Government
**Equalities** Office
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# Explaining the Equality Bill: Dual Discrimination

## Introduction

- Some people experience discrimination because of a combination of protected characteristics – for example black women or Muslim men may be treated less favourably because of stereotyped attitudes or prejudice relating to their particular combination of protected characteristics.
- We know that there is a gap in the law. As the law stands, it is necessary to bring separate discrimination claims for each different characteristic. As a result, it can be difficult, complicated and sometimes impossible to get a legal remedy.
- The Equality Bill includes a **dual discrimination** provision, which will enable people to bring claims where they have experienced less favourable treatment because of a combination of two protected characteristics. This is a progressive, effective and proportionate remedy. We are the first country in the world to develop such a provision.

## Consultation and parliamentary process

- The responses received to the Discrimination Law Review consultation document *Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* back in June 2007 highlighted that there was a gap in the law for those who experience discrimination because of a combination of protected characteristics.
- GEO published *Equality Bill: Assessing the impact of a multiple discrimination provision* in April 2009, which set out a proposed remedy for dual discrimination and sought views on how this remedy would work in practice.
- Having considered the comments received and after reviewing the available evidence, the provision for dual discrimination was introduced to the Equality Bill by Government amendment during the Commons Committee stage in July 2009.
- This provision, now Clause 14 of the Equality Bill, has been based on careful consideration of the evidence obtained – through the consultation process on the Bill, the research we commissioned and following discussions with all interested parties.

## The provision in practice

- The provision for dual discrimination now included within the Equality Bill enables claims of direct discrimination because of a combination of two relevant protected characteristics.
- This provision will provide protection for intersectional discrimination. This is when the less favourable treatment occurs because of the unique combination of protected characteristics, in such a way that they are completely inseparable.

- To establish dual discrimination, the treatment someone experiences would need to be prohibited for each of the protected characteristics in the claim (i.e., the law must make it unlawful to treat someone in such a fashion). This means that the treatment experienced must be within *scope* of the law. For example, the Equality Bill prohibits discrimination in employment in respect of both sex and disability; therefore a disabled woman may bring a claim of dual discrimination if denied a job because of the combination of those protected characteristics.
- But the individual does not need to show that, if taken separately, claims of direct discrimination because of each of the characteristics in the combination would be successful. This means that a person does not need to have a successful claim of direct discrimination because of sex and a successful claim of direct discrimination because of disability to bring a successful sex and disability dual discrimination claim.
- However, dual discrimination cannot be established if an employer or service provider can show that the conduct someone experiences is not unlawful direct discrimination.. This means that if an exception or justification applies to the conduct because of either or both of the combined protected characteristics, there is no dual discrimination. Take, for example, a disabled man who claims that he was discriminated against because of a combination of disability and sex when denied a job in a domestic violence refuge. If it is an occupational requirement that this post must be filled by a woman, the claim of dual discrimination would fail (because refusing to appoint a man to the job because of his sex is not unlawful direct discrimination).
- We have excluded from the scope of clause 14 circumstances involving discrimination in education because of disability. Single-strand claims of discrimination in education because of disability are subject to the exclusive jurisdiction of specialist tribunals. We consider that when someone is treated less favourably by a school because of the combination of disability and another protected characteristic, they are nonetheless likely to succeed on a single-strand disability claim (before the specialist tribunal). We consider that it is better that these cases continue to be considered with the expertise of the specialist tribunals rather than sending them civil courts.
- There is nothing within the provision which would prevent a claimant from bringing a dual discrimination claim alongside single strand direct discrimination claims. Indeed, legal advisors may well advise clients to bring single strand claims alongside dual discrimination claims. This would mean that someone who wants to make a claim that they were discriminated against because of a combination of sexual orientation and sex could bring one dual discrimination claim alongside separate claims of direct discrimination because of sexual orientation and sex.

## Limitations of the provision:

- Clause 14 is based on a careful examination of the evidence available concerning multiple discrimination. It is not intended that this provision should be a panacea for all forms of discrimination; rather, it provides a specific legal remedy for those who have experienced less favourable treatment because of a combination of protected characteristics, where currently it may difficult, complicated and sometimes impossible to get a legal remedy. Just as multiple single-strand claims are often necessary now, multiple claims may be necessary in the future, even with the advent of dual discrimination. Direct discrimination, indirect discrimination and harassment

concern different wrongs as to which different remedies are necessary. It is neither necessary nor appropriate to extend the law by enabling unlimited combinations of any and all protected characteristic in respect of any and all prohibited conduct. A one-size fits all approach does not necessarily simplify the process or achieve the appropriate redress. The point is to ensure that that a remedy is available for conduct which should be prohibited.

- Limited to combinations of two protected characteristics: This provides protection for the vast majority of incidents without imposing disproportionate burdens to organisations and businesses. Given that this provision concerns less favourable treatment which is because of a combination of protected characteristics, the greater the number of characteristics combined, the less the likelihood that the treatment was because of that particular combination. If, for example a black disabled woman is discriminated against, it is likely that the discrimination she experienced was because of any one of the three strands, or because of a combination of any two of these protected characteristics, but less likely to only be because of the particular combination of the three. Evidence shows that enabling claims combining two protected characteristics addresses most (90%) of the cases of intersectional discrimination[1].
- Limited to direct discrimination: There is no evidence that a remedy is lacking in indirect discrimination cases involving more than one protected characteristic. Therefore there is no basis for regulatory intervention. Extending the law to enable claims of intersectional indirect discrimination would require businesses and organisations to actively consider the impact of their provisions, criteria and practices on all 21 possible combinations of protected characteristics to ensure that they do not have an unlawfully disproportionate impact. We consider this to be disproportionate burden, given that there is no evidence of a need.
- Excluding harassment: There is no evidence that a remedy is lacking and so no basis for extending the law to include protection from intersectional harassment.[2] Unlike the prohibition of discrimination, the prohibition of harassment is not expressly comparative. This means that in harassment claims the claimant is not required to show that they experienced less favourable treatment than someone else but rather that they experienced unwanted conduct (related to a protected characteristic). Harassment is therefore not susceptible to the same problems of proof. It is anticipated that the change in the definition of harassment from "on the ground of" to "related to" (which is associative, rather than causative) will mean that any link to the cause of the discrimination will be removed.[3] In its judicial review, the Equal Opportunities Commission argued that defining harassment using "on the ground of" excluded conduct such as making mother-in-law

[1] CAB Evidence showed that of their clients presenting with more than one grounds of discrimination, 90% had two grounds of discrimination, and 10% had more than two.

[2] Some respondents cited the case of *Burton and Rhule v De Vere Hotels* [1997] ICR 1 as involving intersectional harassment. But that case may also be seen as an example of additive discrimination and as the court held that the racists jokes and racial and sexual abuse the claimants suffered constituted a "detriment" for purposes of the RRA 1976, they would have succeeded on a claim for race discrimination (and probably sex discrimination as well) had the hotel been liable for the conduct of the entertainer who harassed them, making a claim for intersectional harassment unnecessary.

[3] The existing definition (using "on the ground of") was found to be causative (rather than associative) by the court in the EOC JR because it required the claimant to establish that the protected characteristic was the reason for the conduct which, in practice, necessitates comparison of the claimant's treatment with that of someone who does not have the protected characteristic. [*Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)]

jokes, disparaging comments about female drivers and putting equipment on high shelves which the average woman couldn't reach, conduct which would be caught were the words "related to" used instead. Thus, moving from a causative definition to an associative definition broadens the concept of harassment, bringing more conduct within scope. Conduct involving a combination of protected characteristics is more likely to satisfy the standard of being "related to" each characteristic even when considered separately.

- Excluding pregnancy and maternity and marriage and civil partnership: We are not aware of any evidence which shows that discrimination involving pregnancy/maternity or marriage/civil partnership is failing to secure the appropriate remedy. In respect of pregnancy/maternity, a claimant need only show that pregnancy was an "effective cause" of the conduct in question. In addition, as claims for pregnancy and maternity do not, and cannot, require a comparator for single strand claims, it would be unnecessarily complicated to include these characteristics in a dual discrimination claim (requiring a comparator)
- Nothing in the Bill requires the award of additional compensation or increased damages for dual discrimination cases. Therefore we would not expect a person who was successful in a dual discrimination claim to receive twice the damages of a single strand claim.
- Clause 14 includes a power to specify further what a claimant must or need not show to establish a contravention or prescribe additional circumstances in which the clause will not apply. This power has been included because combined discrimination is a new and untested concept; it is therefore prudent to provide flexibility to address any undesirable results and accommodate future changes (e.g., should exclusive jurisdictional regimes be created for additional types of claims). Any exercise of this power will be subject to the affirmative procedure.

## Conclusion

- This is a world leading provision which provides protection for some of the most vulnerable people in society, for whom it is currently difficult, complicated, and sometimes even impossible to secure a remedy for the discrimination they experience.
- This provision closes the gap in the law, providing the necessary protection without unduly complicating the law or placing undue burdens on employers, service providers, courts or tribunals.
- It is a forward-thinking provision which will preserve our place as a world leader in the fight against discrimination.


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