup>71</sup> a trainee police officer claimed disability discrimination under Section 15 of the EqA (in relation to a range of medical conditions, including symptoms relating to the menopause) and harassment under Section 26 of the EqA. Her claim failed on all counts. In relation to the menopause, the Employment Tribunal concluded:

We have found that the claimant has provided no evidence of any adverse effect on her ability to carry out day to day duties, not just an effect that is more than trivial ... We conclude therefore that the claimant was not disabled at the material time because of menopause.<sup>72</sup>

In *Davies v. Scottish Courts and Tribunals Service*,<sup>73</sup> a woman employed as a court officer successfully claimed that she had been unfairly dismissed (under the Employment Rights Act 1996) and discriminated against because of the protected characteristic of disability (under Section 15 of the EqA). After '20 years unblemished service',<sup>74</sup> she had developed perimenopausal symptoms – which included heavy bleeding, anxiety, and loss of concentration – for which she had sought treatment. There was a particular incident that led to her dismissal and precipitated her subsequent claim. On one occasion while working in court, she had put cystitis medication into some water, then went to the toilet without drinking it. When she returned, the water was no longer on her desk. Seeing some other (male) court officers drinking water, she expressed concern that they might be drinking her medicated water. One of the men then 'launched into a rant and made comments to the effect of "trying to poison the two old guys in the court" and asking if he would grow "boobs"'.<sup>75</sup> She had apparently shouted back and been unrepentant, which seemed to have been a key factor in a subsequent health and safety investigation. It later transpired that the medication had not actually been in the men's water, and that she had been mistaken in thinking so, caused by – she claimed – her menopause-related confusion. After a convoluted health and safety investigation, she was dismissed for gross misconduct, for being careless with her medication. This was despite the men not having been at risk of consuming it, and an occupational health report that confirmed that she had perimenopausal symptoms affecting her memory and concentration.

<sup>68</sup> *Donnachie*, op. cit., n. 63.

<sup>69</sup> *Id.*, para. 12.

<sup>70</sup> *Id.*, para. 22.

<sup>71</sup> *Miss K. Rose v. The Commissioner of Police for the Metropolis*, ET 3203055/2019.

<sup>72</sup> *Id.*, para. 92.

<sup>73</sup> *Davies*, op. cit., n. 63.

<sup>74</sup> *Id.*, para. 39.

<sup>75</sup> *Id.*, para. 15.

The Employment Tribunal held that her dismissal was disproportionate and unfair and that she had also been subject to disability discrimination. It ordered her reinstatement plus compensation. In terms of her claim for disability discrimination, the Employment Tribunal ruled that her conditions amounted to a disability under the EqA based on

the impact of those conditions on the claimant's day to day living and her performance at work. The claimant gets anxious and upset; suffers short term memory loss and 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.<sup>76</sup>

'Severe and ongoing' menopausal symptoms<sup>77</sup> have been accepted as amounting to a disability in several other employment tribunal claims, even when they have not been successful based on the facts of the specific cases.<sup>78</sup> Central to unsuccessful claims has been a woman's lack of disclosure that she is menopausal, which has then meant that tribunals have not seen how employers could be held liable for failing to provide an appropriate response.<sup>79</sup> For example, in *Gallacher v. Abellio Scotrail Ltd*,<sup>80</sup> a woman unsuccessfully appealed a failed claim for unfair dismissal and menopause-related disability discrimination. She was appealing the Employment Tribunal decision that her instant dismissal, following a breakdown in working relations with her manager, was justifiable. The claimant argued that the breakdown in working relations was due to depression and menopausal symptoms. The Employment Tribunal found, and the appeal court agreed, that the problems in the working relationship preceded the onset of depression and the menopause, and were therefore not disability related, and that the dismissal had been fair and non-discriminatory. The claimant had not attributed her work-related problems to her symptoms at the time and had not objected to workplace adjustments that had been made for her.<sup>81</sup> The issue of contemporaneous disclosure is complicated in menopause cases, as discussed in the next sub-section.

Indirect disability discrimination can occur where an employer's rules, policies, or practices inadvertently disadvantage people with disabilities. If it is accepted that a menopausal woman's symptoms amount to a disability, then rules, policies, or practices that do not take account of the specific needs, issues, and concerns of menopausal women could indirectly discriminate against them. This is discussed further in Section 3.2 on health and safety regulations.

There are, however, concerns in some quarters about framing the menopause as a disability, as the WEC observed:

[S]ome witnesses were concerned about categorising menopause as a disability. For example, the DLA and Police Federation of England and Wales questioned whether it

<sup>76</sup> *Id.*, para. 72.

<sup>77</sup> For a judicial commentary on multiple conditions, see *Patel v. Oldham MBC* [2010] ICR 603.

<sup>78</sup> *Morris*, op. cit., n. 55; *Daley*, op. cit., n. 55; *Mrs D. Gallagher v. Marks & Spencer Plc*, ET 2406039/2020; *Mrs Linda M. Gallacher v. Abellio Scotrail Ltd*, ET 4102245/2017.

<sup>79</sup> *Burchall*, op. cit., n. 51.

<sup>80</sup> *Gallacher v. Abellio Scotrail Ltd* [2020] 2 WLUK 691; Appeal No. UKEATS/0027/19/SS Employment Appeal Tribunal 2020 WL 04589176.

<sup>81</sup> *Id.*, para. 55.

was appropriate or acceptable for a natural life stage such as menopause to be classified as a disability. Law firm Lewis Silkin described this as ‘unattractive’, whilst Cloisters chambers said some women would regard this as ‘unpalatable’. Adam Pavey told us:

It just seems to me, and to lots of people that I speak to and prospective clients, to be just not the right terminology to use, and in actual fact it is being used for convenience rather than design simply so that you can bring those cases.<sup>82</sup>

There is a need to distinguish here between attributing negative meanings to being considered disabled (which would amount to prejudice) and the concern about constructing a natural life event that happens to almost all women as a disability. Moreover, what often makes the menopause ‘disabling’ in the workplace is often not a woman’s symptoms per se, but the workplace environment itself. There is a real risk that masculinity-privileging workplaces produce menopausal women as ‘disabled’, further ‘othering’ and marginalizing older women, and thereby perpetuating male privilege. This is discussed further in the sub-section below.

### *Intersections and contemporaneous disclosure*

Many menopause discrimination claims engage with a range of intersecting issues, some of which are associated with whether, and when, a woman has disclosed to her employer that she is menopausal. In *Rooney v. Leicester City Council*,<sup>83</sup> the Employment Appeal Tribunal concluded that the earlier Employment Tribunal<sup>84</sup> had erroneously ruled that the claimant, a menopausal woman, was not a disabled person. The claimant, a social worker, sought to claim for direct disability discrimination (under Section 15 of the EqA), harassment and victimization (Under Sections 26 and 27 of the EqA), and direct sex discrimination, in relation to her employer’s handling of, and responses to, her menopause-related symptoms and needs. She had suffered from the physical, mental, and psychological effects of the menopause for two years, including insomnia (causing fatigue and tiredness), light-headedness, confusion, stress, depression, anxiety, palpitations, memory loss, migraines, and hot flashes. She had been prescribed hormone replacement therapy and was under the care of a consultant at a specialist menopause clinic. Her symptoms had led to her forgetting to attend meetings and appointments and taking repeated periods of sick leave. She received written warnings relating to her absences and argued that her employer’s approach was insensitive and heavy handed. When she spoke to her male manager about her hot flashes, he replied that he got hot at work too. When her case was reviewed by an internal panel, it comprised all men, to which she objected. Ultimately, she resigned.

The Employment Tribunal had accepted that the claimant ‘suffered from a mental impairment which is stress-related and exacerbated by menopausal symptoms’<sup>85</sup> and that this was long term. However, it did not accept that this amounted to a disability because, though the claimant had received counselling, she had not initially been prescribed medication and because she had not reported any perimenopausal symptoms during a key period prior to a diagnosis of the menopause. This was questionable reasoning, not least of all because receipt of medication is not a requirement to satisfy a disability under the EqA. The Employment Appeal Tribunal ruled

<sup>82</sup> WEC, op. cit., n. 8, para. 31.

<sup>83</sup> *Ms M. Rooney v. Leicester City Council*, Appeal No. EA-2020-000070-DA (previously UKEAT/0064/20/DA).

<sup>84</sup> *Rooney*, op. cit., n. 47.

<sup>85</sup> *Id.*, para. 38.



that the Employment Tribunal had failed in its understanding of the severity of the claimant's condition, had overly focused on what she was able to do rather than on what she could not do, and had incorrectly interpreted and applied the law in relation to sex discrimination, notably in relation to her embarrassment about discussing her menopausal symptoms with men.

*Rooney* highlights how there can be complex, intersecting factors associated with the menopause and menopause discrimination, and that a lack of understanding of these intersectionalities can lead to misinterpretations of the law. It also shows how these issues are often cut through by sex – that is, the sex of the claimant, the sex of the claimant's manager(s), and the courts' (often gendered) understandings of sex discrimination and associated interpretations of the law.

*Rooney* also demonstrates the emphasis placed on contemporaneous disclosure by the courts. Whether a woman told her employer at the time that her symptoms were attributable to the menopause can be crucial to a claim for menopause discrimination. However, the issue is complicated in several ways. First, a woman may only realize retrospectively that the symptoms that she has been experiencing are attributable to the menopause. Second, her menopausal symptoms may overlap with other age-related non-menopausal symptoms, making it difficult to differentiate between them. This has arisen in several disability-based claims, where the claimants had multiple age-related comorbidities, compounded by the menopause, with tribunals being unable to determine the role that the menopause played in the claimant's difficulties. In *Rose*, for example, the Employment Tribunal noted that 'it is unclear to what extent the menopause, rather than the claimant's other conditions, impacted on [her ability to work night shifts]'.<sup>86</sup>

Third, even if a woman is aware that her symptoms are menopausal, she may be reluctant to disclose this partly due to menopause-related anxiety, depression, loss of confidence, and/or embarrassment,<sup>87</sup> but also fearing workplace discrimination as a consequence. Reporting on the findings of their empirical research with menopausal women, Kathleen Riach and Gavin Jack have observed that 'the deeply embedded modes of gendered ageism or gendered ableism within organizations are central to why many women wanted to keep their menopause as a private or unspoken experience'.<sup>88</sup> As Carol Atkinson, Vanessa Beck, Jo Brewis, Andrea Davies, and Joanne Duberley have commented, there is a 'bi-directional relationship between menopause and the workplace';<sup>89</sup> those organizations that are less than supportive of menopausal women are, unsurprisingly, spaces where they are more likely to feel uncomfortable disclosing symptoms. These symptoms may also not be 'disabling' per se but, drawing on the social model of disability,<sup>90</sup> be rendered 'disabling' by their interaction with unsupportive workplace environments. However, the courts often fail to recognize these complexities,<sup>91</sup> particularly within the context of the EqA's emphasis on the medical, as opposed to the social, model of disability.<sup>92</sup>

<sup>86</sup> *Rose*, op. cit., n. 71, para. 92.

<sup>87</sup> A. A. Grandey et al., 'Tackling Taboo Topics: A Review of the Three Ms in Working Women's Lives' (2020) 46 *J. of Management* 7; WEC, op. cit., n. 8, para. 82.

<sup>88</sup> Riach and Jack, op. cit., n. 8, p. 13.

<sup>89</sup> Atkinson et al., op. cit., n. 3, p. 49.

<sup>90</sup> M. Oliver, 'The Social Model of Disability: Thirty Years On' (2013) 28 *Disability & Society* 1024.

<sup>91</sup> Grandey et al., op. cit., n. 87.

<sup>92</sup> S. Bunbury, 'Unconscious Bias and the Medical Model: How the Social Model May Hold the Key to Transformative Thinking about Disability Discrimination' (2019) 19 *International J. of Discrimination and the Law* 26.



### *The disadvantaging of women with caring responsibilities*

In *Rooney*, the court also did not accept that the claimant's symptoms interfered with her ability to perform everyday activities because she had continued to help to care for her ageing mother, doing cooking and cleaning for her. This appears to have penalized the claimant for being an informal carer, as well as failing to appreciate that being able to cook and clean in an informal care context does not mean that one is able to perform sufficiently well in paid employment.

Being an informal carer has also undermined a woman's ability to demonstrate that the menopause was causing fatigue in several other cases. For example, in *McMahon v. Rothwell & Evans*,<sup>93</sup> despite the Employment Tribunal agreeing that the claimant's menopausal symptoms constituted a disability, it did not accept that this had had a significant impact on her workplace performance, particularly her poor attendance, ruling that it was no more than 'trivial' (falling below the EqA threshold). The Employment Tribunal observed that, '[i]n respect of fatigue, the claimant could not help us to distinguish between fatigue resulting from her busy lifestyle, being a single parent and working in a demanding job and studying, with fatigue resulting from the menopause'.<sup>94</sup> Again, the claimant was penalized, in part, because she was an informal carer. Menopausal women are very often informal carers, and sometimes 'sandwich carers', meaning that they are caring for children and/or grandchildren as well as older relatives.<sup>95</sup> This does not stop with the menopause. The courts' failure to differentiate between delivering informal care and performing paid work highlights how gender- and care- blind approaches can produce rulings that significantly disadvantage (older) menopausal women.<sup>96</sup> It also highlights how a lack of understanding of the menopause's intersection with informal caring roles can produce unfair rulings.

### 3.1.5 | Public sector equality duty

The EqA contains a public sector equality duty (PSED). According to Section 149 of the EqA,

- (1) A public authority must, in the exercise of its functions, have due regard to the need to –
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

<sup>93</sup> *McMahon*, op. cit., n. 47.

<sup>94</sup> *Id.*, para. 114.

<sup>95</sup> E. Grundy and J. C. Henretta, 'Between Elderly Parents and Adult Children: A New Look at the Intergenerational Care Provided by the "Sandwich Generation"' (2006) 26 *Ageing & Society* 707.

<sup>96</sup> R. Hunter, 'An Account of Feminist Judging' in *Feminist Judgements: From Theory to Practice*, eds R. Hunter et al. (2010) 30.

The implication of this, in relation to the menopause, is that public authorities (both as employers and more broadly) are required to take into consideration the relevant protected characteristics relating to menopause-related discrimination, harassment, and victimization (age, sex, and disability), and to advance equality of opportunity and foster good relations between those who share those protected characteristics and those who do not.

The PSED constitutes a potential alternative approach to the traditional focus on individual enforcement. For example, it may have influenced the menopause workplace policies of organizations that are public authorities, such as the National Health Service (NHS). As such, the PSED offers a potential route to menopause justice beyond individual claim making. However, it is limited in that it is confined to a 'single characteristic' approach; in other words, there is no mandate to consider intersecting protected characteristics, such as those affecting menopausal women – that is, age and sex; age and disability; sex and disability; or age, sex, and disability combined. Moreover, none of the protected characteristics specifically refer to the menopause, meaning that its particular significance can still be overlooked, even via the PSED.

### 3.1.6 | Section 14 (dual discrimination)

Section 14 of the EqA allows for claims of dual discrimination based on two combined protected characteristics. However, it has not been brought into force. The EqA was created by a Labour government that would soon be out of power, with its implementation left in the hands of the subsequent coalition Conservative/Liberal Democrat government. The coalition announced the 'scrapping' of Section 14, estimating that it would have related to 10 per cent of all potential discrimination cases and claiming that it would have cost businesses over £350 million a year.<sup>97</sup> The lack of opportunity to make intersectional claims particularly affects those experiencing complex forms of social exclusion, marginalization, and discrimination. This includes older women, who cannot make claims for combined discrimination based on age and sex.<sup>98</sup>

The non-implementation of Section 14 under the EqA disadvantages older women discriminated against at the intersection of age and sex in general. In *O'Reilly v. BBC & Others*,<sup>99</sup> a former presenter of the television programme *Countryfile*, Miriam O'Reilly, brought a claim against the BBC, arguing that she had been removed from the programme because she was an older woman. She was required to make separate claims on the grounds of age and sex discrimination. O'Reilly won her claim for age discrimination, but lost her claim for sex discrimination, the Employment Tribunal concluding that a man of the same age would also not have been kept on the programme. The Employment Tribunal also observed, *inter alia*, that if O'Reilly had experienced dual discrimination, it would not have been able to deal with such a complaint, given the current parameters of the EqA.<sup>100</sup> It is likely that O'Reilly was actually discriminated against on the basis of the intersection of age and sex, given that older women experience far greater ageism than older men, especially in the media.<sup>101</sup> However, this was neither recognized by the court, nor was there a means for appropriate legal recourse.

<sup>97</sup> HM Treasury, *Plan for Growth* (2011) 7, at <<https://www.gov.uk/government/publications/plan-for-growth-5>>.

<sup>98</sup> J. S. McLaughlin, 'Falling between the Cracks: Discrimination Laws and Older Women' (2020) 34 *Labour* 215.

<sup>99</sup> *O'Reilly v. BBC & Others*, ET 2200423/2010.

<sup>100</sup> *Id.*, para. 238.

<sup>101</sup> M. Edström, 'Visibility Patterns of Gendered Ageing in the Media Buzz: A Study of the Representation of Gender and Age over Three Decades' (2018) 18 *Feminist Media Studies* 77.

The lack of protection from dual discrimination is also problematic for women experiencing the ‘intersectional phenomenon’ of the menopause.<sup>102</sup> Many commentaries on menopause discrimination rulings have observed how the lack of provision for intersectional discrimination under the EqA limits women’s opportunities to make claims that accurately reflect their experiences. Their experiences are ‘shoe-horned’ into claims for age *or* sex *or* disability discrimination separately, rather than a combination of them. This places constraints upon menopausal women’s access to justice by making it more difficult for them to prove their cases, serving to obscure the intersectional nature of the discrimination that they have experienced, which is distorted by a single-axis model of discrimination.<sup>103</sup> It renders intersectional menopause discrimination claims unrecognizable and unauditable, which in turn means that there can be no monitoring for scale and change, which is needed to evaluate employer and/or social policy interventions.

### 3.2 | Health and safety regulations

Under UK law, employers have a common law duty of care to their employees, and to ensure their health and safety in the workplace.<sup>104</sup> This includes providing a safe place of work, safe working systems, and appropriate plant and equipment as well as recruiting and training competent staff who are themselves responsible in relation to health and safety. Failure to do so can result in claims for constructive dismissal and/or, where there is injury, claims under the tort of negligence.<sup>105</sup>

The pieces of key health and safety legislation relevant to the menopause are the Health and Safety at Work Act 1974 (HSWA), which requires employers to ensure the health and safety of all of their employees and provide adequate information, instruction, training, and supervision to enable their employees to carry out their work safely; the Workplace (Health, Safety and Welfare) Regulations 1992, which set out general requirements for workplace environmental standards, including in relation to temperature, ventilation, sanitary conveniences, washing facilities, and water supply; and the Management of Health and Safety at Work Regulations 1999, which require employers to make appropriate workplace risk assessments in relation to employee health and safety, including identifying groups of workers who might be at particularly at risk (such as individuals going through the menopause). The Health and Safety Executive (HSE) is the national regulator for workplace health and safety. It can issue an improvement notice or a prohibition notice or bring a criminal prosecution against an employer for a breach of health and safety regulations.

Health and safety regulations have so far primarily been raised in menopause discrimination case law in relation to whether risk assessments have been undertaken. However, according to the WEC review,

Marian Bloodworth, Chair of the ELA [Employment Lawyers Association], explained that employers were ‘not necessarily alive to some of the health and safety issues that the menopause can present’, nor were they necessarily aware of [the need to]

<sup>102</sup> WEC, *op. cit.*, n. 8, para. 76.

<sup>103</sup> Crenshaw, *op. cit.*, n. 9.

<sup>104</sup> *Wilsons & Clyde Coal Co. Ltd v. English* [1938] AC 57.

<sup>105</sup> K. Horsey and E. Rackley, *Tort Law* (2021, 7<sup>th</sup> edn) ch. 13.

undertake risk assessments. She told us that the ELA was also not aware of any enforcement action taken by the HSE in relation to menopause in the workplace.<sup>106</sup>

Health and safety legislation is important in that it requires employers to take proactive steps that may provide menopausal women with appropriate support and, as such, to offer preventative measures.<sup>107</sup> However, individual employees cannot bring direct claims under health and safety legislation, which makes it very limited in its usefulness for menopausal women seeking to make claims relating to their own personal circumstances.

Furthermore, health and safety regulations have been critiqued for their masculinist approaches, focusing on work traditionally done by men and paying less attention to workplaces and contexts more traditionally occupied by women. According to Wales TUC Cymru,

[t]he traditional emphasis of health and safety has been on risk prevention in visibly dangerous work largely carried out by men in sectors such as construction and mining, where inadequate risk control can lead to fatalities. Because of this, research and developments in health and safety regulation, policy and risk management have been primarily based on work traditionally done by men, while women's occupational injuries and illnesses have been largely ignored.

This means that, even today, occupational health and safety often treats men and women as if they were the same, or makes gender-stereotypes, such as saying that women do lighter work or that men are less likely to suffer from work-related stress. In contrast, a gender-sensitive approach acknowledges and makes visible the differences that exist between male and female workers, identifying their differing risks and proposing control measures so that effective solutions are provided for everyone.<sup>108</sup>

In this way, intersectionality is relevant once again, in that health and safety workplace policies that do not take sex/gender into account are very likely to recognize the specific needs, issues, and concerns of women employees, including those going through the menopause.

#### 4 | THE NEED FOR REFORM

Menopause discrimination is located within an uncertain and inconsistent legal framework, falling into 'the cracks between disability, sex and age protections'.<sup>109</sup> Women are forced to make claims that do not fully reflect the intersectional nature of their experiences or are unable to make claims at all. Their claims are frequently read through a gender-neutral lens that does not contextualize the gendered nature of their experiences. The courts have so far demonstrated limited understanding of how older menopausal women are impacted by the intersection of ageism and sexism, and the law itself affords them limited opportunity for more nuanced legal interpretations.

<sup>106</sup> WEC, op. cit., n. 8, para. 71.

<sup>107</sup> Wales TUC Cymru, *The Menopause in the Workplace: A Toolkit for Trade Unionists* (2017) 25, at <<https://www.tuc.org.uk/menopause-workplace-toolkit-trade-unionists-wales-tuc-cymru>>.

<sup>108</sup> Id.

<sup>109</sup> Bazeley et al., op. cit., n. 22, p. 8.

An intersectional approach offers insights into the challenges associated with addressing menopause discrimination in law:

[I]n a majority of Global North countries, claimants or complainants are required to ‘opt’ for only a primary mode of discrimination (such as sex, age or disability). As Crenshaw’s critical account of policy discourse surrounding race suggests, the influence of what becomes the ‘common, if not dominant, frame for addressing the disparities’ ... can also silence a plurality of intersectional effects. In other words, framing menopausal inequality as only arising from gender, age or disability means the full force of intersectional disadvantage ... is difficult to capture within formal procedures such as employment tribunal settings and equality legislation.<sup>110</sup>

In light of this, four potential reforms are now discussed: mandatory menopause-specific regulations; the implementation of Section 14 of the EqA; a new protected characteristic, ‘menopause’; and a new equality framework, going beyond individual characteristics.

#### 4.1 | Mandatory menopause-specific regulations

The first option for reform is the introduction of mandatory menopause-specific regulations, either as standalones or in conjunction with health and safety regulations.<sup>111</sup> This would entail a legal requirement that all organizations have policies in place that address how to respond to and support someone going through the menopause. There could be sanctions for non-compliance. Mandatory regulations might require organizations to conduct appropriate risk assessments and implement supportive interventions (practical, social, and psychological). They might state that managers and colleagues must be supportive and that a woman should not be treated less well than someone not going through the menopause.

However, it is open to question as to whether associated sanctions would be implemented and/or have sufficient teeth, and there are concerns that mandatory regulations might become nothing more than a ‘tick-box’ exercise.<sup>112</sup> Moreover, if a woman going through the menopause was bullied, harassed, victimized, denied promotion, and/or subject to unfair performance management based on the menopause, it is unlikely that mandatory regulations would adequately protect her from such discrimination. Thus, while they might go part of the way towards providing menopausal women with support and protection, mandatory regulations alone would be insufficient.

#### 4.2 | Bringing Section 14 of the Equality Act into force

While many countries’ laws do not take into account some form of multiple discrimination, some do.<sup>113</sup> In those instances, it takes three main forms: sequential multiple discrimination

<sup>110</sup> Riach and Jack, *op. cit.*, n. 8, p. 13.

<sup>111</sup> A. Pavey, ‘Written Evidence from Adam Pavey [MEW0086]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>112</sup> CIPD, ‘Written Evidence from Chartered Institute of Personnel and Development (CIPD) [MEW0043]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>113</sup> S. Atrey, *Intersectional Discrimination* (2019).

(discrimination on different grounds on separate occasions), additive discrimination (discrimination on different grounds at the same time); intersectional discrimination (discrimination in combined ways that cannot be separated out).<sup>114</sup> In the US, since the failure of *DeGraffenreid v. General Motors Assembly Div., Etc.*<sup>115</sup> (in which Black women auto workers unsuccessfully claimed for ‘compound discrimination’), the courts have admitted ‘sex-plus’ or ‘race-plus’ additive discrimination, with each ground having to be proved individually.<sup>116</sup> In the European Union (EU), intersectionality is not explicitly enshrined in statute,<sup>117</sup> though the courts have tended to take a purposive approach,<sup>118</sup> with conflicting opinions about whether this is sufficient for intersectional claims (Sandra Fredman arguing that it is,<sup>119</sup> and Shreya Atrey disagreeing<sup>120</sup>).

In the UK, there have been growing calls for Section 14 of the EqA to be brought into force, including from academics Jo Brewis<sup>121</sup> and Vanessa Beck,<sup>122</sup> the 50 Plus Choices Employer Taskforce,<sup>123</sup> the TUC,<sup>124</sup> and the WEC.<sup>125</sup> The government has explicitly rejected the WEC’s recommendation that Section 14 should be implemented, which the WEC had anticipated:

Minister Scully told us that there were no plans to enact section 14 as the Government considered the ability for claimants to bring a claim on more than one ground was sufficient. The Minister for Women argued that enacting s14 would ‘introduce unwelcome regulatory complexity and place new costly burdens on business and the public sector’.<sup>126</sup>

However, the complexity and cost arguments are disputed, with the WEC observing that ‘the DLA told us there was no evidence to support the suggestion that section 14 would

<sup>114</sup> Id.

<sup>115</sup> *DeGraffenreid v. General Motors Assembly Div., Etc.*, 413 F. Supp. 142 (E. D. Mo. 1976).

<sup>116</sup> Atrey, op. cit., n. 113.

<sup>117</sup> L. N. Henningsen, ‘The Emerging Anti-Stereotyping Principle under Article 14 ECHR: Towards a Multidimensional and Intersectional Approach to Equality’ (2021) 3 *European Convention on Human Rights Law Rev.* 185.

<sup>118</sup> C. O’Cinneide and K. Liu, ‘Defining the Limits of Discrimination Law in the United Kingdom: Principle and Pragmatism in Tension’ (2015) 15 *International J. of Discrimination and the Law* 80.

<sup>119</sup> S. Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (2016), at <<https://op.europa.eu/en/publication-detail/-/publication/d73a9221-b7c3-40f6-8414-8a48a2157a2f>>.

<sup>120</sup> S. Atrey, ‘Comparison in Intersectional Discrimination’ (2018) 38 *Legal Studies* 379.

<sup>121</sup> J. Brewis, ‘Written Evidence from Professor Jo Brewis [MEW0018]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>122</sup> V. Beck, ‘Written Evidence from Dr Vanessa Beck, University of Bristol [MEW0038]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>123</sup> 50 Plus Choices Employer Taskforce, *Menopause and Employment: How to Enable Fulfilling Working Lives* (2021), at <<https://wellbeingofwomen.blob.core.windows.net/www/documents/Menopause-and-Employment-50-Plus-choices.pdf>>. The taskforce comprises the CIPD, the British Chamber of Commerce, the Federation of Small Businesses, the Recruitment and Employment Confederation, UK Hospitality, Business in the Community, and the government-appointed Business Champion for Older Workers.

<sup>124</sup> TUC, ‘TUC: Government Must Do More to End Inequality 10 Years On from Equality Act’ *TUC*, 1 October 2020, at <<https://www.tuc.org.uk/news/tuc-government-must-do-more-end-inequality-10-years-equality-act>>.

<sup>125</sup> WEC, op. cit., n. 8, paras 90, 97.

<sup>126</sup> Id., para. 90.



be complex or costly to enact ... [and] would not require much, if any, further training or education'.<sup>127</sup>

Enactment of Section 14 would create a partial window of opportunity allowing for intersectional claims for menopause discrimination on two combined grounds – that is, sex and age, sex and disability, or age and disability. This would go some way towards recognizing the intersectional realities of discrimination through enabling women to avoid having to ‘shoe-horn’ their claims inaccurately and imprecisely into single types of discrimination. However, it would only do so in relation to two intersecting protected characteristics, whereas more than two might be involved (such as age *and* sex *and* disability, perhaps also with other key characteristics, such as race/ethnicity, sexual orientation, and gender reassignment<sup>128</sup>), and it would not fully resolve the difficulty of identifying a comparator in relation to direct discrimination.<sup>129</sup> Moreover, it would still not get to grips with the particularities and uniqueness of menopause discrimination.

### 4.3 | A new protected characteristic

There have also been calls for a new protected characteristic, ‘menopause’, including from the Bar Council,<sup>130</sup> the Law Society of Scotland,<sup>131</sup> various employment law firms and lawyers,<sup>132</sup> the Discrimination Law Association,<sup>133</sup> and the WEC.<sup>134</sup> A new protected characteristic would give those going through the menopause specific rights and protections from direct and indirect discrimination, harassment, and victimization in law, including imposing a duty on employers to make reasonable adjustments, as with the protected characteristic ‘disability’.<sup>135</sup> It would focus on the menopause per se, removing the need to prove underlying causal factors (such as age or sex discrimination) and/or frame the menopause as something it is not (that is, a disability). It would also remove disparities between pregnancy and maternity (already a protected characteristic) and the menopause.<sup>136</sup>

<sup>127</sup> Id.

<sup>128</sup> Riach and Jack, *op. cit.*, n. 8; Y. I. Cortés and V. Marginean, ‘Key Factors in Menopause Health Disparities and Inequities: Beyond Race and Ethnicity’ (2022) 26 *Current Opinion in Endocrine and Metabolic Research* 100389; T. Glyde, ‘LGBTQIA+ Menopause: Room for Improvement’ (2022) 400 *Lancet* 1578.

<sup>129</sup> Atrey, *op. cit.*, n. 113.

<sup>130</sup> The Bar Council, ‘Women and Equalities Committee Inquiry into Menopause and the Workplace Bar Council Written Evidence [MEW0077]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>131</sup> Law Society of Scotland, ‘Written Evidence from the Law Society of Scotland [MEW0078]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>132</sup> Brabners LLP, ‘Written Evidence from Brabners [MEW0071]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022); Lewis Silkin LLP, ‘Written Evidence from Lewis Silkin [MEW0073]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022); Pavey, *op. cit.*, n. 111.

<sup>133</sup> DLA, ‘Written Evidence from the Discrimination Law Association [MEW0081]’, evidence submitted to Women and Equalities Committee Inquiry into Menopause and the Workplace (2022).

<sup>134</sup> WEC, *op. cit.*, n. 8, para. 98.

<sup>135</sup> Id., paras 94, 98.

<sup>136</sup> Id., para. 93.



Creating the protected characteristic ‘menopause’ would also, importantly, remove the need for a comparator in relation to direct discrimination, as already exists for pregnancy and maternity. According to Section 17 of the EqA, pregnancy and maternity discrimination is prohibited in non-work contexts (such as services and public functions, premises, education, and associations). Under Section 17(2), ‘[a] person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers’. There is no requirement for a comparator under Section 18, which relates to the workplace:

- (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
  - (a) because of the pregnancy, or
  - (b) because of illness suffered by her as a result of it.

Similar wording could be employed in relation to the menopause. The removal of the need for a comparator would mitigate the challenges that many women face in making successful claims for menopause discrimination.

Critics opposed to the introduction of a new characteristic have raised concerns about difficulties with legal definitions of the onset and ending of the perimenopause and the menopause, potentially creating legal uncertainty for the courts and employers.<sup>137</sup> Concerns have also been raised about costs associated with training and implementation, though these are disputed.<sup>138</sup> Arguments have also been made that once there is one new protected characteristic, there could be calls for others. There have been calls, for example, for additional protected characteristics based on class,<sup>139</sup> carer status,<sup>140</sup> care leaver status,<sup>141</sup> appearance,<sup>142</sup> fatness/obesity,<sup>143</sup> caste,<sup>144</sup> and hair.<sup>145</sup> There is a concern that more protected characteristics could potentially result in a ‘watering down’ of the EqA,<sup>146</sup> diverting resources from addressing other forms of

<sup>137</sup> *Id.*, para. 95.

<sup>138</sup> *Id.*

<sup>139</sup> A. Benn, ‘The Big Gap in Discrimination Law: Class and the Equality Act 2010’ (2020) 3 *Oxford Human Rights Hub J.* 30.

<sup>140</sup> L. Clements, *Carers and Their Rights: The Law Relating to Carers* (2011, 4<sup>th</sup> edn), at <<https://www.lukeclements.co.uk/downloads/update1-jan2011.pdf>>.

<sup>141</sup> Professional Social Work, ‘Campaign to Make “Care Experience” the Tenth Protected Characteristic under the Equality Act: Care Leavers Demand Law Change to Tackle Discrimination and Improve Support’ *PSW Magazine*, 17 February 2022, at <<https://new.basw.co.uk/about-social-work/psw-magazine/articles/campaign-make-care-experience-tenth-protected>>.

<sup>142</sup> A. Mason and F. Minerva, ‘Should the Equality Act 2010 Be Extended to Prohibit Appearance Discrimination?’ (2022) 70 *Political Studies* 425.

<sup>143</sup> S. W. Flint and J. Snook, ‘Obesity and Discrimination: The Next “Big Issue”?’ (2014) 14 *International J. of Discrimination and the Law* 183.

<sup>144</sup> A. Waughray and M. Dhanda, ‘Ensuring Protection against Caste Discrimination in Britain: Should the Equality Act 2010 Be Extended?’ (2016) 16 *International J. of Discrimination and the Law* 177.

<sup>145</sup> S. Cohen, ‘The Truth within Our Roots: Exploring Hair Discrimination and Professional Grooming Policies in the Context of Equality Law’ (2021) 2 *York Law Rev.* 107.

<sup>146</sup> Benn, *op. cit.*, n. 139.

discrimination<sup>147</sup> and ending up with an Act that is as complicated and unwieldy as the previous patchwork of Acts that it sought to replace.<sup>148</sup>

However, increasing complexity is not an acceptable reason for excluding protection from menopause discrimination. It should not be regarded as the ‘poor relation’ of discrimination law, especially when it affects older women who are already subject to wider social injustices in later life.<sup>149</sup> Moreover, the success of the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA),<sup>150</sup> which has many more protected characteristics than the EqA and also takes into account intersectional discrimination (discussed in Section 4.4), would suggest that a greater number of characteristics is manageable. Even so, adding new protected characteristics does not overcome the need for the EqA to address wider structural issues,<sup>151</sup> both in relation to the menopause and more broadly.

#### 4.4 | Beyond individual characteristics

The EqA recognizes specific categories of individual characteristics, based on a singular, ‘treating likes alike’ approach to (in)equality.<sup>152</sup> Ever since its inception, the EqA has been criticized for the ‘single-dimension logic of the silos’.<sup>153</sup> For example, Judith Squires has asserted that the EqA is ‘structurally antithetical to developing a nuanced recognition of intersectionality’ and is unsuitable for tackling more complex structural aspects of discrimination.<sup>154</sup> This has also been argued more broadly, such as in relation to EU law.<sup>155</sup> A ‘silo’ approach to equality disproportionately affects the most marginalized in society, who are positioned at the intersection of multiple, complex social exclusions, including in law. It disadvantages women compared with men, given that women’s experiences of inequalities are more likely to be interwoven with sexism and gendered ageism<sup>156</sup> and given law’s gendered privileging of early and middle adulthood over older adulthood.<sup>157</sup>

The need to address structural inequalities beyond identity/status categories has been identified by many authors,<sup>158</sup> drawing notably on the capability theories of Amartya Sen and Martha

<sup>147</sup> Mason and Minerva, op. cit., n. 142.

<sup>148</sup> B. Hepple, ‘The New Single Equality Act in Britain’ (2010) 5 *The Equal Rights Rev.* 11.

<sup>149</sup> S. Westwood, ‘Older Women’s Rights in International Law’ in *Research Handbook on Law, Society and Ageing*, eds S. Westwood and N. Knauer (forthcoming).

<sup>150</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA or the Equality Act, Act No. 4 of 2000), SA.

<sup>151</sup> O’Cinneide and Liu, op. cit., n. 118.

<sup>152</sup> S. Fredman, *Discrimination Law* (2023, 3<sup>rd</sup> edn).

<sup>153</sup> I. Solanke, ‘Infusing the Silos in the Equality Act 2010 with Synergy’ (2011) 40 *Industrial Law J.* 336, at 345–346.

<sup>154</sup> J. A. Squires, ‘Intersecting Inequalities: Britain’s Equality Review’ (2009) 11 *International Feminist J. of Politics* 496, at 506.

<sup>155</sup> Atrey, op. cit., n. 113.

<sup>156</sup> Rochon et al., op. cit., n. 12.

<sup>157</sup> J. Herring, *Law through the Life Course* (2021).

<sup>158</sup> See for example B. T. Dill and R. E. Zambrana, ‘Critical Thinking about Inequality: An Emerging Lens’ in *Feminist Theory Reader: Local and Global Perspectives*, eds C. McCann et al. (2020, 5<sup>th</sup> edn) 108.

Nussbaum.<sup>159</sup> The literature abounds with examples of how individual enforcement is insufficient to challenge discrimination based on age,<sup>160</sup> sex,<sup>161</sup> race,<sup>162</sup> disability,<sup>163</sup> and their intersections, as well as other structural inequalities. Kate Malleon has proposed that for a legal framework based on characteristics to work, three conditions must be met: '[The characteristics] must have some definitional and categorical stability, they must broadly reflect people's understanding of social reality and lived experiences and they must align with the most significant axes of discrimination in society.'<sup>164</sup> She has argued that these conditions are increasingly difficult to meet, given the increasing complexities of lived experience, the growing number of 'intersectional axes',<sup>165</sup> the structural disadvantages experienced by certain groups, and the ongoing lack of recognition of socio-economic status as a protected characteristic. She has proposed a substantial broadening of the EqA and expansion of categories, despite the current lack of political will to do so.

In South Africa, the PEPUDA leads the way. This has a wide range of protected characteristics,<sup>166</sup> as well as non-exclusive 'other' grounds, determined on a case-by-case basis, that cause or perpetuate systemic disadvantage, undermine human dignity, or adversely affect 'the equal enjoyment of a person's rights and freedoms in a serious manner'.<sup>167</sup> This offers a 'beyond characteristics' approach, affording the opportunity for claims based on wider structural disadvantage, while also incorporating intersectionality.

The PEPUDA takes a contextual and intersectional approach and does not 'fragment or isolate the group identities of the claimant but considers them together, as a whole'.<sup>168</sup> In *Mahlangu & Another v. Minister of Labour & Others*,<sup>169</sup> for example, the claimant was the dependent daughter of a domestic worker who drowned in her employer's swimming pool. She was not entitled to compensation under the Compensation for Occupational Injuries and Diseases Act (COIDA), which excluded domestic workers. She argued that, as most domestic workers in South Africa are Black, including her mother, the exclusion was discriminatory, based on the intersection of social status, gender, race, and class. The High Court at Pretoria upheld her claim, as did the South African Constitutional Court on appeal. In the Constitutional Court, Judge Victor observed:

Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how

<sup>159</sup> D. R. Woods et al., 'What Is Intersectional Equality? A Definition and Goal of Equality for Organizations' (2022) 29 *Gender, Work & Organization* 92.

<sup>160</sup> A. Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (2022).

<sup>161</sup> Fawcett Society, *Sex Discrimination Law Review: Final Report* (2018), at <<https://www.fawcettsociety.org.uk/sex-discrimination-law-review-final-report>>.

<sup>162</sup> M. Banaji et al., 'Systemic Racism: Individuals and Interactions, Institutions and Society' (2021) 6 *Cognitive Research: Principles and Implications* 1.

<sup>163</sup> T. Shakespeare, 'The Social Model of Disability' in *The Disability Studies Reader*, ed L. J. Davis (2006) 197.

<sup>164</sup> K. Malleon, 'Equality Law and the Protected Characteristics' (2018) 81 *Modern Law Rev.* 598, at 598.

<sup>165</sup> *Id.*, p. 603.

<sup>166</sup> PEPUDA, *op. cit.*, n. 150, s. 1(1)(xxii)(a). These are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

<sup>167</sup> *Id.*, s. 1(1)(xxii)(b).

<sup>168</sup> Atrey, *op. cit.*, n. 120, p. 393.

<sup>169</sup> *Mahlangu & Another v. Minister of Labour & Others* [2020] ZACC 24.

individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination.<sup>170</sup>

As Atrey has observed, the court in *Mahlangu* ‘seems to have navigated a rather complex category of indirect intersectional discrimination with ease’.<sup>171</sup>

Taking a similarly expansive approach to the EqA, by both widening its range of protected characteristics and allowing for claims based on grounds beyond specified characteristics, including an intersectional approach, would enable menopausal women to make claims based on their actual lived experiences. It would prevent them having to reshape those experiences within the confines of the current legal framework, which presently leads to claims unfairly failing, or not being initiated in the first place.

## 5 | CONCLUSION

As this article has demonstrated, there are wide-ranging intersectional inequalities relating to the menopause in the workplace and beyond. An intersectional approach helps to highlight gaps in the law – in this case, gaps in protection for menopausal women. Case law has highlighted how women often have to ‘shoe-horn’ their experiences of menopause discrimination into the categories of sex, age, and/or disability in order to satisfy the inflexible and singular categories of the EqA. Making intersectional claims under the EqA is not possible, which constitutes a significant disadvantage for menopausal women, for whom the menopause is an inherently intersectional experience. Moreover, the courts have made variable interpretations of menopause discrimination, most notably in relation to whether the menopause amounts to a disability, and what criteria should be applied in determining whether it is. These interpretations have been gendered, with some courts perceiving menopausal women’s caring roles as indicators that they are not ‘sufficiently’ disabled to meet the EqA criteria.

Menopausal women are currently being ill-served by the law, and reforms are urgently needed. As this article has argued, such reforms could and should involve mandatory menopause-specific regulations; bringing Section 14 of the EqA into force as an interim measure; a new protected characteristic, ‘menopause’; and a broadening of the EqA to not only include more protected characteristics, but also to facilitate the opportunity to make claims under it that go beyond fixed categories and that are based on more than two intersectional discriminations.

The Conservative government’s swift and absolute rejection of the WEC’s recommendations regarding legal reform is troubling, particularly in light of its 2019 ‘roadmap’ commitment to promote women’s reproductive health across the life course and tackle women’s workplace inequalities.<sup>172</sup> The government’s response seems to have been selective in its reference to aspects of the WEC report, citing (the minority of) sources that did not consider new legislation necessary and discounting (the majority of) sources that did.<sup>173</sup> Its resistance to allowing for protections from intersectional discrimination in law is based, arguably, on cost, pragmatics, and, most significantly, an ideology that takes a determinedly single-lens approach to discrimination. Such an

<sup>170</sup> *Id.*, para. 79.

<sup>171</sup> S. Atrey, ‘Beyond Discrimination: *Mahlangu* and the Use of Intersectionality as a General Theory of Constitutional Interpretation’ (2021) 21 *International J. of Discrimination and the Law* 168, at 174.

<sup>172</sup> Government Equalities Office, *op. cit.*, n. 5.

<sup>173</sup> Department for Work & Pensions, *op. cit.*, n. 32.

ideology inherently disadvantages those who are subject to the most complex forms of structural disadvantage and discrimination, including menopausal women.

While equality legislation is only part of the response to social injustice, it is a key component. Until menopausal women are provided with adequate recognition and protections in law, and both clearer and more flexible means to claim for discrimination relating to the menopause, they will remain on the legal margins. The extent and full nature of the inequalities that they experience are under-recognized and under-protected in law. At the present time, menopause justice in the UK seems a long way off.

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