

**Submission to the Australian Senate Community Affairs
References Committee's inquiry into issues relating to
menopause and perimenopause**

16 February 2024



Introduction

Anti-Discrimination NSW (**ADNSW**) thanks the Senate Community Affairs References Committee (the **Committee**) for the opportunity to provide a submission in response to the inquiry into issues relating to menopause and perimenopause (the **Inquiry**).

As discussed below, ADNSW is concerned that the current law in Australia does not adequately protect against discrimination based on menopause and perimenopause and suggests that the Committee consider recommendations for reform in this area.

About ADNSW

The *Anti-Discrimination Act 1977 (ADA)* makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities. Sexual harassment, as well as vilification on the grounds of race, transgender status, homosexuality and HIV/AIDS is also unlawful.

ADNSW works to eliminate discrimination in NSW by:

- answering enquiries
- resolving complaints
- raising awareness about discrimination and its impacts
- managing applications for exemptions from the ADA
- advising the government about discrimination issues.

In July 2023, the NSW Attorney General asked the NSW Law Reform Commission to undertake a broad review of the ADA, to consider whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards. The review is currently ongoing.¹

Menopause in society today

Although perimenopause and menopause are beginning to be considered more publicly in Australian society,² menopause has historically been a taboo subject and not a well understood life stage of Australian women.³ Issues associated with menopause remain largely private, and personal issues are not openly discussed.

Recent studies have been done to understand and build an evidence base for the effect of menopausal symptoms on daily life. In 2023, the Jean Hailes for Women's Health organisation and Monash University (the **Jean Hailes study**) questioned 3,500 women over the age of 18 across

¹ [Anti-Discrimination Act review](#), NSW Law Reform Commission, accessed 8 February 2024.

² ['The impact of symptoms attributed to menopause by Australian women'](#), the Australian Menopause Society, Women's Health Research Program (Monash University) and Jean Hailes for Women's Health, 2023, p. 3.

³ ADNSW acknowledges that people who do not identify as women can also experience menopausal symptoms.

diverse racial and economic backgrounds about their experience with menopause and the effect of symptoms on their ability to participate in study, work and exercise.

The survey found that one in four midlife women (women aged between 45 – 65 years old) who experienced symptoms that they attributed to menopause, indicated that symptoms had a substantial impact on their daily lives.⁴ It found that 37% of all survey respondents (across all age brackets) who experienced bothersome menopausal symptoms in the last five years, reported that these symptoms made it ‘hard to do daily activities’, with 31% finding it hard to work or study, 22% missing exercise, and 12% missing days of work or study.⁵ Seventeen percent of midlife women reported having taken an extended break from or stopped work or study due to symptoms.⁶

However, the report’s authors warn against catastrophising menopause symptoms, as this risks stigmatizing women over 40 and could lead to further discrimination against women, particularly in the workplace.⁷

Women experiencing menopause at work

The workplace was historically designed by men and with men’s accessibility in mind, and although accommodations for pregnancy and childcare responsibilities have been introduced, protections based on menopause and menstruation are lacking. Women’s workforce participation has increased considerably in Australia in the last 50 years with women making up almost half the paid workforce in Australia in 2020, compared to around 30% in 1966. Women are also working longer.⁸

Some businesses in Australia are becoming more responsive and flexible to the needs of women experiencing menopausal symptoms in the workplace by developing menopause policies, such as paid menstrual and menopausal leave.⁹

Many women will experience perimenopause and menopause while working, and for many this will affect their workforce participation; however, it is not clear to what extent. One international literature review found that although menopause can play a role in diminished work ability, the evidence is inconclusive.¹⁰ The Jean Hailes study states that only two rigorous Australian studies have been undertaken which evaluated the relationship between perimenopause and work ability.¹¹

⁴ Jean Hailes, op. cit, p. 26.

⁵ Ibid, p. 13.

⁶ Ibid, p. 17.

⁷ [‘Catastrophising’ menopausal symptoms in public discussion can be harmful: Jean Hailes research](#), Brianna Boecker, Women’s Agenda, 12 October 2023.

⁸ [‘Changing female employment over time’](#), Australian Bureau of Statistics, 18 March 2021.

⁹ [‘Menopause policies are being adopted in workplaces. Is Australia ready for ‘the change’?’](#), Donna Harper and Elloise Farrow-Smith, ABC News, 18 October 2023.

¹⁰ ‘Menopause and work: A narrative literature review about menopause, work and health’, Verdonk P, Bendien E, Appelman Y, Work. 2022; 72(2), pp. 483-496 cited in Jean Hailes, op. cit, p. 27.

¹¹ Jean Hailes, op. cit, p. 28. In “one study two-thirds of women reported that menopause did ‘not at all’ affect their work performance, but 6% reported that menopause ‘very much’ and a further 6% reported that menopause ‘somewhat’ affected their work performance. In the second study, the authors demonstrated self-reported moderate to severe vasomotor symptoms were associated with moderate to poor self-reported work ability, but that most women reported good work ability”.

Despite the gaps in research, it is notable that the Jean Hailes study found that participation in the workforce for a significant minority of women was affected by menopausal symptoms.¹² Also of relevance is a report from the Australian Bureau of Statistics which showed that women retire earlier on average at 54, compared to 59 for men.¹³ The cumulative effect of the gender pay gap, women taking career breaks to engage in unpaid caring work and working part-time, and retiring earlier means that women's superannuation balances tend to be lower than men. This puts women at greater risk of poverty in retirement and older age.¹⁴

ADNSW is concerned that not clearly accounting for and responding to the needs of women experiencing menopause in legal protections, particularly in relation to the workplace, risks entrenching long term gendered inequality.

Current legal protections in the ADA

Menopause and perimenopause are not protected characteristics under the ADA, however, as noted above, discrimination and harassment based on age, sex and disability are covered. Discrimination based on menopause is also not explicitly covered under federal anti-discrimination law.

ADNSW's view is that a person may bring a complaint of menopause-related discrimination under the grounds of age, sex or disability in the ADA, however the limitations of this approach are discussed below. Moreover, ADNSW could not locate any cases in NSW that deal with menopause related discrimination, therefore, this has not been tested before the courts in NSW.¹⁵ Based on an analysis of ADNSW's complaint statistics over the last five years, ADNSW has not received any complaints alleging menopause or perimenopause related discrimination.

It is unlikely that discrimination based on menopause is non-existent in Australian society. Given that there is a lack of understanding and awareness around menopause, ADNSW is concerned that incidents of discrimination associated with menopausal symptoms are being underreported and not reflected in formal complaint statistics. Therefore, the extent of menopause related discrimination is not known.

People may not be bringing claims for several reasons such as a lack of knowledge about the law, resource limitations, the absence of explicit legal protections or an unwillingness to challenge their discriminator. Women may also be reluctant to disclose personal details about their health in a discrimination complaint, due to privacy concerns and fears of being stigmatised and devalued.

¹² Statistics cited above including 31% of all women found it either hard to work or study and 17% of midlife women had taken extended leave due to symptoms.

¹³ ['Retirement and Retirement Intentions, Australia'](#), Australian Bureau of Statistics, 29 August 2023.

¹⁴ [Accumulating poverty Womens experience of inequality over lifecycle](#), Australian Human Rights Commission, 2009.

¹⁵ ADNSW has only located one judicial decision in Australia that deals with menopause discrimination in which the complainant alleged disability discrimination under the *Disability Discrimination Act 1992*, *Sareen v Queensland Rail* [2017] FCCA 2439 (6 October 2017), which is discussed below.

Cases in other jurisdictions

Australian jurisdictions

ADNSW located one case across Australian federal, state and territory jurisdictions that deals with discrimination and menopause. In *Sareen v Queensland Rail* [2017] FCCA 2439 (6 October 2017) Ms Sareen alleged that Queensland Rail discriminated against her based on her disability under the *Disability Discrimination Act 1992 (Disability Discrimination Act)*. Her application to the Federal Circuit Court was out of time, however, the decision deals with an application for summary dismissal by the respondent.

In her application to the Australian Human Rights Commission (**AHRC**), Ms Sareen described herself as a 50-year-old female professional who had migrated from India. She worked as a senior internal auditor for Queensland Rail and alleged that she was treated poorly by her manager who put her on a performance management plan, insulted her in front of colleagues and made demeaning comments about her English language proficiency. At the time she states that her ‘body was going through lot of changes and [she] was having significant health issues’.¹⁶

In his decision to dismiss the matter, Judge Jarrett made the following findings:

Without more, I would be surprised if the matters of which Ms Sareen complains could be properly characterised as a disorder, illness, disease, malfunction, malformation or disfigurement. She did not suggest that there was any particular symptom from which she suffered that through its manifestation amounted to a disability for the purposes of the Act. Whilst the definition of disability is wide and it is not inconceivable that “hormonal changes and body changes” might, given the consequences of such changes in a particular case, amount to an illness or disease, I doubt very much that the Legislature envisaged that the changes brought about by menopause could properly be described as a disability for the purposes of the Disability Discrimination Act.¹⁷

The United Kingdom

The UK’s *Equality Act 2010 (Equality Act)* provides protection to individuals from prohibited conduct (including direct discrimination or failure to make reasonable adjustments for disabled persons), because of a protected characteristic (such as sex, disability or age) and in certain prescribed contexts (such as work, education and premises).¹⁸

The Equality Act does not specifically include menopause as a protected characteristic, however employees can bring a claim of menopause related workplace discrimination to the UK Employment Tribunal on the basis of sex, age and disability.¹⁹ There have been several successful cases based on disability discrimination brought before the UK Employment Tribunal.²⁰ Claims of discrimination

¹⁶ *Sareen* [7].

¹⁷ *Sareen* [20].

¹⁸ [‘Menopause and the workplace’](#), UK House of Commons Women and Equalities Committee, 28 July 2022, p. 29.

¹⁹ *Ibid*, p. 30.

²⁰ In [Donnachie v Telnet Technology Services Ltd 1300005/2020](#) the judge found that the claimant was disabled due to her menopause symptoms. In [Ms M Rooney v Leicester City Council EA-000070-DA \(Previously UKEAT 0064 20 DA\) EA-2021-000256-DA \(Previously UKEAT 0104 21 DA\)](#) the UK Employment Appeal Tribunal found that the tribunal had erred in deciding that Ms Rooney’s menopausal symptoms did not meet the definition of disability in section 6 of the *Equality Act 2020 (UK)*. It found that menopausal symptom could meet this definition. It therefore remitted the question of whether Ms Rooney was disabled to the employment tribunal which heard the case on 2 October 2023. A decision is not yet available.

have usually occurred when a person experiencing menopause believes that their employer has failed to make reasonable adjustments for them.²¹

In *Lynskey v Direct Line Insurance Services Ltd: 1802204/2022 and 1802386/2022*, Ms Lynskey began working as a motor sales consultant in 2016 and was considered a good employee. In 2019 she began to experience menopausal symptoms including mood swings, poor concentration, and memory loss which profoundly affected her ability to retain information and her emotional stability. She was diagnosed with a hormone imbalance and depression in March 2020. In May 2022, Ms Lynskey resigned from her job due to the treatment she received and brought claims in the Employment Tribunal under the Equality Act which included disability, age and sex discrimination.

The Tribunal dismissed her complaints based on sex and age direction discrimination, however, it found that her menopausal symptoms amounted to a disability under the Equality Act and that she was treated unfavorably, based on her disability, on three occasions by her employer.²² Her claim was upheld and she was awarded £64,645 in compensation.²³

There have also been successful cases in the UK alleging direct sex and age discrimination as well as harassment on the grounds of age and sex. In *A v Bonmarche Ltd (in administration) 4107766/2019* the claimant had worked in retail for 37 years and had been employed by Bonmarche Ltd since 2006. She reported to the store manager, CB, with whom she initially had a good relationship. In 2017 she began to develop menopausal symptoms and CB started to humiliate her in front of staff and customers, including referring to her as a 'dinosaur'. The claimant tried to discuss the issues around menopause with CB, however he refused either to speak with her or to adjust the shop's temperature to take account of the claimant's requirements. She raised the issue with management who, despite advising that they would deal with the issues, never did. CB learnt of this and treated the claimant worse as a result. The claimant suffered a mental breakdown and resigned from her job.

The Tribunal found that the actions of CB amounted to direct discrimination and harassment on the grounds of her being female and of menopausal age. It found that CB treated the claimant less favourably than he would treat someone who was not a female of menopausal age. CB's comments were related to the claimant's protected characteristic and would not have been made to someone without those characteristics. The Tribunal also found that CB had created a hostile work environment for the claimant related to her status as a woman going through menopause, that amounted to unlawful harassment based on age and sex. She was awarded £27,975 for injury to feelings and loss of earnings.²⁴

²¹ UK House of Commons Women and Equalities Committee, op. cit, p. 30.

²² Although she was rated as 'needing improvement' in her annual appraisal in 2020, the Tribunal found that it did not consider the effect of her disability on her performance. Further, a written warning she received in April 2021, and the commencement of formal performance management proceedings against Ms Lynskey were unfavourable because of something arising as a consequence of her disability. The decision to discontinue her sick leave in September due to 'her level of absence' which was 'unsustainable to the business' was also unfavourable.

²³ [Lynskey v Direct Line Insurance Services Ltd: 1802204/2022 and 1802386/2022](#).

²⁴ [A v Bonmarche Ltd \(in administration\): 4107766/2019](#).

Limitations in current protections

Despite these successes, the recent UK Parliament's House of Commons Women and Equalities Committee's report *Menopause and the Workplace (UK Parliament's report on menopause and the workplace)*, released in July 2022, outlined the limitations within the Equality Act in dealing with menopause related discrimination complaints. Several of these limitations are similar to limitations in the ADA and are explored below.

1. In direct discrimination claims, the need for a comparator who does not have the same protected characteristic makes it hard to argue menopause as direct age or sex discrimination. This requirement calls for a woman experiencing menopause to compare herself to a man with an illness, which is not satisfactory. Similarly, in an age discrimination claim, a complainant must show that they had been treated less favourably than a younger employee which would be challenging for someone who had experienced early menopause.²⁵ The ADA imposes a comparator test for direct discrimination complaints with the result that complainants would likely face similar hurdles.
2. Most menopause related discrimination claims in the UK have been framed as disability discrimination, due to the employer's failure to make reasonable adjustments for women experiencing menopause. However, respondents to the UK's inquiry questioned whether it was appropriate for a natural life stage that every woman experiences to be categorised as a disability. Further, establishing that someone has a disability can be a 'long, complex and resource intensive process' and there may be reticence for women to have their medical records exposed, given the taboo nature of menopause in society.²⁶ In the NSW context, it remains untested whether menopause would constitute a disability within the meaning of section 4 in the ADA. Moreover, the only case ADNSW located that deals with disability discrimination and menopause in Australia found that it was unlikely that the federal legislature's intention was that menopause would be classified as a disability under the Disability Discrimination Act.²⁷
3. The UK inquiry noted that menopause discrimination is often intersectional in nature, and is usually based on both sex and age. However, the Equality Act does not allow for claims of dual or combined discrimination, although it is possible to bring a claim on more than one ground.²⁸ Similarly, under the ADA complaints can be brought on multiple grounds, however each ground of complaint is treated separately, and the complainant must establish that discrimination has occurred on each ground. In the federal context, intersectionality is also not accommodated with four different statutes providing protection on the grounds of race, age, sex and disability, with inconsistencies across each of the Acts. People must prove each ground of discrimination separately under each statute, which increases the burden on individuals to make a successful discrimination claim.

²⁵ UK House of Commons Women and Equalities Committee, op. cit, p. 31.

²⁶ Ibid, p. 32.

²⁷ See *Sareen*.

²⁸ UK House of Commons Women and Equalities Committee, op. cit, p. 32.

The UK Parliament's report on menopause and the workplace found that the Equality Act did not serve or protect menopausal women and made two recommendations:

1. To immediately commence section 14 of the Equality Act which would provide for discrimination claims based on a combination of two relevant characteristics and reflect the intersectional nature of menopause; and
2. To launch a consultation led by government on how to amend the Equality Act to introduce a new protected characteristic of menopause, including a duty to provide reasonable adjustments for menopausal employees.²⁹

Legislative reform in Australia

Protections for people associated with childbearing and rearing exist in the ADA, in relation to pregnancy, childbirth, breastfeeding and caring responsibilities. However, reproductive issues, including menstruation and menopause, which *all* women experience (unlike pregnancy) are not explicitly included in the ADA nor in anti-discrimination law in other state, territory and federal jurisdictions in Australia.

ADNSW's view is that the Committee should consider the applicability of the recommendations made by the UK Parliament in the Australian context, including stronger protections for intersectional discrimination in all Australian jurisdictions (similar to section 8 of the *Discrimination Act 1991 (ACT)*) to allow for discrimination that occurs on multiple and intersecting grounds, such as menopause discrimination.

ADNSW also supports consideration being given to whether menopause should be a standalone protected characteristic in the ADA and in anti-discrimination law across jurisdictions in Australia. ADNSW notes that there may be challenges in drafting a definition of menopause, given the range and breadth of symptoms, which can overlap with other conditions. The impact of new protections on Australian businesses will also have to be considered.

ADNSW thanks the Committee for consulting ADNSW in relation to this Inquiry.



Helen McKenzie
President
Anti-Discrimination NSW

²⁹ Ibid, pp. 36 – 37.



We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

We administer the *Anti-Discrimination Act 1977*.

Enquiries and complaints

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