The purpose of this briefing is to explain the current legal position on multiple, and intersectional, discrimination and to set out the case for a change in the law in the forthcoming single Equality Act so as to facilitate discrimination claims based on more than one ground.

Multiple discrimination occurs when someone experiences discrimination on more than one ground, for instance, by being treated less favourably not only on grounds of age but also because of disability. Although multiple and intersectional discrimination are terms that are frequently used interchangeably, this briefing identifies intersectional discrimination as a special kind of multiple discrimination where a person’s multiple identities intersect in a way that cannot be separated out for separate consideration.

Behind the legal issues which are discussed below is a simple truth: people do not simply fit into boxes as black, disabled etc. They are diverse, complex and multi-layered, and sometimes they are treated badly for more than one reason. The problem is that our equality laws assume that the treatment of people should be analysed by reference to a single characteristic at a time. So it is only possible to take a discrimination case alleging a single ground for discrimination, namely gender or race or disability or religion or belief or sexual orientation or age. It is not possible to make a complaint about bad treatment on an undivided combination of grounds.

Some typical examples of treatment where this can be a real problem are where:

1. a black woman serving in the armed forces is refused promotion,
2. a Muslim woman is refused a job because she is not permitted to wear a headscarf while at work,
3. an African Caribbean boy is excluded from a school,
4. an HIV-positive gay man is dismissed from his job as a porter in a nursing home with a religious foundation who consider his HIV status to be a judgment from God.
In each situation it is obvious that the person may have suffered discrimination on more than one ground, whether they actually have experienced discrimination on more than one ground simultaneously would depend on each individual case. However, under our current laws the totality of their experience cannot be adequately recognised and remedied.

**A closer look at the problem**

Sometimes the current laws on discrimination are able to address problems associated with being a member of more than one disadvantaged group.

- For instance, when someone experiences discrimination on different grounds on separate occasions. For example, a female wheelchair user is passed over for promotion because her employers want a man to take the lead, and, on another occasion, she is unable to go to an important meeting because it is being held in an inaccessible place. Here our current laws are adequate, because a single aspect of a multiple identity is relevant to each occasion.

- In cases of ‘additive discrimination’, the steps in the overall treatment can be analysed separately. An example of such a case might be a series of potentially discriminatory job requirements, where a candidate’s chance of getting the job is reduced if s/he cannot meet one potentially discriminatory requirement and reduced further for each of the others that s/he cannot meet. The case of *Perera v Civil Service Commission (no 2)* was an example of this: a man was turned down for a job because of a variety of factors – his experience in the UK, his command of English, his nationality and his age.

However, there are many situations where the current legal framework is totally inadequate. Thus when the discrimination involves more than one ground and those grounds interact with each other in such a way that they are completely inseparable, it will not be possible to analyse the grounds of treatment separately. This kind of discrimination currently has no remedy under UK law.

This is because of the particular approach to comparisons under UK discrimination law. A person wishing to claim discrimination must compare his/her treatment with someone not of the same sex/race/disability/religion or belief/sexual orientation/age but the courts have ruled that this comparison can only be with a single characteristic; not with an indivisible combination of characteristics. UK law allows the courts to consider whether an hypothetical comparator would have been treated less favourably. However, it is only possible to compare one characteristic at a time. So, for instance, a black woman cannot compare her treatment with that of a white man, she can only compare her treatment with that a white woman would have received and then separately with that a black man might have received. Similarly, an older woman cannot compare her treatment with that of a younger man or a Christian lesbian with an atheist man.
To express this graphically:

![Graph showing horizontal and vertical comparisons](image)

The law will only permit a horizontal or a vertical comparison (as above), not a comparison on the diagonal (as below).

![Graph showing diagonal comparison](image)

**The problem of finding a comparator**

This is a real problem as the following examples point up:

1. In the case of the black woman serving in the armed forces, the comparison with a black man may not show the degree of discrimination that she has experienced nor may a comparison with a white woman. So to show the full extent of the discrimination that such a person is experiencing she must be able to compare her situation to that of a white man. Hence to show the full extent of the discrimination that she experiences it is necessary to consider the combined effect of both her race and her gender.

2. Likewise, for a Muslim woman to compare her situation to that of a Muslim man might not reveal the extent of her discrimination any more than a comparison of her situation to that of a Christian woman. To capture the essence of the discrimination that she has experienced it may very well be necessary to consider both her gender and her religion together.

3. And, in the case of the African Caribbean boy excluded from school, comparing his situation with that of an African Caribbean girl may reveal a limited degree of the discrimination he is experiencing, while comparing his treatment to that of a white boy will also not show the full extent of the discrimination he experiences.

4. Similarly, the prejudice suffered by an HIV-positive gay man who was dismissed because his employers considered that his HIV status was a
judgment from God would require very careful analysis. The employer might just have tolerated his sexual orientation; and perhaps they would accept a haemophiliac who was HIV positive. The true grounds for the treatment might well lie in the combination of sexual orientation and HIV status, or even disability. This combination of grounds cannot really be addressed under the current law.

In short, under the current law, a victim of this kind of intersectional discrimination frequently cannot have the reality of his or her experience recognised and secure redress. This is not just an equality issue it is a fundamental human rights issue.

**Why has the law not properly addressed intersectional discrimination?**

Intersectional discrimination is widespread because people are frequently treated less favourably on more than one ground simultaneously, yet there have been few cases where it has been raised directly. While in the past a few cases were successful in arguing intersectional discrimination and having two grounds recognised as operating together\(^i\), case law has now ruled out this possibility.

In 2004, the Court of Appeal in *Bahl v the Law Society*\(^ii\) ruled on the correct way to deal with intersectional discrimination. This ruling now binds the lower courts. In this case an Asian woman claimed that she had been subjected to discriminatory treatment both on the grounds that she was Asian and on the grounds that she was a woman.

This judgment made it clear that each ground had to be separately considered and a ruling made in respect of each, even if the claimant experiences them as inextricably linked. This led to Ms Bahl failing to prove that discrimination has occurred, as she could not identify which aspect of her claim related to only one characteristic. Other cases since then have been lost for the same reason.\(^iv\)

As a result, in order to avoid this problem lawyers have been forced to take up cases on the strongest ground and ignore the other aspects. They have to plead the case to meet the limitations of the law and because of this cannot address the truth of the situation.

**What does European law say?**

While there is no doubt that European law is not as clear about this as it might be, the European Directives which cover discrimination in gender, race, disability, religion or belief, sexual orientation and age\(^v\) do not prevent Member States legislating to prevent intersectional discrimination.

The directives
- do not expressly provide for the consideration of multiple discrimination,
- nor do they expressly prohibit it, however,
- they do expressly recognise that different grounds may intersect.
Recital 14 of the Race Directive, for instance, says:

‘In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.’

Additionally, each Directive does provide that:

‘Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.’

This shows that it would not be contrary to European law to remove the UK’s unnecessary procedural hurdles and to fulfil the directives’ objective of ‘putting into effect in the Member States the principle of equal treatment’.

So what reforms are needed?

If the reality of discrimination and inequality in the 21st century is to be tackled in the UK, our laws must find a workable solution. The single Equality Act, which the Government has promised, provides a real opportunity for change. In the context of current UK law and the imperative to operate within the EC Equality Directives there are a number of adjustments to our existing provisions that could easily be made.

Solutions:

1. *Multiple comparisons should be expressly permitted*, allowing the Courts to combine consideration of two or more grounds. For example, a clause could be included in any new single Equality Act saying:

   ‘For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.’

2. *The omission of clauses requiring that ‘the circumstances in the one case are the same, or not materially different, in the other’ in the legal definition of discrimination*. This would lessen the need to show a hypothetical comparator and put more emphasis on the ‘reason why’ the discrimination occurred. This wording does not entirely remove the comparative element in assessing whether discrimination has occurred, as, in order to establish ‘less favourable treatment’ or a ‘detriment’, a comparative assessment would have to be made.

3. *Where there are any differential provisions, for example, any specific justifications, exceptions or genuine occupational requirements, that apply to one ground for discrimination these should, in effect, be treated as cumulative* and apply to all the grounds involved in a multiple discrimination case. Here similar wording to that used in Germany could be used:

   ‘Discrimination based on several of the grounds...is only capable of being justified...if the justification applies to all the grounds liable for the difference of treatment.’
4. So if there is an exception, justification or genuine occupational requirement for one part of the multiple claim it will be treated cumulatively and a multiple claim cannot be used as a way of undermining a specific exception, justification or genuine occupational requirement. This would mean that, for example, where there is a genuine occupational requirement for a woman to work as a counsellor in a Woman’s Aid Hostel for women who have experienced domestic violence and a black man applies for the job the fact that he is a man will prevent him getting the job in question and the fact that he is black becomes irrelevant. In awarding damages for cases of multiple discrimination the Court or Tribunal could be given a discretion to increase the amount awarded in relation to injury to feelings to reflect the number of grounds.

Would this overburden our courts or tribunals?

No, people who tried to bring a case based on an unnecessary number of grounds would quickly be ruled out as a potential vexatious litigant at a pre-trial stage. The court or tribunal would have to hear all the facts in any event and the fact that they could reach a decision on grounds of multiple discrimination would be more likely to save time, as they would not have to reach a series of separate conclusions.

What needs to be done now?

The Government needs to be persuaded that any new single Equality Act would be incomplete and inadequate without an explicit provision to outlaw multiple or intersectional discrimination.

The deficit in our laws can be put very simply; it is not consistent with the dignity of a person as a whole to exclude consideration of the treatment that they receive as a whole.

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i [1983] IRLR 166
ii See case examples given in Advising ethnic minority women about discrimination at work, EOC, April 2005.
iii [2004] IRLR 799

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