

# RECOMMENDATION

## REVIEW OF FAMILY FRIENDLY EMPLOYMENT RIGHTS



Issued by the Employment Forum on 15 December 2017

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### Purpose of recommendation

The Minister for Social Security directed the Employment Forum to review the existing family friendly employment rights, with a view to extending them in a second stage of protection, and to make a recommendation by the end of 2017. Having consulted with the public and reviewed the evidence, the Forum presents the following unanimous recommendation.

You can obtain a copy of this recommendation from the Forum Secretary or the website – [www.gov.je/employmentforum](http://www.gov.je/employmentforum)

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### Summary of recommended changes

	CURRENT		SEPT 2018		SEPT 2019
<b>Maternity leave</b>	<u>18 weeks</u> 2 weeks compulsory leave <b>paid</b> at 100% of pay and either 6 weeks <b>unpaid</b> leave with no qualifying period or 16 weeks <b>unpaid</b> leave with a 15 month qualifying period.	→	<u>26 weeks</u> 26 weeks of leave of which 6 weeks <b>paid</b> at 100% of pay by the employer, both with no qualifying period.		<u>52 weeks</u> <b>Parental leave</b> Available for both parents. 52 weeks of leave including 6 weeks <b>paid</b> leave at 100% of pay by the employer.
<b>Parental leave</b>	2 weeks <b>unpaid</b> leave, no qualifying period.	→	2 weeks <b>paid</b> leave at 100% of pay by the employer and 24 weeks <b>unpaid</b> leave, both with no qualifying period. Can be taken in up to 3 blocks of leave.	→	States of Jersey to consider funding an additional 6 weeks of paid leave at 100% of pay.  Can be taken in up to 4 blocks of leave.
<b>Leave – adoption &amp; surrogacy</b>	Same as maternity and parental leave for adoptive parents but no rights for the intended parents in a surrogacy situation.	→	<b>Paid</b> and <b>unpaid</b> leave equivalent to maternity leave and parental leave. The elected adopter or main intended parent takes the <b>paid</b> leave.		Also available to adoptive and intended parents.
<b>Ante-natal - father/partner</b>	No right to time off to attend appointments.	→	Unlimited attendance at appointments - up to 10 hours <b>paid</b> , the rest unpaid.	→	No further change.
<b>Antenatal – intended surrogate parents</b>	No right to time off to attend appointments.	→	Unlimited attendance at appointments for both parents. Intended parent 1 - <b>paid</b> Intended parent 2 - up to 10 hours <b>paid</b> , the rest unpaid.	→	No further change.
<b>Adoption appointments</b>	No right to time off to attend appointments.	→	Unlimited attendance at appointments for both parents. Adoptive parent 1 - <b>paid</b> Adoptive parent 2 - up to 10 hours <b>paid</b> , the rest unpaid.	→	No further change.
<b>Flexible working</b>	Right to request for employees with caring responsibilities, subject to a 15 month qualifying period.	→	Right to request for all employees with no qualifying period.	→	No further change
<b>Breast-feeding rights</b>	None	→	Right to request reasonable breaks and employers must take reasonable steps to provide facilities in the workplace.	→	No further change
<b>Paid absence on health and safety grounds</b>	None	→	Right to paid absence where risk assessment prevents a pregnant or breastfeeding employee from carrying out her normal job and she cannot be allocated to other duties.	→	No further change

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### SECTION 1 – Background

The Employment Forum first consulted on family friendly rights in 2007 and presented its recommendation to the Minister in 2008<sup>1</sup>. On the basis of the Forum's recommendation, draft legislation was prepared which was adopted by the States in 2014. The amendment to the Employment (Jersey) Law 2003 (the 'Employment Law') came into force on 1 September 2015 on the same date as protection against discrimination on grounds of sex, maternity and pregnancy. The Employment Law currently provides the following rights<sup>2</sup>:

- **paid** time off for the pregnant employee to attend antenatal care appointments
- 2 weeks' **paid** compulsory maternity leave
- 6 weeks' **unpaid** maternity leave with no qualifying period or 16 weeks' **unpaid** maternity leave with a 15 month qualifying period
- the right to return to work after statutory maternity leave
- 2 weeks' **unpaid** parental leave
- 8 weeks' adoption leave, or 18 weeks for an employee with 15 months' service
- the right to request flexible working for employees with caring responsibilities
- protection against detriment and dismissal for associated reasons

When the legislation was adopted by the States, a commitment was made to review the rights one year after they came into force. The Minister directed the Forum to consult and make a recommendation on the following topics by the end of December 2017 -

1. Review the impact of the new legislation on employers and working parents.
2. Consider extending the rights to statutory leave to provide –
  - a. A longer period of **unpaid** maternity leave
  - b. A longer period of **unpaid** parental leave
  - c. A longer period of **unpaid** adoption leave
  - d. A longer period of **paid** maternity leave
  - e. A period of maternity leave **paid** at an enhanced rate
  - f. A period of **paid** parental leave
  - g. A period of **paid** adoption leave
3. Consider extending the statutory maternity leave so that there is no length of service requirement.
4. Consider extending the right to take time off work to attend antenatal care appointments to the partner/husband/father of the baby.
5. Consider extending the right to request flexible working so that –
  - a. It applies to all employees (not just those with caring responsibilities).
  - b. It applies irrespective of length of service (currently 15 months' service)

<sup>1</sup>[www.gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20EmploymentForumsReccommendationMaternityPaternityFamilyFriendly%2020091211%20EV.pdf](http://www.gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20EmploymentForumsReccommendationMaternityPaternityFamilyFriendly%2020091211%20EV.pdf)

<sup>2</sup> More information about these rights can be found in the report that accompanied the draft legislation to the States and on the Jersey Advisory and Conciliation Service website

[www.statesassembly.gov.je/AssemblyPropositions/2014/P.109-2014%20withCORRIGENDUM.pdf](http://www.statesassembly.gov.je/AssemblyPropositions/2014/P.109-2014%20withCORRIGENDUM.pdf)  
[www.jacs.org.je](http://www.jacs.org.je)

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6. Bearing in mind the potential complexity of the administration of shared leave, consider providing a right for periods of maternity, parental or adoption leave to be shared -
  - a. By two parents
  - b. By grandparents
7. Consider introducing a right to **paid** time off work where an employee is suspended for pregnancy related reasons.
8. Consider introducing statutory provision for breastfeeding rights and/or facilities in the workplace.

With the agreement of the Minister, the Forum has included three additional issues within the scope of the consultation; to consider extending the rights to statutory adoption and parental leave to give surrogate parents equivalent rights, to give surrogate parents the right to take time off work to attend antenatal care appointments with the birth mother and to give adoptive parents the right take time off work to attend adoption appointments.

The consultation paper provided background information including local statistics, details of social security benefits and a summary of rights in the UK, Isle of Man and Guernsey. The information included in the consultation paper is provided in Appendix 1 on on page 63, with updated information where appropriate.

## SECTION 2 – Consultation method

The Forum consulted during the period 5 January to 17 March 2017. The consultation was circulated to those on the Forum’s consultation database (around 300 in total), which includes a wide cross-section of respondents. The survey was also available to complete online which included questions suitable for all types of respondents, including employers, employees, parents, trade unions, employers’ associations and independent bodies.

Details of the review were circulated to States members and promoted via the States of Jersey website, social media, the Jersey Advisory and Conciliation Service and Citizens Advice Jersey. Responses to the survey were submitted by the respondent types shown in Table 1.

**Table 1 – Consultation respondents**

Employee	191
Employer	27
Trade union/staff association	2
Employers’ association/trade body	3
Other <sup>3</sup>	30
Not specified	78
<b>Total</b>	<b>331</b>

<sup>3</sup> ‘Other’ includes, for example, parent, grandparent, advisory body, private individual, retired, ‘both employer and employee’, employment lawyer, recruitment agency.

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Some of the written responses count as a single response in Table 1 but represent the views of a group or organisation rather than an individual respondent, including the following;

- The Jersey Farmers' Union (JFU) was formed to promote the interests of those engaged in agriculture and horticulture in Jersey and to protect and preserve the industry. It has around 100 members.
- The Jersey Hospitality Association (JHA) is an independent trade association that promotes the interests of Jersey's hospitality industry. The JHA represents around 400 industry partners in the hospitality, tourism, leisure and travel industry.
- Unite the Union represents around 1.4 million members across the UK including 4,000 members in Jersey, across all sectors including manufacturing, public services, transport, food, finance and construction.
- NASUWT The Teacher's Union (NASUWT) is the largest union in Jersey representing teachers and school leaders.
- The Jersey Child Care Trust (JCCT) is an independent charity providing direct services to children and their parents and providing information and services to policy makers, childcare providers and other professionals.
- The Jersey branch of the Employment Lawyers Association (ELA (JB)) comprises local practitioners of Jersey employment law. The response to the consultation was prepared by the ELA (JB) Committee.
- The response of the Jersey Advisory and Conciliation Service (JACS) was prepared by the Director of JACS following discussion with the members of the JACS Board.
- The Jersey Chamber of Commerce represents 550 member businesses across a variety of sectors, including finance, retail and tourism. The consultation response was prepared following a survey of Chamber members.
- The local branch of the Institute of Directors (IOD Jersey) represents more than 650 individuals from all sectors of the business community. IoD Jersey represents their local members' views and concerns to government and promotes the business sector.

The Forum's consultation paper invited stakeholders to attend meetings during the period of the review. Around 25 individuals attended the group discussion meetings including parents, representatives of the Jersey Farmers' Union, Community and Constitutional Affairs, Jersey Child Care Trust, Family Nursing and Home Care, local recruitment agencies, law firms, Jersey Chamber of Commerce, and Jersey Hospitality Association. The discussions at those meetings are not directly quoted in this report but valuable information was provided and the views expressed have been taken into account by the Forum as part of this review.

The following sections provide an overview of the survey responses. Written comments have been included verbatim and, where the respondent has agreed to be quoted anonymously, quotes are attributed to the respondent type where that information is available.

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### SECTION 3 – Consultation outcomes and recommendations

The Forum's recommendations in this report are, in some cases, presented in a phased approach with recommendations for changes to the Law in September 2018 and in September 2019. The Forum has selected these dates based on advice from the Social Security Department as to the earliest that changes are likely to be made to the Employment Law if its recommendations are accepted. The Forum understands that law changes would have to be adopted by the States in March 2018 in order to come into force in September 2018. The Forum is conscious that this gives only 5 months' notice for employers of the confirmed legislation and the recommendations for the first phase reflect that short notice period.

A more significant step forward is therefore recommended for implementation in September 2019. The Forum recommends that if, for any reason, it is not possible to introduce the first phase of changes in September 2018, then it would be appropriate to skip the first phase of changes for maternity and parental leave and move directly to the second phase in September 2019 rather than maintaining a two-phased approach. The Forum would be reluctant to see a delay in the implementation of any of its recommendations.

For ease of reference, all of the Forum's recommendations are also listed in Appendix 2 on page 68.

#### 1. Impact of legislation on employers and working parents

Respondents were asked about their experience of the family friendly employment rights since the law came into force in September 2015 and were also asked what aspects of the system work well and what aspects do not work so well. As expected, some felt strongly that the current rights are insufficient while others told us about their positive experiences. Comments included the following -

*"My daughter had time off for ante-natal appointments, paid time off work and has negotiated some flexible working."* (Other respondent)

*"I had twins Feb 2016 and successfully applied for flexible working hours upon my return to work."* (Employee, financial services)

*"Having given birth in November 2016, I was delighted that my partner had the automatic right to 2 weeks (unpaid) paternity leave."* (Employee, wholesale and retail)

*"I benefitted from the 2 weeks compulsory paid maternity leave. I fell pregnant shortly after joining a new employer and wasn't eligible for maternity pay from employer."* (Employee, financial services)

*"The two weeks paid maternity leave for all mums works well as before the new rules some women had no entitlement and had to give up work as their employers 'didn't do maternity leave.' This has helped make the system fair for all mums. The option to take further unpaid leave is vital in allowing mums time to bond with their babies before returning to work. The security provided by having the right to return to your job is also essential, as is the paid time off for appointments as they are always during the working week."* (Employee, public sector)

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*"My son was born in October 2015. It was nice to be able to spend two weeks with my wife and son but should have been more like 4. 2 is way too little and without sounding spoiled, it's unacceptable that those mere two weeks were unpaid leave." (Employee, financial services)*

*"We had our first baby 5 weeks ago, the employment rights have not helped me in any way. I cannot take 2 weeks unpaid parental leave as how will I pay my bills?" (Employee, electricity, gas and water)*

*"I started a new role for a company in Jersey and fell pregnant with my daughter after 3 months working there. Because I hadn't worked there long enough, I was not entitled to any leave beyond 8 weeks. Having worked in the UK and been pregnant and having had mat leave in the UK, it feels very limiting as well as highly frustrating to then be forced to make a choice between your job and looking after your child after only 8 weeks off. Your baby at that age needs you as their care giver more than at any time. I would suggest this is very family unfriendly." (Employee, financial services)*

*"I was on maternity leave in September 2015. I felt that the time I got with my newborn son was too short. I had to give up breastfeeding when he was 16 weeks old as I had to return to work full time." (Employee, education)*

*"I work in a nursery and am aware of the needs of parents, how they struggle and the states maternity leave. That some parents are having to go back to work really early on after their baby is born, creating all sorts of bonding or lack of bonding issues." (Nursery worker)*

*"As a working father of 5 plus two step children I find it extremely difficult to justify flexi time to attend sports days, assemblies, parent/teacher appointments and in practice for a man to ask for time off for such things even though he already works long hours is not something that comes easy. dare I say it, but there is less pressure on mothers for such things." (Employee, legal)*

*"Staff are often confused about paternity. We get a number of questions from staff asking if this is paid, when they can take it and why women get so much more than men." (Employer, hotels, restaurants and bars)*

*"Shocked and very disappointed that some employers have reduced the amount of maternity leave they previously offered to the statutory minimum provided by Law." (Employee)*

*"I have a grand daughter, my son has decided that remaining in the UK is preferable than returning to the island due to the provision of maternity rights and leave available here." (Employee, agriculture)*

*"We have adopted the family friendly employment rights within our policies, but all family friendly employment rights are aligned to our UK policies, which means we offer our Partners in Jersey and Guernsey the same as all our UK Partners." (Employer, wholesale and retail)*

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*“Our company has applied a Group Policy that is aligned to UK employment law which in this case was and is more beneficial to colleagues than what is available locally.”*  
(Employer, financial services)

*“As with all business related government consultations, the Jersey Chamber of Commerce is always eager to provide feedback and an official response on behalf of the business community. On this occasion, however, we feel that there has not been sufficient time since the introduction of the existing Family Friendly legislation (which came into force on the 1st September 2015) to provide comprehensive analysis, regarding the impact of the current rights, with a view to providing feedback on whether changes should be made. Chamber and its members are fully supportive of legislation that provides protective measures to support family life and a recent survey with our members, regarding family friendly legislation, illustrated that 93% of those taking part in the survey (which was 14% of Chambers 540 member organisations) said they did not find any difficulty in applying the current statutory maternity rights.”* (Jersey Chamber of Commerce)

*“It has been a great step to introduce the family friendly rights but there is still a long way to go.”* (Employer, wholesale and retail)

*“Such limited time off with the new baby. Baby going to nursery/care and Mum going back to work in less than 3 months isn't fair. It isn't good for the baby and a lot of Mums are not physically recovered from the birth. Very little time for the Dads. Always unpaid. Access to flexible or reduced hours often unavailable. Child care costs so high it often forces Mum to stay out of work, widening the gender pay gap.”* (Employee, public sector)

*“2 weeks paid leave is nowhere near long enough. There should be 2 weeks paid paternity leave. Shared parental leave should be an option. Existing laws do little to stop anything but the most forward-thinking businesses from seeing women of child-bearing age/expectant and new mums as an inconvenience.”* (Other respondent)

*“The length of leave is insufficient. At 4 months old a baby still needs to be with its mother or father to continue forming a secure attachment to them. Putting them into a nursery environment for long hours every day is damaging. It is also unfair that the leave is only available to mothers.”* (Employee, public sector)

*“Current system favours the employer and fails to look at the long-term social consequences of infants not being cared for by their parents. Fails to take into account the 1001 critical agenda.”* (Employee, public sector)

The Forum is grateful that so many respondents have taken the opportunity to give detailed reasons for their responses and examples from their own experiences, both in writing and at the stakeholder meetings, which have helped to inform the focus of this recommendation.

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## 2. Maternity leave

### 2.1 Period of maternity leave

**Recommendation 1** – The Forum recommends that the period of statutory maternity leave should be increased in two stages:

- o to 26 weeks from 1 September 2018
- o to 52 weeks from 1 September 2019

A longer lead-in time to reach 52 weeks was considered (e.g. September 2020). However the Forum is of the view that almost 3 years from the date of the recommendation is too long a delay for a right to 52 weeks' maternity leave. A shorter lead-in time to reach 52 weeks' leave was also considered (e.g. September 2018) with no interim step of 26 weeks' leave. However, it is likely to be too soon to introduce a 52 week leave period with only five months' notice, combined with the other changes to the Law that are proposed in this recommendation, as well as the fact that employees continue to be employed during the period of leave (accruing rights, such as holiday entitlement).

The Forum also recommends that an issue relating to business licenses and replacement employees providing maternity cover should be referred to the Minister with responsibility for the Control of Housing and Work (Exemptions) (Jersey) Order 2013.

**Respondents were asked if the period of statutory maternity leave should be extended from the current maximum of 18 weeks and, if yes, whether it should be extended to 26 weeks, 39 weeks, 52 weeks or a different number of weeks.**

An extension to the maternity leave period was supported by the majority of respondents across all categories of respondent (84%), including 92 percent of employees and 62 percent of employers. The most popular choice of maternity leave period for all categories of respondent (including for 58% of employees and 44% of employers) was 52 weeks.

Comments from respondents included the following -

*“The agencies are relaxed about the length of statutory maternity leave being increased, so long as any increase is unpaid.”* (Response compiled on behalf of nine local recruitment agencies)

*“This could be supported on a phased incremental basis subject to the permanent nature of the individual’s employment status. Increasing this for those with more continuous service to a maximum of 26 weeks leave would seem reasonable and in line with statutory provisions in other jurisdictions.”* (Institute of Directors, Jersey Branch)

*“Ideally, we would like to see the period of paid CML extended, however, what we are more passionate about is the length of Statutory Maternity Leave being extended from the current maximum of 18 weeks (for employees with 15 months or more service) to 26 weeks.”* (Jersey Child Care Trust)

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*“Given that the UK has operated a system of 52 weeks’ leave for some time, there is no reasonable justification for Jersey not to at least align with this level. Furthermore, the competitive nature of the job market between the UK and Jersey means that the States should look to further enhance maternity leave entitlements.” (NASUWT)*

*“The current Jersey provisions do not compare favourably with the other jurisdictions referenced in the paper i.e. Guernsey, IOM and the UK. Whilst it is understood that this is not a compare and level up exercise, clearly the importance to working people and employers of decent family friendly rights is recognised across all four jurisdictions, the question is what those rights should look like...When compared with the IOM and UK, where up to 52 weeks maternity leave is provided for, there is a clear recognition of the life changing nature of children, the importance of parents being able to be on leave from work in the formative months of their child’s live and this is reflected in the length of maternity leave available.” (Unite the Union)*

*“Many employers are currently offering 26 weeks; whilst we do not want to slavishly follow the UK this would bring us closer to their current 52 weeks which would be too much in one move. However maybe an indication that a futher review is likely to increase this further would be an idea to give employers preparation opportunity.” (JACS)*

*“There is a big issue with extending periods of leave for small businesses. An employer with two employees, one of whom is off on maternity leave, loses 50% of the staff. An employer with 400 employees, one of whom is off on maternity leave, loses 0.25% of the staff...this could be resolved in any law change by linking the amount of maternity leave to the number of employees.” (Anonymous)*

*“I appreciate there is a larger impact on smaller organisations.but 18 weeks is simply not enough.” (Employee, financial services)*

*“The first few years of a baby's life are so vital for their development (as they change so fast compared to other times in life-the first 1001 days research shows this) that mums should have the option to maximise their bond with their infant at this time to ensure a solid relationship for life and long term wellbeing.” (Employee, public sector)*

*“We should be exceeding expectations and supporting an individual's choice to care for their child. If we give 52 weeks leave it will make recruiting a temporary cover much easier as well ensuring people who need jobs have some security and are attracted to FTC roles.” (Other respondent)*

*“The current system risks talented females in particular being lost to the Island's workforce.” (Other respondent)*

*“The first 6 months of a new child is crucial for both parents and the rest of the family but work and financial pressures often make this impossible and therefore the real life experiences is not what it should be for most local families.” (Employee, law)*

*“In Europe many countries have moved to 2 years, its a crucial time in the development of a child and its a shame that this responsibility has to be handed off to (very overpriced) nurseries.” (Employee, financial services)*

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*"The current pressures on busines to find quality tempoary staff is very restricted and any further increasesd in maternity will place an undue burden on employers, which could result in small busineeses having to close."* (Employer)

*"The first year is so important. Parents should be able to choose when to return to work within that year, but should be given the option to have that time off. It could be shared between parents, ie 6 months for one parent, 6 for another. Same sex couples and couples adopting should have the same rights also."* (Employee, legal)

*"The rate of breastfeeding is so low, and isn't made easier for those who have to return to work. Breastfeeding generally means healthier babies which makes savings for the states in other ways, and also means parents are less likely to have to take time off work due to illness of child. The first year of a baby's life, they change and grow so quickly. Women need to be able to have time to heal before worrying about going back to work."* (Employee, financial services)

*"Ideally, caregivers should be able to have a year off work without threat to their job if they so choose- but 9 months is a good compromise. 26 weeks is still too short as it coincides with weaning when many new mums are struggling with a change in routine."* (Other respondent)

*"This brings the baby to an age where typically risks are reduced, feeding is established and sleep patterns are generally more routine. Allowing mother to return to work with confidence, enabling a better more efficient work environment, and an increased bond with child. Not to mention the financial benefiits."* (Employee, health care)

*"The main care giver should be able take maternity leave of 1 year as is common in the UK and EU. Although we are not part of the UK/EU, I can't see that there is any reason for our maternity provisions to fall so far short of what now appears to be the minimum standards."* (Employee, financial services)

*"Our latest period of maternity leave agreed was for 6 months and we try to be conscious of what the individual requires as the early months after birth is so precious. Having said that the great majority of that time is unpaid, albeit we still have to pay for cover as we are a small business charity."* (Employer, charity)

*"26 weeks would be a big improvement, but I think that women should be able to choose to take up to 52 weeks leave if they want to, and still be able to return to their job. However, women must give their employers plenty of notice about how much leave they would like to take and the States must make sure that they do not make it hard for employers to temporarily replace women who are on maternity leave if they want to."* (Employee, public sector)

According to the Jersey Lifestyle and Opinions Survey for 2016, the economic activity rate amongst working age women is high in Jersey (85%). Of the parents who had taken a period of maternity leave in the last 5 years, women had taken an average of 29 weeks' leave, 69 percent of women would have liked to have taken more leave and 71 percent of women said financial reasons prevented them from taking a longer period of leave.

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The Forum considers that the period of statutory maternity leave could be increased from 18 weeks to 26 weeks and then to 52 weeks fairly quickly with limited financial impact on most employers. (The matter of **paid** maternity leave is considered in the next section). An increase to a 26 week leave period is unlikely to cause difficulties for the majority of employers.

An interim increase to 39 weeks was considered but the Forum considers that progress should be made to 52 weeks' leave as quickly as possible and that too many interim stages might be more complex for employers to manage. Discussion at stakeholder meetings indicated that moving to 52 weeks' leave from 18 weeks' leave would be a significant change for some employers but if this is planned in stages, with the future rights set out in the law in advance, employers will have time to prepare.

The Forum noted that, even if a 52 week period of statutory maternity leave is available, many employees will not take the full 52 weeks, particularly if part of it is **unpaid**. However, it is considered important to give working families the choice of taking longer periods of leave with the financial security of returning to work afterwards, even if some cannot afford to take a period of **unpaid** leave. This view came across strongly from parents who attended the Forum's first stakeholder meeting, including the view that this should be a statutory right, rather than a matter for negotiation with the employer, with some employers being more likely to grant it than others.

Some respondents have indicated that recruiting a replacement employee to cover for a longer period may in fact be easier than covering for a shorter period of leave. Other than potentially any cost in recruiting and training a replacement, there is no direct cost to the employer for a period of **unpaid** leave. Discussions at stakeholder meetings indicated that finding suitably skilled replacement employees is not easy in some industries. Where replacements are not appointed to cover periods of maternity leave and existing team members absorb the workload, this may become more difficult if the maternity leave period is longer.

The Forum also noted that the Control of Housing and Work (Exemptions) (Jersey) Order 2013<sup>4</sup> provides an exception so that, for the purpose of business licences, individuals are disregarded in relation to the maximum numbers condition where employees are providing maternity cover for up to 9 months. It may be appropriate for that Order to be amended given the Forum's recommendation to extend the statutory maternity leave period, as well as the recommendations for extended periods of adoption and parental leave.

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<sup>4</sup> [www.jerseylaw.je/laws/revised/Pages/18.150.10.aspx](http://www.jerseylaw.je/laws/revised/Pages/18.150.10.aspx)

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### 2.2 Paid maternity leave

**Recommendation 2** – The Forum recommends that, from 1 September 2018, 6 weeks of statutory maternity leave should be paid by the employer at 100 percent of pay.

The Forum would prefer to recommend a longer period of **paid** leave but recognises the financial burden on employers. Having taken into account the level of support in the consultation for a longer period of **paid** leave, the fact that the States of Jersey provides 12 weeks of **paid** maternity leave for its own employees and the recent Social Security consultation on improvements to maternity benefits, the Forum recommends that 12 weeks of **paid** leave should be available in total in September 2019, with 6 weeks continuing to be funded by the employer plus 6 weeks funded by the States at 100 percent of pay.

Having noted JACS concern that a longer period of **paid** maternity leave could lead to employees being dismissed if the potential unfair dismissal award would amount to less than any maternity pay (particularly where the employee's length of service means that the unfair dismissal award would be a maximum of 4 weeks' pay), the Forum recommends that the Employment Law should provide an additional penalty or compensation where the employer has dismissed an employee in order to avoid paying a period of maternity leave, over and above any unfair dismissal award and any award under the Discrimination (Jersey) Law 2013.

**Respondents were asked how many weeks of their preferred period of maternity leave should be paid, either fully or partially, by the employer.**

The Forum noted in the consultation paper that, currently in Jersey, an employee must not be permitted to work for 2 weeks after giving birth and the employer must pay the employee at their normal rate of pay for these 2 weeks of leave. There is no statutory requirement to provide pay for any further weeks of maternity leave but some employers provide a contractual or discretionary period of **paid** leave.

Respondents tended to choose either half or all of their preferred period of maternity leave. For example, the most popular periods of **paid** leave for those who preferred a 26 week maternity leave period were 12-13 weeks and 26 weeks. For those who preferred a 52 week maternity leave period, the most popular periods of **paid** leave were 26 weeks and 52 weeks.

Comments from respondents included the following –

*“The Union believes that a key determinant of the take-up of maternity leave is whether it is paid at reasonable-earnings replacement levels, and that better levels of pay, coupled with at least 52 weeks’ maternity leave, are needed to ensure that low-income families have an equal opportunity to take time out to care for their children.”*  
(NASUWT)

*“If the argument is accepted that there are societal and economic benefits in extending maternity leave, economic reality will mean that unless the extended maternity leave is complimented by an improved maternity pay regime, only the more affluent will be able to afford to take the extended leave. In terms of whether maternity leave should be paid at an enhanced rate, assuming in comparison the first six weeks at 90% payable in the UK, as previously stated a number of employers already extend the UK provisions to their employees, so the impact of such a move will be lessened. Improved financial support at what is an expensive time for parents will improve*

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*employee engagement and coupled with extended maternity leave will mean that the employee is more likely to return to work from leave, meaning a retention of skills for the employer and the continuation of a more diverse workforce.” (Unite the Union)*

*“In general terms, the agencies would be content with an increased period of maternity leave for temps but would wish to see anything beyond the current two weeks’ statutory maximum as unpaid leave. The agencies strongly feel that they will be unable to convince client employers to take on additional payments for longer periods of maternity leave. This is due to the very nature of a temps’ role within a business i.e. to perform a specified role for a defined period (often plugging a gap in the business due to sickness/leave of permanent staff). Profit margins on temp desks within agencies could make the continuation of such business unworkable if agencies were required to pay longer periods of statutory maternity leave.” (Response compiled on behalf of nine local recruitment agencies)*

*“Increasing the amount of paid leave, to say 4 weeks, could equally be considered on a phased basis for those with more service (more commitment to their employment). Equally it would be reasonable for employers to request a pre-payment of any paid leave (over and above the current two weeks) is repayable if the employee does not return to work for whatever reason.” (Institute of Directors, Jersey Branch)*

*“One option which we discussed, would be for the employer to pay a percentage of the employee’s salary for a period following the 2 weeks CML at 90% of the employee’s salary and being able to claim this back from the States Revenue.” (Jersey Child Care Trust)*

*“The government should pay for the leave and remove the burden from employers. Perhaps an employer could pay some with the government topping up from taxation to earnings. 3 months gets past the initial stages of having a v young one.” (Employee, public sector)*

*“I think it is important that moms to be are given the opportunity to spend time with their new baby, I do not necessarily think that this should mean paid maternity leave - just to give mums the opportunity to spend time with their newborn and return to their original role on return to work.” (Employee, finance)*

*“I think that would help a lot of families and also shows support from the business who are investing in that member of staff and the future.” (Employee, hotels restaurant and bars)*

*“I understand that businesses still have to employ staff to cover maternity leave so it's an added expense and not fair to expect them to pay for a full years leave.” (Employee, finance)*

*“It is an individuals choice to have children why should companies be encumbered with these entitlements.” (Employer, manufacturing)*

*“It is the employees choice to have a child, if you put too much of a burden on the employer they will choose not to employ or will take on subcontractors to avoid the expense and loss of labour.” (Employer, construction)*

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*"It is unfair to force an employer to pay any more than required. At the end of the day it is the employees decision to take a child and they should therefore be prepared to deal with the financial burden of that."* (Employer, hotels restaurants and bars)

*"I don't think two weeks paid from the start of employment is fair/right. There should be a lead in period making someone eligible. Firm will still have the right to exercises their digression and pay should they wish to."* (Employer, financial services)

*"We are a small company, registered as a charity, manned by volunteers and four part time remunerated staff. Any absence usually creates cover problems for us."* (Employer, charity)

*"A colleague of mine was only paid 2 weeks maternity. We work for a finance company, that could easily afford to pay more but took advantage of the legal minimum so just stuck to it. As a result she was forced to return to work after 4 months off because she needed the money."* (Employee, finance)

*"Many mothers feel under pressure to return to work financially and because the law does not validate their choose to have children. Because of these some excellent employees leave the workforce or settle in jobs that are not suited to them In any other way than the hours. This is bad for the workforce and for family life."* (Employee, public sector)

*"I think that the extra cost (a minimum income to sustain mother) should be shared by society through higher general taxation and/or higher contributions into the Social Security scheme. It should not be statutory for businesses to pay more than 2 weeks."* (Employee, public sector)

*"Most people cannot afford to take time off work unpaid. If the employer had to pay even partially during this period then more people could afford to take additional time off."* (Employee, finance)

*"Although an increase on 2 weeks should be encouraged, a concern would be if it were increased too much then some employers may struggle to pay more, bearing in mind that in the UK employers are able to reclaim any monies paid out during maternity leave from Government, however if this were to happen in Jersey this would have an impact on Social Security contribution levels for both employees and employers. Furthermore, an additional concern is that it could lead to employees being dismissed if fundamentally the unfair dismissal award would amount to less than any maternity pay."* (JACS)

The Forum notes that the Social Security Department has recently consulted on changes to maternity benefits with a remit to make changes to bring parental benefits more in line with the needs of modern families. The Forum has no remit to make recommendations on changes to Social Security legislation and so this recommendation is made on the basis of the current benefits system which provides up to 18 weeks of maternity allowance at a standard weekly rate (currently £209.51 per week).

Any recommendation to extend the period of **paid** statutory maternity leave from the current 2 weeks must be on the basis that any pay would be provided by the employer<sup>5</sup>. The Forum

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<sup>5</sup> An employer may offset the value of the maternity allowance against the 2 weeks' paid maternity leave.

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notes that 53 percent of respondents overall said that 26 weeks or more of the maternity leave should be paid. It is not clear whether respondents were aware that employers would be required to fully fund a longer period of paid leave. As noted by JACS, an employer in the UK can recoup the cost of statutory maternity pay through national insurance contributions.

Of the employer respondents, 39 percent said that either 0 or 2 weeks of maternity leave should be paid (i.e. the same as, or less than, currently). The Forum is conscious that the recommendation must be sensitive to the financial impact on businesses, particularly on the large proportion of small businesses in Jersey, but the Forum recognises that substantial progress is needed. A limited number of employees and employers will be affected each year. An estimate based on maternity benefits data suggests that around 850-950 working women give birth each year<sup>6</sup>.

Having taken into account the level of support in the consultation for a longer period of paid leave, as well as the financial cost to employers, the Forum reached a tentative conclusion that 6 weeks of the period of statutory maternity leave should be **paid**. The Forum would have preferred to recommend a longer period of **paid** leave, such as 12 weeks. However, the recommendation tries to achieve a balance between the different views expressed during consultation. Having taking into account the fact that the States of Jersey provides 12 weeks of paid maternity leave for its own employees and the recent Social Security consultation on improvements to maternity benefits, the Forum is of the view that the States of Jersey should be asked to consider providing funding for 6 weeks of paid leave at 100 percent of pay, in addition to 6 weeks funded by the employer, so that 12 weeks of paid leave would be available in total in September 2019.

The Forum went on to consider whether the 6 week period of paid leave should be fully or partially paid by the employer. The Employment Law already requires an employer to pay 2 weeks of compulsory maternity leave at 100 percent of pay. The Forum considers that the additional 4 weeks should be paid by the employer at 100 percent of pay. If paid at a lower percentage of pay, this would effectively reduce the paid period of leave (e.g. at 90% of pay, the period of paid leave is reduced to 5 and a half weeks). The Forum does not wish to reduce the level of pay in the current 2 week compulsory leave period and feels that it would be unnecessarily complex to provide 2 weeks at full pay and 4 weeks at a percentage of pay.

#### **2.3 Qualifying period for maternity leave**

**Recommendation 3** – The Forum recommends that the proposed periods of **paid** and **unpaid** statutory maternity leave should be available to an employee from day one of employment.

**Respondents were asked if employees should be required to have a minimum period of continuous employment before becoming entitled to any part maternity leave and, if yes, what minimum period of continuous employment should be required.**

The Forum explained in the consultation paper that, currently in Jersey, 8 weeks of statutory maternity leave are available from day one of employment and an additional 10 weeks of maternity leave are available to a woman who has 15 months' continuous employment with her employer.

<sup>6</sup> See 'Table 2 - Maternity indicators' on page 64.

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The Forum noted that the majority of respondents across all categories (69%) said that a qualifying period should apply before an employee is entitled to all or part of the maternity leave period (68% percent of employees and 77% of employers).

Comments from respondents included the following –

*“We feel there should be a minimum period of continuous service before being entitled to the full amount of statutory maternity leave.”* (Jersey Child Care Trust)

*“The Agricultural Industry employs largely seasonal labour and if the period of statutory maternity leave was extended **with no length of service requirement** and the period of paid maternity leave extended, pregnant women could arrive to start work without informing their employer of their condition. This could be highly dangerous due to the strenuous work involved in the Industry.”* (Jersey Farmer's Union)

*“I think the time restrictions and length of service need reviewing. Paid maternity pay should be given to workers who have two years service with at least 1 month full pay and then further weeks at reduced pay.”* (Employer, public sector)

*“You cannot expect employers to employ women of childbearing age if they have to pay maternity for employees who haven't worked for any length of time.”* (Employee, financial services)

*“I think it's only fair that you don't start a job already pregnant then expect the company to pick up the bill for your maternity leave. However, I believe that a mother Must be able to spent adequate time off with their young infant.”* (Employee, financial services)

*“It's fair that employees show commitment to a workplace or work team before going off on prolonged leave.”* (Other respondent)

*“There needs to be a balance between parents rights, and not creating an unfair burden on employers.”* (Employee, legal)

*“Women should not have to plan their family around maternity leave entitlement. Those that have been unable to do so, should not be limited to remaining in a job where they may be unhappy/unproductive and not developing accordingly.”* (Employee, pharmaceutical)

*“Maternity pay and leave should be a day-one right. The NASUWT can see no cogent argument as to why many of the family-related employment rights and entitlements available are not day-one rights. This would further assist more parents, as well as enhance the appeal of living and working in Jersey.”* (NASUWT)

*“The changing nature of employment with tenure within roles lessening with a more fluid employment market make this provision a necessity. A service requirement, which does exist in a number of employers for enhanced maternity leave/pay/benefits, on the statutory provisions will have a controlling influence upon prospective parents who are currently forced to delay plans for a family due to the statutory provisions not being available to them. The service requirements on the statutory provisions should be removed.”* (Unite the Union)

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The Forum reviewed the purpose a qualifying period for **unpaid** maternity leave and reached the conclusion that **unpaid** maternity leave is essentially a social right to protect the family rather than a reward for long service or loyalty. A qualifying period potentially discourages employees from changing jobs to avoid losing employment rights. The removal of the qualifying period for **unpaid** maternity leave would give employees more choice and flexibility.

The Forum is conscious that if the qualifying period for **unpaid** leave were to be removed, this could significantly expand the pool of employees who are eligible to take a period of statutory maternity leave.

Having reached a decision that the qualifying period should be removed for **unpaid** maternity leave, the Forum considered whether there are any additional factors or reasons to suggest that a qualifying period might be appropriate for entitlement to a period of **paid** leave, such as, to demonstrate commitment to the employer.

The Forum considered whether a six month qualifying period might be considered a fair amount of time before an employee can expect financial outlay from the employer. However, 6 months' service is not necessarily long enough to demonstrate 'loyalty' to the employer. It would effectively serve as a probationary period giving both parties the opportunity to assess suitability for a role. If a day one right is provided, arguably neither party has the opportunity to assess suitability and it might be unfair to expect the employer to pay for a period of leave for an 'unknown quantity'. With 6 months' service, the employee would have 6 months' experience in the job to fall back on when they return.

If there was no qualifying period, the Forum considered whether an employer might be more likely to discriminate on grounds of sex or pregnancy. The Forum considers that, where an employer is inclined to discriminate in recruitment for reasons relating to pregnancy, a six month qualifying period for **paid** leave is unlikely to reduce that inclination. The Forum recognises that, from a commercial point of view, a day one right to **paid** leave would be a big commitment for some employers. In a stakeholder meeting, the Forum noted the concerns of the Jersey Farmers' Union about the possibility of a day one right, but considers that a qualifying period of more than 6 months would potentially exclude most seasonal employees which may be a particularly vulnerable group.

If the Forum's intention, as with **unpaid** maternity leave, is to provide a social right to protect and provide more choices for families, any qualifying period would automatically exclude some employees from this right. Paid maternity leave is not a reward, a bonus, an insurance scheme, a benefit or compensation for long service. The Forum considers that women should not have to protect their employment entitlements when planning to have children to the potential detriment of their careers.

The Forum considers that it would be inappropriate to introduce a qualifying period for the existing day-one right to 2 weeks' **paid** maternity leave. Any qualifying period would therefore apply only to 4 of the 6 weeks' leave. This would introduce unnecessary complexity for employers and employees.

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### 2.4 Taking maternity leave

**Recommendation 4** – The Forum recommends that in September 2018, the 26 weeks of maternity leave should be available to take in one block. As is currently provided in the Employment Law, the period of leave should start no earlier than the 11th week before the expected week of childbirth.

In 2019, the 52 weeks of maternity leave should be available to take in up to 4 blocks, of not less than 2 weeks each, within a period starting no earlier than the 11th week before the expected week of childbirth and ending when the child reaches age 3.

The requirement to give the employer notice of leave dates and of changes to leave dates should remain in accordance with the current law (i.e. the employee must notify the employer of leave dates no later than the end of the 15th week before the expected week of childbirth, and for any changes to the start date(s) notice must be given 28 days before the date on which leave was originally intended to start or 28 days before the new date, whichever is earlier).

The Forum considered the period of time and manner in which maternity leave can be taken. The Forum noted that statutory maternity leave must currently be taken in one block starting no earlier than 11 weeks before the expected week of childbirth.

The Forum considered that, with a recommendation to extend the maternity leave period, it would be helpful if there was more flexibility available in the taking of that leave. Seventy-eight percent of employee respondents said that there is too little flexibility in the current system. Parents could be permitted to take longer periods of leave at the same time, overlapping or back-to-back. The Forum's intention is to make relatively straightforward changes in September 2018, and then to make more significant changes in 2019 allowing greater choice for employees.

The Forum noted that, given the current rules for statutory leave and for social security benefits, mothers will usually be accustomed to taking a period of maternity leave in one block. The proposal for 2018 provides 8 additional weeks of statutory maternity leave, on top of the existing 18 weeks of leave, and so this relatively minor change means that it should be straightforward for women to simply take a longer period of maternity leave within the existing parameters of the law.

With the proposed move to 52 weeks of maternity leave in 2019, the Forum considers that flexibility for mothers will be essential and so a longer period of time should be provided in which the 52 weeks of leave may be taken. The Forum notes that 20 hours of free State-funded nursery education each week are provided in the school year that a child turns four years old.

### 2.5 Right to return to work after maternity leave

**Recommendation 5** – The Forum recommends that an employee should continue to have the right to return to the same job (where that job still exists) after a period of statutory maternity leave, no matter how many weeks of leave are available (26 or 52 weeks).

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**Respondents were asked, if the period of maternity leave was extended, should employees continue to have the right to return to the same job, or should employees instead have the right to return to a job that is comparable and no less favourable in its terms and conditions, such as equivalent status and remuneration.**

The consultation paper explained that, currently in Jersey, employees have the right to return to the same job after up to 18 weeks' maternity leave.

A right to return to the same job was supported by a small majority of employer respondents (58%) and employee respondents (53%) and was supported by 51 percent of respondents overall. The right to return to the same job was supported by 54 percent of those who preferred a 26 week maternity leave period and 56 percent of those who preferred a 52 week maternity leave period).

Comments from respondents included the following -

*"The Union is concerned about the lack of clear commitment to the right to return to the same job after 18 weeks' leave, and concerned that the introduction of the inferior right of return to suitable alternative employment would apply instead. This is not only potentially discriminatory and unfair, but it also does not make good business sense to risk losing skilled and experienced workers."* (NASUWT)

*"The guarantee of the same role back gives peace of mind to the employee, and 'a comparable role' is potentially too subjective a phrase."* (JACS)

*"Need for a secure workforce applies to both the employee and the employer."* (Employer, charity)

*"Although same job sounds fair, insisting on that effectively stops organisational change if an employee happens to be on maternity leave."* (Employer, public sector)

*"Depending on the nature of the business it could be very difficult to give the same job as paternal cover could be hard to get and there may not be an option to leave the role empty whilst on leave. Also businesses are changing all of the time so I think having the flexibility is a good thing as long as the person isn't returning to a less favorable role due to parental leave."* (Employee, hotels restaurants and bars)

*"Why would you want to lose that knowledge and information for the sake of 1 year out of service. You can provide paid KIT days. If the role for any reason changes whilst the woman is on mat leave then she should have the equivalent to return to."* (Employee, financial services)

*"It should be easy enough to cover a job on a 1 year fixed contract and allow the employee taking maternity leave to be free of the stress of wondering where they might be working after their period of leave, especially during such a life changing time. 'Keep in touch' days during their leave could help them stay up to date with what's going on before their return to work."* (Employee, public sector)

*"Businesses can change a lot in 12 months. As a mum who has recently returned to work, I didn't expect my same role to be there as I understood that someone needed to cover my work whilst off. I don't think you should be penalised for taking maternity leave therefore a comparable role should be available."* (Employee, financial services)

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*“Uncertain times and businesses need to have flexibility to meet client and external demands and should not be restricted by legislation that interfere with that and potentially put other roles at risk. No guarantee that same job will still exist. Likewise no guarantee that employee will wish to return to same job.”* (Employee, financial services)

*“With companies changing so frequently to meet regulatory, customer and financial demands then there is no guarantee that the same role will be available. comparable is a fairer approach for both colleague and employer.”* (Employer, financial services)

*“If a woman is unable to return to the same job, maternity leave effectively results in the woman being discriminated against. Many people work hard to get the job that they want/line so to lose it because you have gone on maternity leave is unfair. I understand that employers will need to replace the woman during her absence, but this should be done on a temporary basis.”* (Employee, financial services)

The Forum considered whether employees should continue to have the right to return to the same job if the statutory maternity leave period is extended, either to 26 weeks or to 52 weeks. The Forum sees no reason to justify eroding the existing employment rights just because the period of maternity leave is longer. An employee’s right to return to work would not prevent the employer from making genuine redundancies or restructuring the business where required.

The Forum notes that, although a replacement employee would potentially be employed for one year, they would not qualify for protection against unfair dismissal because the Employment Law ensures that a dismissal is fair if the employee was appointed as a replacement for an employee on maternity leave and they are dismissed to allow that employee to return to work.

If the right to return to the same job was replaced with a right to return to a comparable job, the question of what might constitute a job that is ‘comparable and no less favourable’ would bring unnecessary complexity to the legislation and guidance and it introduces further potential for complaints. A right to return to the same job is more straightforward and it would provide more stability and certainty for both parties.

### 3. Shared leave

#### 3.1 Period of shared leave

**Recommendation 6** – The Forum recommends that a shared leave system should not be introduced. The Forum is conscious that the law cannot cover every eventuality and family arrangement and so there may be scenarios where shared leave might have been the preferred option for some parents. However, the Forum considers that providing parity via a defined period of leave for each parent is likely to provide a more positive outcome for the majority of new parents in terms of flexibility and promoting gender balance (see the parental leave recommendation on page 27).

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**Respondents were asked, if a total period of leave was available for parents to share, how many weeks should be available in total.**

The majority of respondents overall supported a 52 week period of shared leave (59% of employees and 33% of employers). 18 percent of respondents supported a 26 week period of shared leave (17% of employees and 29% of employers).

**Respondents were also asked whether a specific period of shared leave should be reserved for each parent.**

Less than a quarter of respondents overall (24%) said that a specific period should be reserved for each parent.

Comments from respondents on shared leave included –

*“The ever changing nature of parenting means that both parents are wanting to share in the formative upbringing of their child. Equally, particularly with maternity leave, it is not always the case that the non-birth parent is the highest earner, so economically there will be circumstances where the birth parent wishes to return to work and the non-birth parent undertakes a period of leave and care. Such a position promotes shared responsibility for children, means that the provision of leave does not fall upon one employer and also engenders shared responsibility between the parents for on-going care of the child, which means that any future time off to care for sick children does not fall upon one employer, but will be shared between the employers of both parents.” (Unite the Union)*

*“Shared parental leave should be based on the same provisions as maternity leave. The NASUWT believes that this will provide parents with greater choice and flexibility over their childcare arrangements. In doing so, the Union believes that this should change the culture of parenting in Jersey by enabling fathers to take extended leave close to their child’s birth.” (NASUWT)*

*“Whilst we welcome the opportunity for Shared Maternity Leave, we would like to see a period of time taken by the mother following the birth of no less than 12 weeks, as we would have concerns that she would be returning to work too early.” (Jersey Child Care Trust)*

*“Shared care approach where different weeks are taken off by different carers to a child would be exceptionally hard to manage for temps. If someone is assigned to a project, then the view within the agencies is that it would be very difficult to get the client employer to agree that the temp could, for example, have 1 week in every 4 weeks out from the project. There was a concern expressed that if the law did take such an approach then a natural response by client businesses may be to simply select other candidate who did not have the same requirements regarding shared care, which could of itself raise discrimination issues.” (Response on behalf of 9 local recruitment agencies)*

*“This is incredibly complicated. We doubt social security would help employers check who is taking what! It would be better to simply offer additional unpaid leave – say four weeks within the first six months after the baby is born to both/any parents.” (Institute of Directors)*

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*"26 weeks has been chosen as a measured approach to align with suggestion of 26 maternity leave - this being a more reasonable shift from the current situation than say 39 weeks in the first instance. This would allow the highest income provider for the household to continue/return to work whilst knowing that the baby is still being cared for by their partner"* (JACS)

*"26 weeks between two carers, should be the benchmark, the first year of a child's life is so heavy duty that a parent or guardian with which the child bonds should be available at all times. The leave should be allowed to be shared by both mother and partner, or grandparents. This way employers cannot discriminate against women for a risk of them taking maternity leave."* (Employee)

*"In my family I'd choose 6 months off for each of me and my husband initially. So we would both be off together."* (Employee, public sector)

*"This should be at the discretion of parents and dependant on their own circumstances. The current law is unfair to both men and women - some women would prefer to take shorter breaks for the sake of their careers and some men may wish to take longer time to spend with their child."* (Employee, financial services)

*"Shared leave would hopefully support families where the mother is the greater salary provider."* (Employee, charity)

*"To ensure parity for both parents."* (Other respondent)

*"Prioritisation of family life and equality between the sexes."* (Employee, financial services)

*"It is up to parents what they choose to do. There should be flexibility, what works for some doesn't work for others. However the woman's health needs to be protected early on."* (Employee, transport storage and communications)

*"Both parents deserve equal time with the new arrival."* (Employee, public sector)

*"Sharing maternity leave is notoriously difficult to administer in the U.K., where employees work for different organizations. As Government funded statutory maternity pay is not a feature in Jersey this would be even more difficult for local employees to administer. This administration would create financial and resource burdens on employers."* (Employer, financial services)

*"Simply increasing leave entitlements is unlikely to secure the underlying social policy objective of enabling men and women to share family friendly rights and thereby share the commitment/experience of their child's first weeks. Recognising the challenges/shortcomings of SPL, a proposal may be to focus on achieving a better financial deal for qualifying men and women that attempts to move towards parity (albeit over time) between the sexes under the maternity and parental regimes – focusing here on breaking down financial barriers to men spending material amounts of time caring for the child (which appears critical from the UK's experience)."* (Employment Lawyers Association, Jersey branch)

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A longer period of leave to be shared by two parents was generally supported by the respondents, particularly by employees. The 2016 Jersey Lifestyle and Opinions Survey found that 87 percent of adults said that parents should be able to share parental leave. Reasons given included to allow both parents to be involved in childcare (65%), to make it easier to fit childcare around work (17%) and because it would be more practical financially (13%). Similar reasons for supporting shared leave were given by those who responded to the Forum's survey.

Some of the respondents also commented on the challenges and complications in the administration and management of shared leave, including the following -

*"Employers communicating with regards to eligibility. However any challenges are vastly outweighed by the benefits to the employer in terms of employee satisfaction, loyalty, talent retention, and less time off caring for sick children if they are breastfeeding."* (Employee, public sector)

*"Communication between employers. It would have to be agreed before birth and requests to change would have to follow a process."* (Employee, IT)

*"Proving to 2 separate employers when leave will or will not be taken."* (Employee, electricity, gas and water)

*"The employers being able to successfully cover the leave of both parents."* (Other respondent)

*"Payroll, employees comprehension of this, checking balance of leave when people work at different companies."* (Employer, wholesale and retail)

*"The administration of pay and potentially 2 employers working together to ensure the correct leave is taken."* (Employee, financial services)

*"Co-ordination with another employer, particularly in respect of data protection legislation."* (Employer, hotels restaurants and bars)

*"Knowing when the mother/father would be working or not working and gaps in employment which would make continuous working practices hard to plan for/cover."* (Employer, wholesale and retail)

Take-up of shared leave in the UK has been low. The CIPD's 'Labour Market Outlook: Focus on working parents', published in December 2016<sup>7</sup> found that only 5 percent of eligible fathers and 8 percent of eligible mothers had taken shared parental leave. Recent research from My Family Care and the Women's Business Council<sup>8</sup> suggests that a combination of factors are likely to contribute to the low take-up, including financial reasons, a lack of awareness, the attitudes of employers and society (50% of men agreed that taking SPL is perceived negatively at work), as well as women (55%) wanting to take all of the leave themselves. The UK government intends to review shared leave in 2018. The Trades Union Congress is calling for fathers to be given a right to their own period of parental leave that is not dependent on their partner.

<sup>7</sup> [https://www.cipd.co.uk/Images/labour-market-outlook-focus-on-working-parents\\_tcm18-17048.pdf](https://www.cipd.co.uk/Images/labour-market-outlook-focus-on-working-parents_tcm18-17048.pdf)

<sup>8</sup> [www.theguardian.com/money/2017/apr/05/few-fathers-can-afford-to-take-shared-parental-leave-say-campaigners](http://www.theguardian.com/money/2017/apr/05/few-fathers-can-afford-to-take-shared-parental-leave-say-campaigners)

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The Forum notes that many of the respondents indicated a desire for more choice and flexibility so that working parents can adjust periods of leave to suit their particular family unit and financial circumstances, for parity in parental rights and to address discrimination against women as the typical primary carer by encouraging both parents to share the responsibility. A shared leave system, as introduced in the UK in 2015, would not necessarily help to achieve all of these aims as the period of leave remains as a period of maternity leave unless the mother agrees to transfer the leave to the other parent.

The Forum noted that some respondents may not have considered whether having a longer defined period of leave for each parent might be preferable to shared leave. Experience in other jurisdictions suggests that, when parents are given their own allocation of leave, men are more likely to take a period of leave. In Sweden, for example, the shared leave system introduced in 1975 had a low take up; after 20 years, 90% of the leave days were still being used by women. In 1995, the Swedish government introduced a specific 'use it or lose it' allocation for fathers (which increased to 90 days in 2016). By 2014, men were taking 25% of the available leave days.<sup>9</sup>

The advantages and disadvantages of shared leave can be summarised as follows –

Any period of leave which the mother does not wish to take can be transferred to the other parent, or potentially to another person, such as a grandparent. This would allow families to decide if one person will take a longer period of leave (e.g. the lower earner), or if the leave will be shared. Shared leave can be taken in chunks, with overlapping and/or separate periods. However this can make it administratively complex for all parties. Other significant disadvantages of shared leave are that the other parent's entitlement is dependent upon the mother. There are a number of circumstances where the other parent would not have the opportunity to share a longer period of leave (e.g. the mother is not entitled to maternity leave because she is not employed, the mother wants to take the leave herself, or the mother dies or leaves shortly after birth). In addition, experience in other jurisdictions suggests that men are less likely to take a period of leave if do not have their own statutory entitlement.

The advantages and disadvantages of a defined period of leave for each parent can be summarised as follows –

There are some circumstances in which parents would be worse off, such as a single parent would be entitled to half of the leave that a couple would be entitled to, and any leave not taken by that parent cannot be transferred to another person. Like shared leave, defined leave can be taken in chunks, with overlapping and/or separate periods. Administratively this is likely to be more straightforward than for shared leave because the employer only has to take into account the leave entitlements of their own employee. A significant advantage of defined leave compared to shared leave is that parents would be entitled to a number of weeks' leave in their own right which may help to shift attitudes and practice.

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<sup>9</sup> Swedish couples are entitled to 480 days' leave, which is paid at 80% of pay up to a maximum of about £76 per day for the first 390 days, plus 90 days paid at a lower rate. See [www.bbc.co.uk/news/magazine-35225982](http://www.bbc.co.uk/news/magazine-35225982)

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### 3.2 Leave shared with grandparents

**Recommendation 7** – The Forum has recommended that a shared leave system should not be introduced. Defined periods of leave for each parent cannot be shared with another person. Given the consultation responses, if the Forum had recommended a shared leave system, it is unlikely that the Forum would have recommended including an option for leave to be shared with grandparents.

#### **Respondents were asked if parents should be able to share their parental leave with the child’s grandparents.**

The majority of respondents (53%) did not agree that parents should be able to share period of parental leave with the child’s grandparents (49% of employees and 65% of employers). Just over one quarter (26%) of respondents said that parents should be able to share leave with grandparents (27% of employees and 13% of employers) and 22 percent did not know.

Respondents who supported sharing leave with grandparents suggested that it would be more flexible and helpful for financial reasons, particularly due to the cost of childcare in Jersey. However, many felt that this would be a step too far. Comments included -

*“Shared parental leave should also be extended to grandparents, as grandparents are increasingly shouldering the burden of childcare, with research conducted by Loughborough and Kent Universities on behalf of the UK Government finding that in 35% of families grandparents are the main source of childcare.” (NASUWT)*

*“On the subject of grandparents, the 2016 survey suggested that there was not majority support for such a proposal; however this should not be discounted. As workers are working longer before pensionable age this means that increasingly grandparents are of working age, equally the shifting demographics around relationships means that there are an increasing number of single parents, therefore the opportunity for grandparents to share leave should be explored and at least the opportunity for such leave to be requested, like with flexible working, to be included within the new family friendly rights.” (Unite the Union)*

*“Some parents may not be able to afford to take the time out themselves, so this would enable a lone parent to have the support of grandparents.” (JACS)*

*“Yes, I think that grandparents can play an important role to help mothers/fathers return to work sooner if they want to, so they can remain workready / help out their employer etc.” (Employee, public sector)*

*“Not the responsibility of the employer or law and each extended family circumstances is different.” (Employee, law)*

*“Maybe in single parent situations but other issues are more important in my opinion.” (Employee, IT)*

*“Where do you draw the line. Lots of people of here don’t have parents living locally.” (Employee, financial services)*

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*“If you widen eligibility outside of parents for parental leave then this should not just be for grandparents but for other close relatives such as Aunts!”* (Employer, wholesale and retail)

*“In some cases it might be helpful but could put too much on the employer.”* (Employee, public sector)

*“Grandparents help extensively whenever possible but to bring them into the equation would complicate matters unduly.”* (Employer, charity)

The Forum noted that one of the potential advantages of a shared leave system would be the opportunity to permit the leave to be shared with a grandparent or another person. However, both the Forum’s consultation and the Jersey Lifestyle and Opinions Survey (2016) have demonstrated that this option is not strongly supported<sup>10</sup>. The Forum also considered whether the law should provide an option for the mother to transfer her leave to a ‘nominated person’ where there is not a person who “expects to have responsibility for the upbringing of the child”<sup>11</sup>. However, the Forum noted that people with caring responsibilities (including grandparents, relatives and friends) may request flexible working to allow them to help if they wish.

### 4. Parental leave

#### 4.1 Period of parental leave

**Recommendation 8** – For parity with maternity leave, the Forum recommends that the period of parental leave should be increased in two stages

- o to 26 weeks from 1 September 2018
- o to 52 weeks from 1 September 2019

The Forum also recommends that, in moving to a position where the periods of maternity leave and parental leave are comparable in 2019, the conditions for each period of leave should be aligned so that parents are simply entitled to 52 weeks of parental leave each. This would introduce a new more inclusive and straightforward system of parental leave which will be referred to in this recommendation as ‘2019 parental leave’.

**Respondents were asked if the period of statutory parental leave should be extended from the current maximum of 2 weeks and, if yes, how many weeks the period of leave should be.**

The Forum noted in the consultation paper that, currently, up to 2 weeks’ **unpaid** parental leave can be taken by the father of the child, or the husband, civil partner or partner of the mother. A partner for this purpose means a person who lives with the mother or adopter in an enduring family relationship. This person must also expect to have responsibility, or the main responsibility, for bringing up the child.

An extension to the parental leave period was supported by the majority of respondents across all categories of respondent (76%), including 82 percent of employees, 68 percent of ‘other’ respondents and 50 percent of employers. The most popular choice of parental leave

<sup>10</sup> See Appendix 1, page 62.

<sup>11</sup> As required by Article 55N of the Employment Law for entitlement to the current right to parental leave.

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period for all categories of respondent (including 39% of employees and 67% of employers) was 4 weeks.

Comments from respondents included -

*“If a mother's leave is extended I think any other parental leave does not need greatly extending albeit a small extension would be beneficial for many.”* (Individual)

*“The current period is long enough any longer is a burden on the employer.”* (Employer, construction)

*“Every situation is different and i think the rights of the partner are just as important. You want your member of staff to be in a positive position to return to work and 2 weeks to help care for a new baby isnt enough. I think extending it to a fair amount will help support staff and therefore they are more likely to return to work and be comfortable of the support they have given at home.”* (Employee, hotels restaurants and bars)

*“(4 weeks) This would be on a slight increase so not too unreasonable an intial step, however if there is to be any extension to the number of weeks a level of flexibility around this would also be advantageous so for example 2 weeks as per now and the (up to) additional 2 weeks within the first year of the child being born or something similar. Again though this would be the first incremental move and a statement regarding this is likely to increase further to allow employers to prepare for this.”* (JACS)

*“Depending on the childbirth experience, the father returning to work after 2 weeks could be hugely impractical. If the mother has had a C-section she will be unable to physically manage by herself after 2 weeks and will need the support of the child's father beyond this period.”* (Employee, public sector)

*“Many new mothers have had to undergo surgery during birth and therefore a month is a more realistic time for the new family to have found a routine.”* (Employer, wholesale and retail)

*“(6 weeks) This is the estimated recovery time following birth for the mother and this is how long she should technically need help for.”* (Employee, health care)

*“Some births do not go according to plan and the mother may not be able to lift the baby for 6 weeks so it would be helpful to have the other parent to help out.”* (Employee, construction)

More than three-quarters of the respondents supported extending the period of parental leave. Of the responses overall, 75 percent preferred a parental leave period of 4 to 18 weeks and 26 percent preferred a period of 26 to 52 weeks. The Forum notes that, based on the number of survey responses alone, a 4 week parental leave period would be the preferred option often for practical reasons, such as supporting the mother on her return from hospital, establishing a routine and early bonding with the baby. However, there were a number of comments calling for parity in the periods of leave available and more flexibility for both parents.

*“The position in the UK is very settled with adoption and parental leave being analogous to maternity leave. The responsibilities upon an adoptive parent or in parental leave the non-birth parent are very similar to those of a birth parent on maternity leave, therefore*

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*a framework of rights that provide equity of time off and payments regardless of whether maternity, adoption or parental leave is progressive, inclusive and beneficial to workers and employers in Jersey.” (Unite the Union)*

*“Parents should have equal rights and the choice to have either parent stay home.” (Employee, financial services)*

*“The only way we can move forward towards a equal society where women are treated the same as men in pay is that men be afforded the same right, that way a employer cannot discriminate between sexes if all rights are the same.” (Employee)*

*“The parenthood should be equally divided . We live in times where men and women have equal rights and maternity leave should not be any different.” (Employee, financial services)*

*“Fathers are equal parents, not a second or substitute parent. They should equally have time to bond with their child.” (Employee, transport storage and communications)*

*“By allowing the option to take the same amount of time for parental leave, this would rule out any discrimination.” (Employee, wholesale and retail)*

According to the Jersey Lifestyle and Opinions Survey for 2016, of the parents who had taken a period of parental leave in the last 5 years, men had taken an average of 2 weeks’ leave, 92 percent of men would have liked to have taken more leave and 69 percent of men said they were prevented from taking more leave because the length of leave was limited by their employer. Around two-thirds of men had not taken any parental leave.

The Forum considered whether to recommend increasing the period of statutory parental leave to 4 weeks in line with the expectations of many of the respondents. The Forum noted that, while this option slightly improves options and choices for parents who do not already have a contractual entitlement, it would do little to improve flexibility or gender balance in parenting.

Having considered the potential advantages and disadvantages of a shared leave system as well as the policy intent of extending the family-related employment rights, the Forum is persuaded that it would be more progressive and inclusive to extend parental leave to provide an equal period of leave for each parent with flexibility as to when it can be taken. The Forum considers that this could be more successful in improving options and choices for parents, improving gender balance in parenting and ensuring that the rights are suitable for the range of increasingly complex and less ‘traditional’ family arrangements. Experience in other jurisdictions has shown that men are more likely to use a defined period of leave. In addition, defined periods of leave for each parent are likely to be more manageable for employers than a shared leave system and mothers would retain the right to take a period of leave for physical recovery.

To distinguish this new system of parental leave proposed to be introduced in September 2019 from the existing right to statutory parental leave, the recommendation will refer to the proposal as ‘2019 parental leave’.

Given the Forum’s intention to recommend a system where all parents are independently entitled to 52 weeks of ‘2019 parental leave’ in September 2019, there would be no need to continue to separately define a period of statutory maternity leave. In the current Employment

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Law, the main difference between maternity leave and parental leave is the 2 week compulsory maternity leave period which must be taken immediately after giving birth. During this time, an employer must not permit a woman to work. The Forum considers that this provision is unnecessary, ineffective and inappropriate and so it should not be retained as part of '2019 parental leave'. It is not the role of the Employment Law to take a medical position in preventing a woman from working if she chooses to do so. A mother has the right to take a period of leave and the employer cannot require her to work during that period. With the proposed recommendation for 6 weeks of **paid** maternity leave from day one of employment, most women are likely to take that period of leave. In rare cases, some women might want or need to undertake some work in that period, in which case it is unlikely that the current compulsory leave period would prevent that from happening.

#### **4.2 Paid parental leave**

**Recommendation 9** – The Forum recommends that the period of parental leave that is **paid** by the employer should be increased in two stages -

- o to 2 weeks at 100 percent of pay from 1 September 2018
- o to 6 weeks at 100 percent of pay from 1 September 2019

The Forum also recommends that 12 weeks of **paid** leave should be available in total in September 2019, with 6 weeks continuing to be funded by the employer plus 6 weeks funded by the States at 100 percent of pay.

**Respondents were asked how many weeks of parental leave should be paid, either fully or partially, by the employer.**

The survey responses supported at least 1 to 2 weeks of **paid** leave (31% of employees, 43% of employers and 33% of 'other' respondents). The consultation paper explained that, currently in Jersey, the employer is not required to pay the employee for the 2 weeks' parental leave.

Respondents tended to choose either half or all of their preferred period of parental leave. For example, the most popular periods of **paid** leave for those who preferred a 4 week parental leave period were 1 to 2 weeks (41%) and 3 to 4 weeks (52%). For those who preferred an 8 week parental leave period, the most popular periods of **paid** leave were 3 to 4 weeks (32%) and 6 to 8 weeks (57%).

Comments from respondents included the following –

*“We feel that the current 2 weeks statutory unpaid leave should be paid at the employee’s full rate and there should be flexibility when it can be taken”* (Jersey Child Care Trust)

*“As uptake of leave by new fathers is a clear cause for concern, whereas current parental leave is unpaid with no statutory payment, the proposals for paternity leave should include at least a commitment to two weeks’ paternity allowance, the level set being equal to maternity allowance. However, the NASUWT would strongly urge that this is paid by the employer at full pay.”* (NASUWT)

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*“Any framework of rights which enshrines extended leave provisions will be of limited benefit if these are not supported financially. The cost of extending and paying parental leave in line with any improved position on maternity leave will be broadly cost neutral on the basis that the assumption would be that this would be done on a shared basis, i.e. any parental leave will mean that the birth parent is back at work and not on maternity leave/pay.” (Unite the Union)*

*“This would hopefully allow all employees to access this right and not have to worry about no income for a period of parental leave, whilst hopefully not being too excessive for employers to manage.” (JACS)*

*“If the right to paternity leave is extended beyond the current 2 weeks unpaid, then any further length of time should also be unpaid for the reasons set out above in relation to Maternity rights.” (Response compiled on behalf of nine local recruitment agencies)*

*“The introduction of paid paternity leave would have an affect on the Industry financially. If say a Polish worker was to claim his paternity leave and return to Poland he would be highly likely to stay for a longer period before returning and may in fact choose not to resume his employment. If he also chose to go in the high season, his employer would be unlikely to find a suitable replacement. The loss of a member of staff could have a huge impact on small businesses if say they employed a herdsman as they would not be able to train up a replacement for a relatively short period in what is a specialised job.” (Jersey Farmers Union)*

*“I think that paternity leave needs to be promoted to encourage men to take an active interest in (and responsibility for) their baby and to support their partner. If it is unpaid, it does not send the right message about the importance of men taking paternity leave. It will also discourage many men from taking up their right.” (Employee, public sector)*

*“This would reduce the sexual discrimination that women of a child bearing age experience.” (Employer, charity)*

*“It ought to be treated as close to maternity leave as possible. So have (roughly) the same percentage of paid time.” (Employee, public sector)*

*“If staff do not feel they are being supported this could lead to sickness or people deciding to leave. This would have a bigger impact on the company than investing and supporting your staff in the first place.” (Employee, hotels, restaurants and bars)*

*“Parental leave should be paid at 100%, as per the first two weeks of maternity leave.” (Employee, charity)*

*“The two weeks granted at the beginning should definitely be paid in full. I was really shocked my husband's employer does not pay any paternity leave at all.” (Employee)*

The Forum notes that a proportion of new parents work for the States of Jersey and large private sector companies that will already pay a period of parental leave. However, smaller businesses are less likely to provide any periods of **paid** parental leave. The Forum recognises that this potentially places a financial burden on employers.

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In relation to a **paid** period of maternity leave, the Forum has recommended that, from 1 September 2018, 6 weeks of statutory maternity leave should be **paid** by the employer at 100 percent of pay. This recommendation was reached on the basis that, while being sensitive to the impact on businesses in Jersey, there was a strong indication from the consultation responses that substantial progress in parental rights is required. The same arguments apply in relation to a **paid** period of parental leave. However, the Forum considers that it would be a step too far to move from the current position of 2 weeks' **unpaid** parental leave to 6 weeks of **paid** leave in September 2018, particularly in combination with the other recommendations. The Forum intends that parity in parental rights would be achieved with the introduction of '2019 parental leave' in September 2019.

#### 4.3 Qualifying period for parental leave

**Recommendation 10** - The Forum recommends that, for parity with maternity leave, periods of **paid** and **unpaid** statutory parental leave should be available to an employee from day one of employment with no requirement for a minimum period of continuous employment.

**Respondents were asked if employees should be required to have a minimum period of continuous employment before becoming entitled to any part of parental leave and, if yes, what minimum period of continuous employment should be required.**

The consultation paper explained that, currently in Jersey, the 2 weeks of statutory parental leave are available from day-one of employment with no qualifying period of service.

Responses overall were fairly split; 50 percent of respondents said that a qualifying period should apply to all or part of the parental leave period (including 69% of employers and 46% of employees) and 45 percent said that a qualifying period should not apply. Respondents overall preferred a qualifying period of either 12 months (37%) or 15 months (33%)

Comments from respondents included the following –

*“As with maternity entitlements, rights to paternity and parental leave should be day one rights.”* (NASUWT)

*“In order to protect the employer from employees that may try to abuse the system or not return to work after the granted leave.”* (Employee, financial services)

*“By setting delimiters on such leave, you are risking the father being unable to spend this time with their new baby.”* (Employee)

*“New employers have spent money on the new recruit. It seems unfair to expect them to then having this large financial burden placed upon them until the employee has worked and paid into the company, as such.”* (Employee, public sector)

*“The father should be entitled to time off regardless of their length of employment. Someone could be take a week off with some cold longer than with having a child!”* (Employee, financial services)

*“Someone in a new job may not be able to afford to take the time off to be with their wife/partner/baby if they did not qualify for the sake of a few weeks.”* (Employee, public sector)

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*“To protect employers and prevent accidental discrimination (they may not hire women/ men that they think may have a child imminently if they are forced to pay for many weeks of leave soon after hiring)” (Employer/employee, transport, storage and communications)*

In relation to a qualifying period for maternity leave, the Forum has recommended that periods of **paid** and **unpaid** statutory maternity leave should be available to an employee from day one of employment, with no minimum period of continuous employment. The Forum recognises that a day one right to **paid** leave would be a big commitment for some employers. However, the Forum’s intention, as with maternity leave, is to provide a social right to protect the family and provide more choices and flexibility. Any qualifying period would automatically exclude some employees from this right. Paid parental leave is not a reward, a bonus, an insurance scheme, a benefit or compensation for long service. The Forum considers that parents should not have to protect their employment entitlements when planning to have children to the potential detriment of their careers.

#### **4.4 Taking parental leave**

**Recommendation 11** – The Forum recommends that –

- o From 1 September 2018, 26 weeks of parental leave should be available to take in up to 3 blocks of not less than 2 weeks each, within a 52 week period starting from the date of birth (or placement for adoption).
- o From 1 September 2019, 52 weeks of ‘2019 parental leave’ should be available to take in up to 4 blocks of not less than 2 weeks each within a period starting no earlier than the 11th week before the expected week of childbirth and ending when the child reaches age 3 (or within 3 years of placement for adoption).

The requirement to give the employer notice of leave dates and of changes to leave dates should remain in accordance with the existing law (i.e. the employee must notify the employer of leave dates no later than the end of the 15th week before the expected week of childbirth, and for any changes to the start date(s) notice must be given 28 days before the date on which leave was originally intended to start or 28 days before the new date, whichever is earlier).

The Forum has also considered the period of time and manner in which parental leave can be taken. The Forum noted that parental leave must currently be taken within 8 weeks of the birth starting on the day on which the child is born or a specified date after childbirth.

If parental leave was only available to take in one block, take-up might be low. Unlike maternity leave, fathers and partners are likely to want to take a short period, such as 2 to 4 weeks shortly after the birth (a typical ‘paternity leave’ period) and another period later, either at the same time as the mother, or after maternity leave has ended. The Forum considers that, in order to make an improvement for families, parental leave must be available to take in shorter blocks of time. The Forum considers that 3 blocks of time are sufficient for a 26 week leave period but that the number of blocks should be increased to 4 when 52 weeks of ‘2019 parental leave’ are available in order to ensure that parents can use the full period of leave appropriately to suit the needs of the family.

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Given the Forum's recommendation to move to a system where all parents are independently entitled to 52 weeks of '2019 parental leave' in September 2019, where there is no need to separately define maternity leave, it is important to ensure that a mother can continue to start her parental leave before the expected date of childbirth if she wants to. Currently, maternity leave may start no earlier than the 11th week before the expected week of childbirth and parental leave may start no earlier than the date of birth or placement for adoption. The Forum considers that it is likely to be simpler to allow both parents to start their '2019 parental leave' on a date to be notified to the employer no earlier than the 11th week before the expected week of childbirth. A father or partner would then be permitted to start '2019 parental leave' before the birth but in most cases it is anticipated that the parent who is not giving birth will want to take as much leave as possible after the baby is born. However, this flexibility may assist, for example, if there are complications in the later stages of pregnancy.

#### **4.5 Right to return to work after parental leave**

**Recommendation 12** – The Forum recommends that an employee should have the right to return to the same job (where that job still exists) after a period of statutory parental leave, no matter how many weeks of leave are available (26 or 52 weeks).

Currently in Jersey, employees have the right to return to the same job after up to 18 weeks' **maternity** leave. A provision for the right to return to the same job is not included in relation to the 2 weeks of parental leave. If the period of parental leave is to be extended beyond a short period of leave, the Forum considers that an equivalent right to return to the same job must be provided to provide stability and certainty for the employer and both parents.

As with maternity leave, an employee's right to return to work would not prevent the employer from making genuine redundancies or restructuring the business where required.

## **5. Adoption leave**

### **5.1 Period of adoption leave**

**Recommendation 13** – The Forum recommends that adoptive parents should have the right to take periods of leave that are equivalent to maternity leave and parental leave.

The Forum has recommended a more inclusive and straightforward system of '2019 parental leave' which the Forum recommends should equally be available to adopters from September 2019.

**Respondents were asked, if the periods of maternity and parental leave are extended, whether adoptive parents should have the right to take equivalent periods of maternity leave and parental leave.**

The consultation paper noted that, currently in Jersey, **unpaid** adoption leave is available equivalent to the periods of maternity and parental leave, but available to either parent, irrespective of gender.

The majority of respondents overall (80%) agreed that equivalent rights should be provided for adoptive parents (81% of employees and 65% of employers).

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Comments from respondents included –

*“As the introduction of a child into the family unit and the adjustments needed would be the same, and in some cases maybe even greater if the child is older and/or from outside of Jersey.” (JACS)*

*“The position in the UK is very settled with adoption and parental leave being analogous to maternity leave. The responsibilities upon an adoptive parent or in parental leave the non-birth parent are very similar to those of a birth parent on maternity leave, therefore a framework of rights that provide equity of time off and payments regardless of whether maternity, adoption or parental leave is progressive, inclusive and beneficial to workers and employers in Jersey.” (Unite the Union)*

*“On the basis of a new born only. For older children their needs are far less so the period should be shorter.” (Employee, public sector)*

*“Adopting a child is a massive responsibility that may come with some difficult emotions for parent and child. This additional time would allow both the parent(s) and child time to become fully acquainted and adapt to their new surroundings without the stress of the parent having to return to work before the child is fully settled.” (Employee, financial services)*

*“Being an adoptive parent is harder than a birth parent. Adoptive parents have to work harder to forge bonds with a child, especially if the child is older.” (Employee, public sector)*

*“People adopt for all personal reasons and so why should they be deemed different when they need the time to nurture their child and more so dependent on age the child may need more time to build attachments, a bond and settle in with a new family.” (Other respondent)*

*“Adoption is completely different and not requiring hospitalisation so a shorter period of adjustment and settling in should be sufficient.” (Employer, construction)*

*“Yes, it is about creating a family unit even if the parents are not the natural ones.” (Jersey Hospitality Association)*

*“New babies need time to bond with parents and everything they do is new and scary. With older children this isn't the same. I would say depending on the age of the child and if they are of school age, the child would be at school so wouldn't benefit the parent being off.” (Employee, public sector)*

Some of the respondents have suggested that the right to a period of adoption leave should apply subject to an age limit for the adopted child on the basis that adoptive parents might not need as long a period of leave where older children are adopted. The Forum is of the view that the age of a child does not necessarily indicate the demands on the parents' time and that, often, more time is needed with older children. This might particularly be the case when settling a child in an adoption situation. If the adoptive parent does not require the full period of leave, it is unlikely that they would take it given that most of the weeks would be **unpaid**.

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### 5.2 Paid adoption leave

**Recommendation 14** – The Forum recommends that adoptive parents should have the right to take periods of **paid** leave that are equivalent to maternity leave and parental leave. Either parent may elect to take the more generous period of **paid** leave (until **paid** leave is equalised with the introduction of ‘2019 parental leave’).

The 52 weeks of ‘2019 parental leave’ recommended to be available for each parent in September 2019 should be available to take during a period starting no more than 14 days before the placement date (as provided in the current law) and ending up to 3 years after the adoption placement, in up to 4 blocks of not less than 2 weeks each.

The requirement to give the employer notice of leave dates and of changes to leave dates should remain in accordance with the current law (i.e. the employee must notify the employer of leave dates no later than 7 days after receiving official notification of being matched with a child (or the child entering Jersey), and for any changes to the start date(s) notice must be given 28 days before the date when the child is placed for adoption (or enters Jersey) or 28 days before the predetermined start date, whichever is earlier).

**Respondents were asked if the first 2 weeks of adoption leave (the period equivalent to compulsory maternity leave) should be paid by the employer at the normal rate of pay.**

The consultation paper noted that adoption leave does not include 2 weeks’ compulsory leave **paid** at the employee’s normal rate of pay because the policy behind compulsory **paid** leave was to protect the health of the mother immediately after giving birth.

The majority of respondents overall (70%) agreed that 2 weeks of adoption leave should be **paid** by the employer at the normal rate of pay (75% of employees and 58% of employers).

Comments from respondents included –

*“The NASUWT can see no cogent argument as to why the rights and entitlements of adoptive parents should be any different to those of biological parents. As such, all provisions for adoption leave and pay should mirror those for maternity leave and pay. This would include the provisions for surrogacy.” (NASUWT)*

*“Adoption leave probably does not need to be compulsory but the adopting parents should be able to avail of the same rights if they choose to do so.” (Other respondent)*

*“Prospective adoptive parents should have the right to take equivalent periods of maternity leave and parental leave, i.e. the 2 weeks leave following placement of the child should be paid. An exception would be (e.g.) where a parent has fostered that child for some time and therefore a period of 2 weeks is not deemed essential.” (Jersey Child Care Trust)*

*“The agencies collective view is that adoptive or surrogate parents should get the same rights as natural parents. This would include 2 weeks paid adoption leave for the primary carer and two weeks’ unpaid paternity leave for their partner (under current provisions).” (Response on behalf of 9 local recruitment agencies)*

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*“Whilst the health and wellbeing of the mother has not been compromised, this argument would not be relevant when it comes to encouraging people to adopt and therefore the same provision regarding payment should apply.” (JACS)*

*“I think this is a difficult one as adopting a new baby could still cause health issues for a parent even without the physical birth. Perhaps not to the same extent but then you have mothers who have very easy births and no problems at all.” (Employee, hotels, restaurants and bars)*

*“The current policy is only looking at the physical well-being of the mother - both giving birth and adopting a child has a huge emotional and psychological strain. In some ways, adopting may even be harder and this should be taken into account.” (Employee, financial services)*

*“What planet are you on Again you are considering putting another burden on the employer.” (Employer, construction)*

*“I see no reason why there should be a compulsory period for adoption. Forced leave is there for physical health recovery and I see no reason why a forced break would be justifiable.” (Employer, hotels, restaurants and bars)*

*“Without their being a compulsory period of paid employment, some parents may be unable to take any time off work - this is completely prohibitive for adoptive parents.” (Employee, public sector)*

In recommending that ‘2019 parental leave’ should include 6 weeks of **paid** parental leave for all parents as part of the 52 week total parental leave entitlement, the Forum has recognised that substantial progress is required but has tried to be sensitive to the impact on businesses in Jersey. The Forum would prefer to recommend a longer period of **paid** leave but recognises the potential financial burden on employers. However, the number of employees and employers that are likely to be affected each year is small, particularly in the case of adoption. In order to achieve parity, the Forum considers that the same rights must be available to adoptive parents.

#### 6. Surrogacy – leave for intended parents

**Recommendation 15** – The Forum recommends that the intended parents in a surrogacy arrangement should have the right to take periods of **paid** and **unpaid** leave that are equivalent to adoption leave and parental leave. Either parent may elect to take the more generous period of **paid** leave (until **paid** leave is equalised with the introduction of ‘2019 parental leave’).

The Forum has recommended a more inclusive and straightforward system of ‘2019 parental leave’ which the Forum recommends should equally be available to the intended parents in a surrogacy arrangement from September 2019.

## RECOMMENDATION

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**Respondents were asked if the intended parents in a surrogacy arrangement should have the right to take periods of leave that are equivalent to adoption leave and parental leave.**

The consultation paper noted that currently the birth mother would have the right to up to 18 weeks' maternity leave. However, the intended surrogate parents would not be entitled to maternity leave, parental leave or adoption leave where they have become the legal parents of the child other than through an adoption.

The majority of respondents overall (70%) agreed that the intended parents in a surrogacy arrangement should have the right to take periods of leave that are equivalent to adoption leave and parental leave (72% of employees and 77% of employers). 'Other' respondents were more split (56% agreed and 40% disagreed).

Comments from respondents included –

*"The agencies collective view is that adoptive or surrogate parents should get the same rights as natural parents. This would include 2 weeks paid adoption leave for the primary carer and two weeks' unpaid paternity leave for their partner (under current provisions)." (Response on behalf of 9 local recruitment agencies)*

*"Suggest this follows adoption format. The mum (who gave birth to the baby) will get two weeks paid leave." (Institute of Directors)*

*"As with adoption, they are also parents with the same pressures and responsibilities and bonding time is important to raise these children into healthy happy islanders for the future." (Employee, IT)*

*"I think regardless of how you are having a new baby this is still a big life changing event and because you cannot physically have a child shouldn't mean you are treated less favorably." (Employee, hotels, restaurants and bars)*

*"They are still taking the time to settle the child. I do not understand why the birth mother who is not going to be looking after the child would get leave but the actual parents wouldn't." (Employee, financial services)*

*"New parents should be treated equally, irrespective of how they have become parents - the needs of a baby / child remain the same, no matter how that child was brought into the world." (Employee, public sector)*

*"We had a same sex male couple in this situation and because neither of them were going to be paid for their time off one of them had to resign from their job." (Employer, transport, storage and communications)*

The Forum has recommended that '2019 parental leave' should include 6 weeks of paid parental leave for all parents as part of the 52 week total parental leave entitlement. The number of employees and employers that are likely to be affected in relation to surrogacy each year in Jersey is likely to be very small. In order to achieve parity for families, the Forum considers that the same rights must be available to the intended parents in a surrogacy arrangement.

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### 7. Antenatal appointments for the father/partner

**Recommendation 16** – The Forum recommends that the father of the child or the husband, civil partner or partner of the mother should have the right to attend an unlimited number of antenatal appointments (where those appointments are held in Jersey) of which up to 10 hours of appointments are **paid** at the employee’s normal rate of pay and the rest are unpaid. The entitlement should be subject to the presentation of evidence, if requested by the employer, as with antenatal care for the birth mother. This right should be introduced from 1 September 2018.

#### 7.1 Time off work

**Respondents were asked if the father of the child (or the husband, civil partner or partner of the mother) should be entitled to time off work to attend ante-natal appointments.**

Responses to the survey were mainly in favour of providing a statutory entitlement to time off work in these circumstances; 87 percent of those who responded to the survey said yes (91% of employees, 81% of employers and 68% of ‘others’). Comments included –

*“Extending this to men would feed into the wider objective (e.g. cultural / mindset change) that men should be free to / encouraged to participate in the child care.”*  
(Employment Lawyers Association)

*“This is fundamental and progressive right in terms of the involvement of the partner in the antenatal care, many employers already provide this provision as part of enhanced maternity schemes, the right should be extended in statute.”* (Unite the Union)

*“The NASUWT supports proposals that allow fathers time off to attend antenatal appointments.”* (NASUWT)

*“This should encouraged to be a partnership where both parties are present from the beginning. Hearing medical advice from medical professionals first hand is imperative.”* (Employee, transport, storage and communications)

*“Absolutely not. Fathers and parents can simply ask that their employer is reasonable in allowing flexibility to attend these appointments and then make the time up, much like attending medical / dental appointments.”* (IOD)

*“Should be treated under the same policy of employee handbooks as other medical appointments/procedures.”* (Employee, financial services)

The Forum noted that some employers might not be reasonable about permitting time off work and that some employers do not permit time off (to be made up, or not) for medical or dental appointments.

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### 7.2 Number of appointments

**Respondents were asked if there should be a limit on the number of appointments that the father of the child (or the husband, civil partner or partner of the mother) is permitted to attend and, if so, how many appointments should be permitted.**

70 percent of those who responded to the survey said that there should not be a limit on the number of appointments (74% of employees, 63% of employers and 52% of 'others'). Comments from respondents included -

*"There should be entitlement for "the other parent" to be given paid time off to attend a maximum number of antenatal/scan appointments. This could be capped to include the main two scan appointments and one further appointment."* (JCCT)

*"The consultation implies that there may be an acceptable amount of leave for antenatal appointments which should be permitted, but the Union believes that provision should be made for complicated pregnancies where even more support is needed."* (NASUWT)

*"Specific appointments ie seeing scan, first scan. All others are routine so would not need attendance from both parties."* (Employee, financial services)

*"They should be able to attend at least both important scans (12 and 20 week) as standard and also their appointments. Making this legal would be much better. Dads are sneaking around attending scans and "making the time up"."* (Employee, financial services)

*"This is about encouraging fathers to take an active role in the pregnancy and anything that enables fathers to do this is a good thing."* (Employee, public sector)

*"The 12 week and 20 week scans would provide support to the mother in the event that concerns with the baby's health are identified."* (Employee, charity)

Some of the respondents suggested a number of appointments ranging from 1 to 'all appointments'. However, no particular reasons were given for most of the suggested limits, other than two appointments to permit attendance at the two main scans. The responses received would appear to provide support for two possible options; either limited to the two main scan appointments, or an unlimited number of appointments.

The Forum noted that the amount of time required off work to attend antenatal appointments is likely to be shorter in Jersey than it might be in the UK due to the travelling time. Most employees work in St Helier and most antenatal appointments are likely to take place at the General Hospital or a doctor's surgery in St Helier. For parents who use the 'shared care' system, which is a combination of private surgery and hospital appointments, time required away from the office is likely to be even shorter because most appointments are at a defined time at the doctor's surgery.

A question was raised in one of the stakeholders meetings about employees taking time off work to travel to support a pregnant partner who lives in a different country. The Forum noted that the Law should give fathers and partners the right to attend antenatal appointments in Jersey only.

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### 7.3 Paid time off for appointments

**Respondents were asked if any time off work for the father of the child (or the husband, civil partner or partner of the mother) to attend these appointments should be paid.**

64 percent of those who responded to the survey said that time off for appointments should be **paid** (69% of employees, 42% of employers, 60% of 'others'). Comments included –

*“This could be capped to include the main two scan appointments and one further appointment. Where there are additional appointments and the employer feels it is unreasonable for the member of staff to be paid, flexibility of working hours should be exercised to allow them to attend.”* (JCCT)

*“The Union sees no rationale for this leave to be unpaid, given that it relates to periods of hours rather than days.”* (NASUWT)

*“As antenatal appointments can be frequent and it is to check the health of mother and baby I don't feel there is a need for the second person to be paid.”* (Employee, wholesale and retail)

*“Employers not offering flexi hours forces parents to take time off. If unpaid or time had to be made up then they are being penalised for having a child. If these appointments are deemed necessary by health professionals then they should be attended.”* (Employee, public sector)

*“Unreasonable financial burden on businesses. Also, how would a business check the legitimacy of this leave?”* (Employer, financial services)

*“Appointments aren't that long, most people can arrange them before work if needed anyway (we did) but it is better for the health of the mother and care of the child to have both parents present and it is unfair to penalise people for attending.”* (Employee)

*“If the time off is not paid, the entitlement will not be used. It is in the best interests of the child that both parents are involved in its care even from before birth.”* (Employee, public sector)

*“We are talking an hour or two out of a working day. The administration in many cases of making deductions will cost more than the pay recouped.”* (Other respondent)

*“In a healthy pregnancy, fathers would only need to attend 2 or 3 ante-natal appointments. It wouldn't be reasonable to have paid leave. However, flexibility might be needed if there is an issue with the pregnancy. Perhaps 2 paid, 2 unpaid?”* (Employee, public sector)

*“They may not get paid it but should be able to make up the time in lieu. Everyone does more than their contracted hours at work so they might as well be offered that flexibility. They need to be fair to the employer within reason though.”* (Employee, public sector)

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With approximately 1,000 births each year in Jersey, around 1,000 fathers and partners will be eligible for this right. The Forum considers that a right for fathers and partners to take time off to accompany the mother to antenatal appointments demonstrates support for the father or partner being involved from the start, promoting the idea that both parents have an equal interest in the child.

The Forum noted that a normal antenatal regime requires around seven appointments. The duration of each appointment might vary from 30 minutes to half a day depending on where the appointment is held (GP surgery or hospital) and travelling time. Guidance is already available from JACS to advise employers what to expect. For example, the employer may request proof of the appointment.

The Forum noted that it is likely to be excessive to require the employer to pay wages to the father or partner for all antenatal appointments. Some businesses would need to cover the absence for even a short period of time, such as in a small shop or restaurant, and so would potentially have to pay two members of staff for that period. In the UK, fathers and partners have the right to take **unpaid** time off work to attend two antenatal appointments. The Forum considers that the father or partner should be able to attend at least two important scans without fear of losing wages. The Forum noted the response that for some employers it may be easier to pay the employee for a few hours off work rather than trying to amend the payroll system.

#### 8. Antenatal appointments in a surrogacy situation

**Recommendation 17** – The Forum recommends that, for parity, the main intended parent should be entitled to an unlimited number of **paid** appointments (equivalent to antenatal appointments for the birth mother). The other parent should be entitled to an unlimited number of appointments of which up to 10 hours of appointments are **paid** at the normal rate of pay and the rest are unpaid. The rights should only apply where the antenatal appointments are in Jersey and entitlement should be subject to the presentation of evidence, if requested by the employer, (e.g. the employees should be able to obtain from the birth mother a certificate from a medical professional showing that the appointment has been made). The intended parents must choose and notify their employer(s) which of them intends to be the main intended parent for the purpose of taking the more generous entitlement. This right should be introduced from 1 September 2018.

##### 8.1 Time off work

**Respondents were asked if the intended parents in a surrogacy situation should be entitled to time off work to enable them to accompany the birth mother to antenatal care appointments.**

The Forum noted that the surrogate birth mother will already be entitled to take **paid** time off work to attend ante-natal care appointments.

Of those who responded to the survey, 66 percent said that the intended parents in a surrogate situation should be entitled to take time off work to attend antenatal appointments with the birth mother (68% of employees, 58% of employers, 48% of 'others').

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Comments included –

*“Surrogate parents should have the right to take periods of leave that are equivalent to adoption and parental appointments.” (JCCT)*

*“The assumption is that these are relatively low in comparison to the number of maternities, therefore the impact and cost upon the States and employers will be limited. The inclusion of such rights in a framework of family friendly rights will promote the correct messages around equity of treatment when starting a family and highlight positively equality and diversity in the workplace.” (Unite the Union)*

*“The NASUWT supports proposals that allow surrogate parents time off to attend antenatal appointments.” (NASUWT)*

*“We have only every received one query on surrogacy and this was around maternity leave for the birth mother, so JACS experience is very limited in this situation.” (JACS)*

*“Having children is a choice and the work time taken should be made up somehow. People need time off for reasons that aren't a choice and don't get it.” (Other respondent)*

*“We have the opportunity to be world class here in the way we support children and families let's grab the chance please!” (Employee, public sector)*

*“As the soon to be parents of the unborn child, it is vital for the surrogate parents to be able to attend these appointments without barriers - both from an attachment perspective, in terms of feeling involved in the pregnancy and bonding with the unborn child, but also in terms of their knowledge of the pregnancy and how their baby is developing.” (Employee, public sector)*

*“1. These appointments are also an opportunity to bond with the child and feel a part of the process. 2. Any information given about the health of the child should be heard by the child's parents 3. If there are any decisions to be made, the child's parents MUST be involved.” (Employee, financial services)*

### **8.2 Number of appointments**

**Respondents were asked if there should be a limit on the number of appointments that the intended surrogate parents are permitted to attend and, if so, how many appointments should be permitted.**

60 percent of those who responded to the survey said there should **not** be a limit on the number of antenatal appointments (63% of employees, 50% of employers, 41% of 'others').

Comments included -

*“2 appointments, 12 week and 20 week scan.” (Employee, charity)*

*“Same as fathers.” (Other respondent)*

*“Scan appointments and emergency appointments.” (Employee, IT)*

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*“The consultation implies that there may be an acceptable amount of leave for antenatal appointments which should be permitted, but the Union believes that provision should be made for complicated pregnancies where even more support is needed.” (NASUWT)*

*“The ‘to-be’ parents of the child should be able to attend the same number of appointments as the ‘I’m having the baby myself’ parents.” (Employee, public sector)*

### **8.3 Paid time off for appointments**

**Respondents were asked if time off work for the intended parents to attend antenatal appointments should be paid and, if so, how many appointments should be paid.**

51 percent of those who responded to the survey said that the time off should be **paid** (55% of employees, 35% of employers, 29% of ‘others’).

Of the respondents who provided a comment, 24 specified that all appointments should be **paid**. Other comments included –

*“The Union sees no rationale for this to be unpaid.” (NASUWT)*

*“It is not their immediate or partners health, but they should be given the opportunity to be involved without penalty.” (Employee, public sector)*

*“There should be no difference between surrogate/adoptive and birth parents.” (Employee)*

*“Whilst they should be allowed to attend ante natal appointments, this is unpaid and at their own expens, or asked to work the time taken off at another time.” (Employee, legal)*

*“Surrogacy arrangements must be sufficiently rare in the Island that the costs associated with time off are entirely marginal and non-material to Jersey employers.” (Other respondent)*

*“I think that surrogate parents should be able to attend the standard number of appointments (x2 scans) and these should be unpaid, unless the companies' policy details otherwise.” (Employer, wholesale and retail)*

The Forum notes that, in the UK, the intended parents are each entitled to two **unpaid** antenatal appointments to enable them to accompany the birth mother. As a number of the respondents have pointed out, the number of births by surrogate mother is expected to be low in Jersey and so any new rights would have little impact on employers. However, introducing equivalent rights for the intended parents is important in terms of promoting an inclusive family friendly approach.

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### 9. Adoption appointments

**Recommendation 18** – The Forum recommends that the main adopter should be entitled to an unlimited number of **paid** appointments. The other adoptive parent should be entitled to an unlimited number of appointments of which up to 10 hours of appointments are **paid** at the normal rate of pay and the rest are unpaid. The adoptive parents must choose and notify their employer(s) which of them intends to be the main adopter taking the more generous entitlement (as with the existing right to adoption leave where one of the parents elects to be the ‘the adopter’ for the purpose of that right). The rights should only apply where the appointments are in Jersey and entitlement should be subject to the presentation of evidence, if requested by the employer, as with antenatal care. This right should be introduced from 1 September 2018.

#### 9.1 Time off work

**Respondents were asked if adoptive parents should be entitled to take time off work to attend adoption appointments.**

Of those who responded to the survey, 87 percent said that adoptive parents should be entitled to time off work to attend adoption appointments (87% of employees, 81% of employers, 96% of ‘others’).

Comments included –

*“The assumption is that these are relatively low in comparison to the number of maternities, therefore the impact and cost upon the States and employers will be limited. The inclusion of such rights in a framework of family friendly rights will promote the correct messages around equity of treatment when starting a family and highlight positively equality and diversity in the workplace.”* (Unite the Union)

*“We would not suggest legislation supports time off here.”* (IOD)

*“There should not be a difference between birth and adoption.”* (Employee, financial services)

*“These meetings are vital. And the adoption cannot go ahead without them.”* (Employee, public sector)

*“Adoption needs to be encouraged. There is currently scant encouragement for prospective adoptees, whom lets not forget are helping the States to discharge an onerous burden under the Childrens Law by assuming parental responsibility which would otherwise rest with the States.”* (Other respondent)

*“These should be arranged in lunch hours or outside of working hours - like all appointments.”* (Employee, public sector)

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### 9.2 Number of appointments

**Respondents were asked if there should be a limit on the number of appointments that adoptive parents are permitted to attend.**

69 percent of those who responded to the survey said that there should **not** be a limit on the number of appointments that adoptive parents are permitted to attend (72% of employees, 64% of employers, 32% of 'others').

Comments included –

*“Need to be strict here as there are many stages to the process and it could be very costly to a business, especially if they are considering an overseas adoption / surrogacy. A business could, at their discretion have a policy to cap the support to say one normal working day in total.” (IOD)*

*“Prospective adoptive parents should also be given paid time off to attend a maximum number of appointments. The number of appointments should be equated to the amount of time a typical pregnant woman would access in relation to paid antenatal appointments.” (JCCT)*

*“Whatever the minimum required by the adoption service is.” (Other respondent)*

*“The same number of appointments that would be allocated to a mother attending ante-natal appointments.” (Employee, charity)*

*“More appointments required due to procedures to protect vulnerable children.” (Employee, legal)*

*“Adoption is a valid method of initiating a family, and if anything, should be stimulated however possible. It is not fair to deny adopting parents the opportunity to participate on however many appointments necessary, or force them to use their annual leave for it.” (Employee, public sector)*

### 9.3 Paid time off for appointments

**Respondents were asked if the time off work for adoption appointments should be paid and, if yes, how many appointments should be paid.**

64 percent of those who responded to the survey said that time off work for adoption appointments should be **paid** (69% of employees, 42% of employers, 60% of 'others').

Comments included –

*“The NASUWT supports proposals that allow adoptive parents time off to attend appointments. However, the Union sees no rationale for this to be unpaid, given that these are periods of hours rather than days.” (NASUWT)*

*“Within reason, up to a maximum of 5 days' paid.” (Employer, financial services)*

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*“Adoption should be encouraged. However, financial reward for time off work is not required, there are enough hours in the week for people to make the time up.”* (Other respondent)

*“Adoption is a difficult enough process without the added worry of not getting time out of work or suffering financially to attend required appointments.”* (Employee, financial services)

*“People should have the right to attend however it shouldn't always be at the cost of the company. If they are milestone appointments they should be able to attend.”* (Employee, financial services)

*“Regardless of the method that you become a parent, you should be treated equally by your employer.”* (Employee, financial services)

*“This would be consistent with the proposal to offer partners and surrogate parents 2 appointments.”* (Employee, charity)

The Forum has been advised by the States of Jersey Fostering and Adoption team that, on average, around five local adoptions and one intercountry adoption are completed each year. It is likely that a number of other couples and individuals will also undergo the training and assessment process without ultimately adopting. However, the number of employers and employees affected by any new rights in Jersey will be small.

Prospective adopters are required to follow 24 hours of training to prepare to adopt (8 sessions of 4 hours, 2 of which are on a Saturday) as well as approximately 12 appointments of 2 hours each as part of the assessment process, some of which may be arranged in the evening. The total amount of time spent at adoption appointments is potentially greater than antenatal appointments. However, given the low number of adoptions in Jersey (and not all adopters will be working) there is likely to be minimal impact on employers and the economy. Unlike with antenatal care, it is mandatory for both parents (if there are two) to attend all training and assessment appointments which may be spread over a longer period than an antenatal care regime. Refusal to allow an employee to attend adoption appointments could prevent that person from adopting.

The Forum noted that employers may wish to see evidence that the employee is undertaking the adoption process. In the case of the current right to time off for antenatal care, the employee may be requested to produce a certificate from medical professional stating that she is pregnant and an appointment card, or similar, showing that the appointment has been made. Individuals starting the adoption process are likely to have a letter or document from the Fostering and Adoption team confirming that they have been accepted to join the programme and confirming the dates of the appointments.

In the UK, the main adopter can take **paid** time off for up to five adoption appointments. The secondary adopter can take **unpaid** time off for up to two appointments. Given that prospective adopters are required to undertake approximately 48 hours of appointments in total, the Forum considers that an hourly arrangement is likely to be particularly appropriate for the purpose of adoption appointments in Jersey. Although the number of employers and employees affected by any new rights will be small, as with rights for the intended parents in a surrogate arrangement, introducing equivalent rights for adoptive parents is important in terms of promoting an inclusive family friendly approach.

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## REVIEW OF FAMILY FRIENDLY EMPLOYMENT RIGHTS



### 10. Breastfeeding rights

**Recommendation 19** - The Forum recommends that employees should have the right to request reasonable breaks for the purpose of breastfeeding or expressing. Where the employee returns to work early, i.e. within her statutory leave entitlement (26 weeks from September 2018 or 52 weeks from September 2019) the breaks must be **paid** at her normal rate of pay for the duration of the period of statutory leave that she could have taken. After the statutory leave period, any breaks would be **unpaid**.

The Forum also recommends that employers should have a duty to take reasonable steps to provide facilities in the workplace for breastfeeding mothers to express and store milk where an employee requests it.

**Respondents were asked, if an employer has been notified by an employee that she intends to breastfeed her baby after her return to work, should her employer have a duty to provide any of the following -**

**a) Paid rest breaks during the working day to feed the baby or to express milk?**

57 percent of those who responded to the survey said that employers should have a duty to provide **paid** rest breaks (62% of employees, 36% of employers, 36% of 'others').

**b) Unpaid rest breaks during the working day to feed the baby or to express milk?**

47 percent of those who responded to the survey said that employers should have a duty to provide **unpaid** rest breaks (43% of employees, 43% of employers, 73% of 'others').

**c) Suitable facilities in the workplace to express and store milk, unless not reasonably practicable**

75 percent of those who responded to the survey said that employers should have a duty to provide suitable facilities (77% of employees, 58% of employers, 75% of 'others').

**Respondents were asked in what order they would prioritise the following employment rights in respect of breastfeeding mothers (*with number 1 as the highest priority*).**

Both employers and employees prioritised longer maternity leave over rest breaks from work and facilities in the workplace. For employees, the rights were prioritised in the following order -

1. Longer maternity leave – 80 percent of employees selected this as their first priority
2. Rest breaks from work – 59 percent of employees selected this as their second priority
3. Suitable facilities in the workplace – 54 percent of employees selected this as their third priority

For employers, the rights were prioritised in the following order

1. Longer maternity leave – 52 percent of employers selected this as their first priority
2. Suitable facilities in the workplace – 57 percent of employers selected this as their second priority
3. Rest breaks from work – 32 percent of employers selected this as their third priority

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A number of comments were received on the request to prioritise these rights –

*"I think it is unfair to rank the points above as they all compliment each other. I think too many people give up breastfeeding as it's not compatible with work, even though health benefits are proven, financial pressure is greater in Jersey." (Employee, public sector)*

*"These are equally important and should all be implemented. Some women will want to return to work and their children should not be penalised because more women answering the survey wanted to take a break from work." (Employee, public sector)*

*"They are all of equal importance. Medical wisdom suggests that breast feeding is important to promote a healthy immune system etc. with lifelong health benefits for the baby. Why wouldn't the States of Jersey take all action it can to ensure Jersey babies are as healthy as possible?" (Other respondent)*

A large number of comments were received in relation to breastfeeding, including examples from respondents' own personal experiences of breastfeeding. Comments included –

*"The NASUWT asserts that there should be a legal obligation on employers to provide sufficient facilities to allow mothers to continue to breastfeed and/or express milk. There is a clear economic benefit to this, as it would permit nursing mothers who wish to return to the workplace the ability to do so. There are also major health benefits of breastfeeding for children that would lessen their future reliance on health and social-care support. Employers should be obligated to provide not only physical facilities for breastfeeding and/or expression and/or storage of milk, but also to provide sufficient paid breaks." (NASUWT)*

*"To what extent is it "necessary" to legislate for this? Has a "need" been identified? Does discretion naturally operate on the part of the employers to allow for this? As to facilities: Consider the impact on SME's ability to practically comply with this." (ELA (JB))*

*"Where practicable, legislation should state that employers should have a policy in place to enable breast milk feeding mothers to express or to feed their child in the work place." (JCCT)*

*"Breastfeeding mothers should not get preferential treatment over bottle feeding mums as it is often not a choice and to do so would exacerbate the stigma which already exists in association with bottle feeding." (Employee, financial services)*

*"As someone who might want to still breastfeed when I return to work, I think this is important. However, I think the paid rest break should be part of the normal breaks e.g. lunch hour. I guess it depends on what kind of job you do, but for an office-based job I think I could juggle it around the business need." (Employee)*

*"All reasonable adjustments should be made to allow the mother to return to work and breastfeed." (Employer, wholesale and retail)*

*"Most offices would have somewhere suitable." (Employer, charity)*

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*“This is very difficult because you have to be careful from a health & safety and hygiene perspective. Also in the sense of rest breaks would this include the staff member going home to breastfeed or just expressing at work? Its difficult to know how much time this would require and actually how much stress it would put on the mother and the company...I think expressing at work could be very difficult and may result in comments from other staff as well.”* (Employee, hotels, restaurants and bars)

*“Rest breaks should be given within reason, i.e. it would not be reasonable for a mother to travel home to St Ouen to feed her baby.”* (Employer, financial services)

A number of respondents commented on the link between the length of the maternity leave period and the requirement for workplace facilities and rest breaks, including the following -

*“There are extensive studies around the benefits of breastfeeding for the development of babies and such provisions will make returning to work for women more accessible and enable them to juggle work with breastfeeding. Whilst such statutory provisions should be introduced, the need is even more acute currently given the relatively short nature of current statutory maternity leave in Jersey i.e. 18 weeks after 15 months versus the desire for women to continue breastfeeding on their return to work.”* (Unite the Union)

*“Longer maternity leave, post 18 weeks would allow a mother to breastfeed for the first 6 months. Not all mothers would feel comfortable expressing or feeding in the workplace. Rest breaks would allow a mother to take an extended break to go home or to the child’s nursery to feed the child or breastfeed in a more comfortable location, mothercare feeding room or the feeding room at the hospital (not ideal for mothers working outside of town).”* (Employee, charity)

*“Key to breastfeeding is to give the woman sufficient maternity leave to give breastfeeding a decent go. We have very low rates here, in part because there is not a culture of it but also because we have to go back to work so soon.”* (Employee)

*“WHO guidelines say a child should be breastfed for 6 months. Logic would dictate maternity leave ought to be 6 months. Practicalities need to be thought of here-a mother needs a warm, dry, secure, safe, hygienic place to express/breastfeed without the pressure of a watched clock.”* (Employee, legal)

*“Longer maternity leave would enable mother’s to fully breastfeed for longer, the reason our breastfeeding rates decline so much after 6 weeks is because mums are starting to think about going back to work and reducing the breast feeds and introducing formula.”* (Employee, public sector)

*“I think that when a woman returns to work there can be many complications with continuing to feed, personally I feel it would be better to have longer off and feed then prepare to stop when returning to work.”* (Employee)

*“39 weeks maternity leave ensures that mothers can take longer before feeling any financial pressure to return to work which leads to there being more requirement to provide further facilities at an earlier time.”* (Employer, financial services)

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*“Breastfeeding / feeding is bonding time especially if a woman does not have much maternity leave. An element of privacy and quiet is likely to be appreciated if not necessary in a busy office or workplace.”* (Other respondent)

*“As I am currently in this situation, I use my flexible lunch hour to feed my baby. It didn't even occur to me to request paid rest breaks. My office has a small private room and a fridge, both of which you need when expressing. Longer maternity leave would not necessarily help as it has recently been found that there are still benefits to breastfeeding to the age of 6!”* (Employee, construction)

*“Bearing in mind the health benefits of breastfeeding and our appalling rate of it here, the pressure for women to be working we need to make it as easy as possible for them. To my mind mothers should have more paid maternity leave at home, that way it would more encouraging for them to continue. We need to value mothers more than we do, and by offering protection and encouragement would be a good start.”* (Employee, agriculture)

There was more support amongst respondents for **paid** breaks rather than **unpaid** breaks, however facilities in the workplace was more popular than both of those options with 75 percent of respondents in favour.

The 2017 Jersey Opinions and Lifestyle Survey<sup>12</sup> also asked respondents about breastfeeding breaks and facilities. The survey found that 40 percent of adults agreed strongly and 22 percent agreed slightly that employers should provide rest breaks for breastfeeding mothers. The survey also found that 35 percent of adults agreed strongly and 25 percent agreed slightly that employers should provide facilities for breastfeeding mothers.

The Forum considered whether statutory rest breaks would be useful to breastfeeding mothers if facilities are not also provided by the employer to express and store milk. The Forum noted that some employees may be able to use a statutory break to feed the baby or express milk elsewhere (e.g. at home or a child care provider). The Forum also considered whether facilities in the workplace to express and store milk would be useful to employees if they are not also provided with a statutory rest break to express milk. The Forum noted that some employees will use a lunch break, alter their working hours or make up the time later. While alternative arrangements can be made in either case, the Forum considers that both facilities and rest breaks should be provided, if this is to be a meaningful right and one that will support women who wish to continue breastfeeding on returning to the workplace.

Discussions during stakeholder meetings explored what facilities an employer might be expected to provide, noting that often small changes can be made by an employer that would allow a woman to continue expressing on her return to work. For example, a suitable private space does not have to be available permanently and a mother will often provide her own cool bag rather than requiring a fridge. A local breastfeeding working group<sup>13</sup> that promotes the exclusive breast milk feeding of infants up to six months is working to educate employers and change attitudes towards breastfeeding. The group has provided a sample breastfeeding policy and encourages employers to have a written guideline which outlines breaks for breastfeeding mothers, facilities for expressing milk and storage of breast milk at their place of work.

<sup>12</sup> [www.gov.je/Government/JerseyInFigures/StatisticsCommunityPeople/Pages/SocialStatistics.aspx](http://www.gov.je/Government/JerseyInFigures/StatisticsCommunityPeople/Pages/SocialStatistics.aspx)

<sup>13</sup> [www.jcct.org.je/about-jcct/our-work-with-others/](http://www.jcct.org.je/about-jcct/our-work-with-others/)

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The JACS best practice guide for breastfeeding in the workplace highlights that *“Whilst the legislation in Jersey does not require an employer to provide facilities for breastfeeding/expressing milk it is good practice to do so. The benefits of being able to provide some facility to enable employees to continue to breastfeed once they return to work can encourage employee loyalty and may help with the general wellbeing of the employee. However, there may be a risk of indirect sex discrimination if the employer does not give due consideration to any request or risk a claim for refusing to consider a flexible working request.”*

The Forum notes that exclusive breastfeeding for at least 26 weeks is recommended by the World Health Organisation. According to the Bulletin of the World Health Organisation, *“the existence of a national policy guaranteeing breastfeeding breaks until an infant is at least 6 months old was associated with significantly higher rates of exclusive breastfeeding.”*<sup>14</sup>

The Forum’s recommendation to increase the period of statutory maternity leave to 26 weeks in 2018 and to 52 weeks in 2019 will hopefully support those who wish to continue exclusive breastfeeding for at least 26 weeks. This will also support the 1,001 Critical Days<sup>15</sup>, a manifesto which was introduced in Jersey in 2015 to highlight the importance of acting early to give children a positive start in life. The Minister who has responsibility for that initiative, Deputy Kristina Moore, was assigned as breastfeeding champion for the States of Jersey earlier this year. In a November 2017 news release<sup>16</sup> about Breastfeeding Buddies - a group that supports new mothers - Deputy Moore said;

*“Some mothers were worrying about going back to work at an early stage. This can put a woman off breastfeeding altogether as they put a lot of effort and time into establishing the feeding and become worried about the difficulties of then stopping to go back to work. I hope that we can encourage employers to consider these matters and meet with new mothers, before they return to work, to assess their needs and discuss whether private areas in the workplace can be made available for the mother to express milk or feed baby on a break. This is an important matter to consider as concerns about going back to work can cause unnecessary stress and impact on the mother’s wellbeing, which has a negative impact on their ability to work.”*

Some of those who responded to the Forum’s consultation had assumed that, if the statutory maternity leave period were to be extended to at least 26 weeks, breastfeeding facilities and breaks from work would not be required. However, mothers who return to work earlier while they are still breastfeeding would benefit from these rights (e.g. where the father will take over the child care, as well as mothers who wish to continue breastfeeding for longer than 26 (or 52) weeks). It is important to consider these additional workplace rights to provide more flexibility and choice for families.

The Forum considered whether the law should specify a limited number or duration of breaks so that employers know what to expect. However, it is clear that requirements will vary greatly in terms of the frequency and duration of the breaks required, which may depend on factors such as the age of the baby. The Forum concluded that to provide a right to take breaks but then limiting those breaks would simply place another barrier and restrict choices for mothers who wish to continue breastfeeding. The Forum notes that employers often have concerns about breastfeeding breaks and facilities, but in reality, for the relatively small number of

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<sup>14</sup> Breastfeeding policy: a globally comparative analysis, Bulletin of the World Health Organisation [www.who.int/bulletin/volumes/91/6/12-109363/en/](http://www.who.int/bulletin/volumes/91/6/12-109363/en/)

<sup>15</sup> [www.gov.je/news/2015/pages/1001criticaldays%20.aspx](http://www.gov.je/news/2015/pages/1001criticaldays%20.aspx)

<sup>16</sup> [www.gov.je/news/2017/pages/breastfeedingbuddies.aspx](http://www.gov.je/news/2017/pages/breastfeedingbuddies.aspx)

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women who wish to continue exclusive breastfeeding after they return to work, they can generally be accommodated with little difficulty.

The Forum considered whether an approach similar to the existing right to request flexible working could be adopted in order to introduce an element of reasonableness to a request. On the basis that breastfeeding breaks are potentially a short-term and temporary arrangement rather than a long-term or permanent change to terms and conditions of employment, the Forum considers that the current business grounds for refusing a flexible working request and the application procedure would be excessive in the case of breastfeeding breaks. The Forum considers that, in most circumstances, employers would accept a reasonable request from an employee for breaks to facilitate breastfeeding.

Data provided by the World Health Organisation<sup>17</sup> shows that 71 percent of countries guaranteed paid breastfeeding breaks. The Forum considered whether any breaks should be paid, taking into account the potential impact on the employer of paid breaks, particularly if the employee chooses to breastfeed for a number of years, as well as the difficulties administratively for employers if breaks are unpaid and variable break times must be monitored and pay reduced accordingly.

The Forum is concerned that women who wish or need to return to work early may decide to discontinue exclusive breastfeeding for financial reasons if breaks are not paid. The Forum considers that an appropriate compromise can be provided. Where the employee returns to work within the period of her statutory leave entitlement (26 weeks' maternity leave from September 2018 or 52 weeks' parental leave from September 2019) any breaks must be **paid** at her normal rate of pay for the duration of the statutory leave that she could have taken. After the statutory leave period, any breaks would be **unpaid**.

In making this recommendation, the Forum hopes to support women who want to continue exclusive breastfeeding to have the choice to return to work so that their talent may be retained in the workforce and to remove barriers to breastfeeding.

The Forum is aware that for some employers, it will not be easy to provide specific facilities in the workplace, for example, due to the size or location of the workplace. The Forum considers that it might be possible to include a 'reasonable steps' type provision, similar to that included in the consultation draft of the disability discrimination Regulations.<sup>18</sup> Such a provision would guide employers (and ultimately the Employment and Discrimination Tribunal) as to when it might be reasonable for an employer to provide facilities in the workplace to express and store milk where an employee requests it, taking into account matters including –

- (a) the extent to which any steps are, or would be if taken, effective to provide suitable facilities;
- (b) the extent to which any steps are, or would be if taken, practical;
- (c) the cost of any steps that have or might be taken;
- (d) the extent of the financial, administrative and any other resources available to the person, including any provided by a third party, for the purpose of taking any steps;
- (e) characteristics of the person such as the nature of the person's business, if any, and size.

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<sup>17</sup> Table 2 Characteristics of national policies on breastfeeding breaks in the workplace, 2012 [www.who.int/bulletin/volumes/91/6/12-109363/en/](http://www.who.int/bulletin/volumes/91/6/12-109363/en/)

<sup>18</sup> See [www.gov.je/consult](http://www.gov.je/consult), the proposed new Article 7A(9)

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#### 11. Health and safety absence

**Recommendation 20** – The Forum recommends that pregnant and/or breastfeeding employees should have the right to **paid** absence where both of the following conditions are met -

1. It is not possible to allocate the employee to other duties, alter her duties or make appropriate changes to the working environment, **and**
2. It is not reasonably practical for the employee to continue working in her usual employment according to a risk assessment undertaken in accordance with Article 3 of the Health and Safety at Work (Jersey) Law 1989.

**Respondents were asked, if the workplace is a potential danger to a woman who is a new, expectant or breastfeeding mother and the employer is not able to offer alternative “safe” duties, should the employer be obliged to provide a period of paid absence until the woman can safely resume her duties?**

65 percent of those who responded to the survey said that the employer should be obliged to provide a period of **paid** leave until the woman can safely resume her duties (69% of employees, 50% of employers, 44% of ‘others’).

Comments included –

*“The mother should not have to bear the costs of her employer not having suitable facilities for her to work. Ideally, administrative work (available in absolutely every company) should be done if the mother’s usual role is hazardous in its nature, but when not possible, paid leave should be granted.”* (Employee, public sector)

*“It is an employer’s responsibility to provide a safe working environment for an expectant employee, if this is not possible they should accommodate the employee until they are able to return to the workplace.”* (Employer, financial services)

*“Pros: Pay to the employee in such “no fault” circumstances. Cons Requirement to pay could give rise to situations where unscrupulous employers seek to take the health and safety risk as opposed to releasing the member of staff for a period of paid suspension.”* (ELA (JB))

*“We choose our careers/jobs and we know whether or not we want children. Sadly we can’t ‘have it all’ and some compromise is required when picking a career or job.”* (Other respondent)

*“I think this would be difficult and perhaps there would need to be a timescale in place and a review date. Also would the employee be able to employ someone to cover the role at that time?”* (Employee, hotels, restaurants and bars)

A number of respondents commented about the employer’s general responsibility to provide a safe workplace. Also, some respondents assumed that this question was about pregnancy-related illness. This is different from a situation in which a woman is unfit to work because of a pregnancy-related condition, in which case a woman is likely to be on sick leave. This is about the specific job (or a part of it) being dangerous or unsuitable for a new, expectant or

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breastfeeding mother. This relates to specific roles where the nature of the work, or some of the duties, necessarily involve certain risks to women who are pregnant or breastfeeding, such as exposure to ionising radiation or certain chemicals.

A number of respondents commented on the question of whether the employer should be required to pay the employee during the period of leave -

*“This is unlikely to affect a lot of employers in Jersey, however in the few cases it does, the woman's rights and income should be protected. The States should support these employers.”* (Employee, financial services)

*“We would do this for our staff as it's not their fault they cannot complete certain tasks. However it would not be fair for them to receive 100% of their wage and I think they should have to use annual leave if they have it.”* (Employer, public sector)

*“Whilst JACS have not received any queries in relation to this and again a concern would be that a dismissal would cost less than paying for any such period. However if there was say a short period where the employer was able to make a reasonable adjustment to allow the employee to continue to work in a safe environment then payment should be considered.”* (JACS)

A number of respondents commented on the length of time during which an employer might be required to provide paid leave specifically in relation to breastfeeding -

*“I can't think of an example where work would be unsafe for a breastfeeding mother but in this instance I would say yes, but perhaps capped for a certain time, as in theory a woman can continue to breastfeed for years.”* (Employee, public sector)

*“With regards to breastfeeding for some this can go on for a few years so would be unreasonable to expect an employer to accommodate this on an ongoing basis.”* (Employee, public sector)

*“This would be unfair to the employer, again because the mother could choose to breast feed for years. If there is such an occupation that would be risky I imagine this would be taken advantage of.”* (Employee, construction)

Legislation in the UK crosses two laws; the Management of Health and Safety at Work Regulations 1999 requires a risk assessment and requires the employer to take certain actions if any risk cannot be removed (adjust conditions/hours, offer suitable alternative or suspend on **paid** leave for as long as necessary). The Employment Rights Act 1996 makes provision for pay during the period of absence.<sup>19</sup>

Under the general duties imposed by Jersey's Health and Safety at Work Law, all employers must assess the significant risks associated with its working activities. If there are any specific risks which may affect a pregnant employee or her baby, this should be identified within the generic risk assessment.

According to both the Director of JACS and the Director of the Health and Safety Inspectorate, there are very few occupations or working activities in Jersey which will pose a significant risk, particularly to the extent that absence from the workplace may be deemed necessary

<sup>19</sup> [www.hse.gov.uk/mothers/law.htm](http://www.hse.gov.uk/mothers/law.htm)

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and so very few women are likely to be affected. Working with ionising radiation is one of the few and this is covered by the Approved Code of Practice for work with ionising radiation. Given the circumstances in which this applies in Jersey, such as radiographers at the hospital and vets, there are likely to be few circumstances in which risks cannot be controlled to acceptable levels (e.g. reducing the level of exposure to ionising radiation), or alternative arrangements cannot be made (e.g. moving the employee to administrative duties). Where a woman works in a job that poses a risk during pregnancy or breastfeeding, it is likely that she and her employer will be fully aware of the risk in advance.

The Forum notes that an employer would have to pay the absent employee as well as any replacement employee for an indefinite period and has considered whether it is appropriate to introduce a right where there is little evidence of a problem for women in Jersey. The Employment Law already provides that it is automatically unfair from day one of employment for an employer to dismiss a woman for reasons connected with her pregnancy, as well as giving protection against detriment and dismissal on grounds of pregnancy and maternity. However, it is possible that introducing a right might remove a further barrier to breastfeeding for some women and that employers are more likely to provide alternative work for an employee in this situation if the alternative is a requirement to provide **paid** absence.

The Forum considers that this is a 'no fault' situation in which employees should be protected for as long as the risk assessment says that there is a risk to the woman. If paid absence is not available, an employee is likely to take sick leave instead and the Forum considers this to be an undesirable outcome.

The Forum notes that, under the Discrimination Law, treating a woman less favourably because of breastfeeding is direct discrimination on grounds of maternity irrespective of how long breastfeeding continues for. In the UK, **paid** absence must be for as long as is necessary to protect the health and safety of the employee and her child.

## 12. Flexible working

### 12.1 Right to request flexible working

**Recommendation 21** - The Forum recommends that the right to request flexible working should be extended so that it applies to all employees, not just those with caring responsibilities.

Respondents were asked if the right to request flexible working should be extended to all employees, regardless of their caring responsibilities.

70 percent of those who responded to the survey said that the right to request flexible working should be extended to all employees (71% of employees, 69% of employers, 56% of 'others').

Comments from those who supported extending the right included –

*“Why not? There are many reasons why people might want to work flexibly. Flexible working is good for the worker and the employee and for the economy as it keeps people economically active and happy.”* (Employer, public sector)

*“We work in a 24/7 world - it may be to the employers advantage to have people working out of hours or later.”* (Employee, financial services)

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*“Flexible working should be offered to all employees regardless of their caring responsibilities. They may have other reasons for requesting flexible working such as disabilities, physical health problems or mental health problems and in such situations, flexible working may be beneficial to enable a person to work fewer hours or from home to manage their conditions.”*

*“We are a modern society and as long as duties are performed satisfactorily then why not especially with I.T options to work/communicate from home, on the move etc.”  
(Employee, legal)*

*“Any employer should want to help in such situations but requesting does not mean the employer must agree.” (Employer, charity)*

*“The NASUWT supports a right for all workers to request flexible working. The Union asserts that it can and does benefit service provision. The Union believes that flexible working can bring about an improvement in women’s engagement with the labour market when they are caring for children, as it can help open up the number of vacancies advertised on a flexible-work basis from day one. In addition, it should assist in ensuring all employees receive the same treatment in terms of the right to request flexible working..” (NASUWT)*

*“This could cause some employers real issues as they could potentially be continuous processing of flexible working applications and a ‘pecking order’ put in place either expressly or implied on who should be granted flexible working. JACS have already seen an example of an employer who wanted to ‘reserve’ flexible working for female employees, ‘just in case’. Although the option of requesting flexible working for say older employees who are not ready for retirement but may wish to work fewer hours could be advantageous to employers as well with the Age Discrimination changes due on 1 September 2018.” (JACS)*

*“The need for flexible working is growing rapidly, however, we know for it to be successful, the balance is absolutely crucial and employers have to be certain that the flexibility offered works effectively for all parties...We are also a society with an ageing workforce. Flexible working would enable those employees who are nearing retirement age to consider more flexible working arrangements by continuing to be associated with the company, hence retaining valuable skills and knowledge for the business.” (JCCT)*

*“The extension of the flexible working regulations to all employees is again a progressive step and not one that will place any onerous restrictions upon employers given that the right is for employees to request flexible working and the employers, subject to the key criteria have the right to decline the application.” (Unite the Union)*

*“Enable the Employer to have the ability to alter the terms to requests with say 3 or 6 months notice - depending how long its been in force - or to have the ability to review annually - with notice if arrangement can no longer be considered viable. ie: PT hours agreed child not left school others in team now have young children but employer cannot offer as unable to change the PT arrangement of the person they granted to for those specific reasons...This DOES cause resentment amongst colleagues.”  
(Employee, financial services)*

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Comments from respondents who did not support extending the right included –

*“I’d love it if everyone could choose to work flexibly, but that’s not the way the world is. If everyone could apply then there may not be opportunities for those who really need it when they need it.”* (Employee, public sector)

*“Primarily this should be offered to parents or carers.”* (Employer, charity)

*“I think if too many people applied for flexible working then people who genuinely require it might suffer as a result of employers not having sufficient cover to grant a flexible working application.”* (Employee, financial services)

*“This would be extremely difficult to manage and be unfair on a business. The employment offer and acceptance would contain hours, times and locations to begin with to suit the business.”* (Other respondent)

*“Consider the difficulties this would take into account for organisations operating a service 24-hours per day, 7 days per week working shift-work.”* (Employee, charity)

*Employers wouldn’t have the capacity to facilitate flexible working for all employees in most cases. Priority for flexible working needs to be considered according to indivisible needs and the needs of the employer. A balance is required.”* (Employee, financial services)

A number of comments in the written responses and the stakeholder meetings indicated that there may be a lack of awareness that the right is already in place and that it applies to anyone with caring responsibilities, not just to parents of children. Comments included -

*“Many people have caring responsibilities for parents and it’s on fair to offer it to one group of carers and not the other.”* (Employee)

*“We suggest the ‘right’ to request continues to be restricted to those with caring responsibilities but be clear that care does not simply apply to parents with young children but to those with responsibilities for others e.g. elderly parents / relatives, dependants with disabilities and so on.”* (IOD)

*“I work in hr and am currently pregnant. The women I have met through my pregnancy have not known that they have the right to request flexible working.”* (Employee, financial services)

While there may be a case for raising awareness about this right, discussions during the stakeholder meetings also indicated that the right has worked well in practice and that some employers already offer flexible working to all staff. It was also noted at one of the stakeholder meetings that flexible working is not as complex as some employers might think and that employers should be supported and encouraged to promote flexible working opportunities as this can enable the employer to be responsive to employees on an individual basis without permanently changing the contract.

A ‘Working parent survey 2017’ carried out by the Jersey Child Care Trust found that 49 percent of respondents have no extended family support in the Island and 48% said more flexibility from employers would help them meet their work and family needs. The lack of family support for some employees, particularly in seasonal industries was also highlighted

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in the Forums stakeholder meetings. In response to the JCCT survey, the President of the Jersey Chamber of Commerce, Eliot Lincoln said: *“The right to request flexible working was a fundamental change in Jersey legislation, so it is encouraging that businesses and organisations in the island are recognising the benefits of offering flexible working practices. The fact that 68% of respondents felt that their working arrangements were meeting their needs, is a good sign and a positive differentiator for businesses looking to recruit in a competitive marketplace.”*<sup>20</sup>

The right to request flexible working is currently limited to those with caring responsibilities based on a previous recommendation from the Forum (2008). Despite support amongst the consultation respondents, the Forum did not at that time recommend that all employees should have the right to request flexible working because the Forum’s remit was to consider the introduction of family related rights in the workplace. As in 2008, the latest consultation responses would support extending the right to all employees to benefit families and children, as well as employers and the economy, including;

1. To address the perception that flexible working is a benefit for mothers of young children. If the right is extended to all employees, it may become more socially acceptable for fathers to make a request and the career penalty for women may reduce.
2. Helping families to manage life and work - More flexible working options might help a wide range of people, not just parents, including people with disabilities, carers, young people seeking entry to the workforce and older employees in a more gradual approach to retirement.
3. Flexible working can be offered by employers as an incentive to attract and retain skilled staff, and as a way of making better use of existing skills.

#### 12.2 Qualifying period for flexible working

**Recommendation 22** - The Forum recommends that the qualifying period for the right to request flexible working should be removed in order to provide a day-one right. The Forum notes that a right to request a change to the contracted times and hours of work is likely to make a significant difference to zero-hour contract employees.

**Respondents were asked if the 15 month qualifying period for the right to request flexible working should continue to apply.**

48 percent of those who responded to the survey said that the current 15 month qualifying period should continue to apply (50% of employees, 42% of employers, 36% of ‘others’). When asked to specify a different qualifying period, 22 percent of respondents said there should be no qualifying period, 15 percent said 6 months, 39 percent said 1 year, and 20 percent of respondents specified a period greater than the current 15 month qualifying period. Comments on a qualifying period included –

*“Flexibility if not based on caring purposes is more of an earned benefit and will entail additional administration from employers.”*(Other respondent)

*“There needs to be a balance. It shouldn’t be to the detriment of small employers.”*  
(Employee, financial services)

<sup>20</sup> [www.jcct.org.je/working-parent-survey-2017/](http://www.jcct.org.je/working-parent-survey-2017/)

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*“Business should be afforded the right to have the newly-engaged worker to work the terms agreed for a period before assess whether key terms (such as hours) should / could be amended.” (ELA (JB))*

*“In terms of the length of service qualification, such a provision would appear to have no justification and would also act as an inhibitor to a dynamic employment market with workers who require flexible working or likely to require flexible working in the future not moving role due to be barred from making an application for flexible working for 15 months.” (Unite the Union)*

*“The NASUWT does not believe that a cogent case can be made against flexible working being a day-one right. This entitlement from day one would enable and encourage more parents and carers to access jobs. The development of flexible working should enable greater gender equality in both the workplace and at home, as well as play a role in promoting greater social mobility. The Union believes that flexible working would help to break down stereotypes in relation to parenting that would increase gender equality...Any flexible working entitlement should be a day-one right.” (NASUWT)*

*“I don't see why a qualifying period is relevant. In this day and age it's just a question of whether it is possible to accommodate the request and still meet the business need. If yes, then it should be done.” (Employee)*

*“We feel that all employees should have the opportunity to request flexible working, as the business is still able to decline the request if they have a genuine business reason to do so.” (Employer, financial services)*

*“An employer can either accommodate the request or deny it for the specified, defined reasons. 15 months service shouldn't affect this and it could be mutually beneficial for both employee and the employer.” (Employee, financial services)*

The Forum notes that, in terms of the number of responses, most respondents supported either maintaining the qualifying period at 15 months or reducing it to 12 months. However, the comments and discussions at the stakeholder meetings provided some convincing reasons for removing the qualifying period.

The Forum's 2008 recommendation notes that the original intention was to match the 15 month qualifying period for entitlement to certain periods of maternity and parental leave. The Forum appreciates that consistency across the legislation can sometimes be helpful. However, the same qualifying periods will not necessarily be appropriate for different employment rights. In addition, the Forum is now recommending that the 15 month qualifying period be removed from the right to maternity leave.

A 12 month qualifying period would match the qualifying period for protection against unfair dismissal. However, there is no particular reason why these qualifying periods should be the same. The Forum has also considered whether there is sufficient value in amending the law to reduce the qualifying period by only 3 months, from 15 months to 12 months. The Forum noted that most probationary periods are 6 months or less and at this stage in employment, other employment benefits often become available to an employee. In addition, the qualifying period for the equivalent right in the UK is 6 months. A six month period should allow the employer time to assess capability and whether a job can be done with different hours, times or location of work.

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At the public consultation meetings, the Forum explored the view that an employee should have to show some initial commitment to the employer and that an employer should not have to consider reducing an employee's hours from day one of employment. However, some respondents identified that a day-one right might encourage employers to recognise the potential benefits to the business of more flexible working opportunities and to consider these options prior to advertising and recruitment. For some employers, any opportunities to make a role more flexible will have already been considered before a job is advertised in order to attract the best candidates. Other employers continue to advertise jobs at standard office hours without properly considering alternative arrangements.

The Forum considered what a qualifying period is trying to achieve, prevent or reward in the case of the right to request flexible working;

- To prevent requests from day-one of employment?
- Time to demonstrate commitment to the employer?
- Time to assess capability?
- To have worked under the original terms and condition before seeking a change?

The Forum considers that, if the right to request flexible working is intended to help people to juggle life and family responsibilities with work, it is not appropriate for this to be treated as an employment "benefit" that the employee must build up an entitlement to by showing a period of commitment to the employer. However, if the intention of a qualifying period is to ensure that the employee can do the job before changing the terms and conditions, 12 months is likely to be too long. A standard probationary period of 6 months is likely to be sufficient for that purpose.

Some employers in Jersey already give all of their employees the right to request flexible working from day-one of employment but others do not. The Forum considers that extending this right to all employees is well supported in the consultation responses and removing the qualifying period would have no financial implications for employers. This might seem a big change for some employers. However, while the employer must follow due process, ultimately they have the right to refuse a request on genuine business grounds and the employee can only make one request in a 12 month period.

The Minister wrote to the Forum in July 2017 following the release of the UK government report "Good work: the Taylor review of modern working practices" which recommended that zero-hour contract workers in the UK should have the right to request guaranteed working hours. The Minister noted that Jersey's Employment Law already provides a right to request a change to the terms and conditions of employment relating to the hours, times, or location of work (which is known as the right to request flexible working).

The Minister noted that she had already directed the Forum to consider whether this right should be extended so that it applies to all employees, instead of just employees with caring responsibilities, and whether the qualifying period should be removed or reduced from 15 months. The Minister considered that this may be a good option to help employees who would prefer to work fixed hours each week, while allowing zero-hour contracts to continue to be used by those who value their flexibility. The Minister asked the Forum, as part of its decision-making process in this review, to bear in mind any potential changes within the additional context of zero-hour contract employees.

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### 13. Other comments

**Foster carers** – *“Increased support and assistant for foster parents.”* (Employee, public sector) Comments were also submitted by the local fostering and adoption team in relation to support for foster carers. The Forum has advised the team that support for foster carers is not within the remit of this consultation but confirmed that there is currently a statutory right to request flexible working for employees with caring responsibilities (which the Forum has now recommended be extended to all employees with no qualifying period of employment).

**Advice** – *“There needs to be clear information/advice available and strong communication when any changes come in to force.”* (Jersey Hospitality Association) The Forum understands that JACS will continue to provide advice, guidance and training on any new rights under the Employment Law.

**Dependent leave** – *“Leave for caring for sick children should be paid by law up to a maximum amount.”* (Employee, IT). *“Parents ought to have available approx 8 days per year to be taken as “dependent days”.* (Employee, legal). *“I believe that there should be a system of paid leave for all care givers of close family not just focussing on children but also people providing elder care as well. We are in an aging population and we are not addressing ‘family’ leave in all its forms, simply focussing on those who have had children is not enough.”* (Other respondent). The Forum notes that periods of leave to provide care for dependents was not within the remit of this consultation. Employees with caring responsibilities already have the right to request flexible working (which the Forum has now recommended be extended to all employees with no qualifying period of employment).

**Social Security benefits** -*“We feel there should be a statutory Adoption Allowance and Grant to match that offered for Maternity. We feel there should be statutory parental allowance for people taking parental leave.”* (Employer, financial services). A number of other respondents commented on the range and criteria for social security benefits. The Social Security Law is outside of the Employment Forum’s remit. The Department has recently consulted on maternity benefits.

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### Appendix 1 – Background provided in consultation paper

The following background information was presented in the Forum's consultation on family friendly rights, released on 5 January 2017. Footnotes provide updated rates of benefit, where applicable.

#### LOCAL STATISTICS

##### Parental leave - Jersey Opinions and Lifestyle Survey 2016 (JOLS)<sup>21</sup>

- 87 percent of adults said that parents should be able to share parental leave (84% of men and 89% of women)
- Reasons for agreeing that leave should be shared were -
  - To allow both parents to be involved in childcare (65%)
  - To make it easier to fit childcare around work (17%)
  - More practical financially (13%)
- 59 percent of adults said that parents should not be able to share parental leave with the child's grandparents
- Of the parents who had taken a period of maternity, paternity or adoption leave in the last 5 years -
  - 18 weeks' leave was taken on average
  - Women had taken an average of 29 weeks' leave (14 weeks' paid and 15 weeks' unpaid leave)
  - Men had taken an average of 2 weeks' leave (2 weeks' paid leave and 1 week's unpaid leave).
  - Around two-thirds of men had not taken any parental leave
  - 8 out of 10 parents would have liked to have taken more leave (92% of men and 69% of women)
  - 69 percent of men said they were prevented from taking more leave because the length of leave was limited by their employer
  - 71 percent of women said financial reasons prevented them from taking a longer period of leave

##### Economic activity - Jersey Opinions and Lifestyle Survey 2016 (JOLS)

- The economic activity rate for all working age adults is 86 percent (87% of men aged 16-64 and 85% of women aged 16-59)
- Men were contracted to work 2.5 hours per week longer than women (37.5 and 35.0 hours on average, respectively)

##### Economic activity - Census 2011<sup>22</sup>

- For men, the rate of economic activity (either working or looking for work) decreased from 86 percent in 1961 to 74 percent in 2011
- The economic activity rate for women increased substantially over a 50 year period, from 37 percent in 1961 to 61 percent in 2011. (The economic activity rate for women in the UK in 2011 was 57%)

<sup>21</sup> [www.gov.je/Government/Pages/StatesReports.aspx?ReportID=2481](http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=2481)

<sup>22</sup> [www.gov.je/Government/Census/Census2011/Pages/2011CensusResults.aspx](http://www.gov.je/Government/Census/Census2011/Pages/2011CensusResults.aspx)

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- Of the **working age** population in Jersey (age 16-64 for men and 16-59 for women) 82 percent were economically active
- Over three-quarters (77%) of working age women were economically active
- Of those who were of working age but economically inactive, 44 percent of the women and 3 percent of the men were looking after the home
- 20 percent of working women worked part-time compared to 4 percent of men

#### Sex discrimination – Jersey Annual Social Survey 2012 (JASS)<sup>23</sup>

- A quarter of respondents said they had been discriminated against at least once in the previous 12 months. For one in 20 people, the discrimination was on grounds of gender (5%)
- Women were more likely to report having been discriminated against on grounds of gender (9%) than men (2%)
- The most frequently cited location of the discrimination was at work (36% of respondents) and 23 percent reported discrimination when applying for a job

#### SOCIAL SECURITY BENEFITS

**Maternity grant** is a lump sum payment which may be paid either before or following birth to help with the general cost of having a baby. The current rate is £612.57<sup>24</sup> which is payable for each baby (including multiple births). To qualify, the mother or her husband/civil partner must have paid enough contributions for at least three months before the expected or actual date of childbirth. An equivalent grant for adoptive parents is also available where a person has been granted an adoption order.

**Maternity allowance** is a weekly benefit paid to help a mother take time off work to give birth and look after her baby. The full rate per week is currently £204.19<sup>25</sup> (the amount paid is based on the mother's own contributions) and can be paid for a maximum of 18 weeks as compensation for loss of earnings while the woman is not working. Jersey's maternity allowance is more generous per week than the UK equivalent but is available for fewer weeks in total (the UK benefit is paid for 39 weeks at £140.98 per week). There is currently no weekly allowance in Jersey associated with periods of parental or adoption leave.

The majority of parents who had a baby in 2015 received a maternity grant in 2015. From 1 January 2015, women have had more flexibility in the timing of their maternity allowance claim. The Social Security Department's annual report for 2015<sup>26</sup> states that this is likely to explain the reduction in the number of claims made in the latter months of 2014. Between September and December 2014, claims for Maternity Allowance decreased by 15 percent on average each month, and claims for a Maternity Grant decreased by 28 percent on average each month. This was followed by a significant increase in the number of claims in January 2015 when the rule change was in force. (See Table 2).

A number of other benefits are available from the Social Security Department to support families including Income Support and Home Responsibility Protection. More information is

<sup>23</sup> [www.gov.je/Government/Pages/StatesReports.aspx?ReportID=859](http://www.gov.je/Government/Pages/StatesReports.aspx?ReportID=859)

<sup>24</sup> Since the Forum's consultation was released, the rate has been increased to £628.53 per week.

<sup>25</sup> Since the Forum's consultation was released, the rate has been increased to £209.51 per week.

<sup>26</sup> [www.gov.je/SiteCollectionDocuments/Government%20and%20administration/Social%20Security%20Department%20Minister's%20Report%202015.pdf](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/Social%20Security%20Department%20Minister's%20Report%202015.pdf)

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available on the website<sup>27</sup>. It is not within the Forum's remit to consult on, or to recommend, changes to social security benefits.

**Table 2 - Maternity indicators, 2011 to 2015**

Indicator	2011	2012	2013	2014	2015
No. of Maternity Allowance claims in the year	944	982	894	834	876
No. of Maternity Grant claims paid in the year	1,056	1,011	970	837	1,020
No of Births Recorded	1,102	1,123	1,017	985	997

### OTHER JURISDICTIONS

This section provides a high level summary of the main provisions in some relevant jurisdictions that you may wish to consider when you respond to the survey. In presenting this information, the Forum is not advocating any particular system or approach.

#### Guernsey

From 1 April 2016, the Maternity Leave and Adoption Leave (Guernsey) Ordinance 2016 provides the following statutory rights:

- Paid time off for antenatal appointments during working hours
- Basic maternity leave of 12 weeks (includes 2 weeks' compulsory leave)
- Enhanced period of an additional 14 weeks' maternity leave for employees who have 15 months' service
- The right to return to the same job or a suitable alternative
- The partner of an employee who is entitled to basic maternity leave and has 15 months' service has a right to take two weeks' maternity support leave
- Maternity allowance at a rate of £150.43 per week for up to 18 weeks<sup>28</sup>

Employers in Guernsey are not required to provide paid maternity leave, paternity or adoption leave. Employers who choose to do so provide such benefits through a discretionary or contractual agreement and reference to any such policy must be included in the statement of the main terms and conditions of employment.

#### Isle of Man

Family friendly rights are set out in the Employment Act 2006 and Regulations made under that Act, including the Maternity Leave Regulations 2007 and the Paternity Leave Regulations 2007. These include:

- Paid time off for antenatal appointments during working hours
- 26 weeks' Ordinary Maternity Leave (includes 2 weeks' compulsory leave)
- 26 weeks' Additional Maternity Leave for employees with 26 weeks' service
- The right to return to the same job
- Paternity leave of either one or two weeks

<sup>27</sup> [www.gov.je/benefits/maternityfamilysupport/Pages/index.aspx](http://www.gov.je/benefits/maternityfamilysupport/Pages/index.aspx)

<sup>28</sup> Since the Forum's consultation was released, the benefits system has changed and maternal health allowance and parental allowance are paid at a maximum of £206.43 per week

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- Adoption leave matching maternity and paternity leave for birth parents
- A right to request flexible working for the parents of a child under 6 years old; the parents of a disabled child under 18 years old; and/or have defined caring responsibilities. Available to employees with 26 weeks' qualifying service
- Maternity allowance at a rate of £179.85 per week for up to 39 weeks

As in Guernsey, employers in the Isle of Man are not required to provide paid maternity leave, paternity or adoption leave.

#### UK

Family friendly rights are provided primarily in the Employment Rights Act 1996, the Employment Relations Act 1999, the Employment Act 2002, the Work and Families Act 2006 and the Children and Families Act 2014. These include:

- Paid time off for antenatal appointments during working hours
- Unpaid leave for fathers or partners to attend two antenatal appointments
- For adopters, 5 paid adoption appointments for the main adopter and 2 unpaid appointments for the other adopter.
- Statutory maternity leave of 52 weeks with no qualifying period of employment
  - Ordinary Maternity Leave - 26 weeks (includes 2 weeks' compulsory leave)
  - Additional Maternity Leave - 26 weeks
- Statutory Maternity Pay – depending on contributions for up to 39 weeks
  - 90 percent of average weekly earnings for the first 6 weeks
  - £139.58 (or 90% of average weekly earnings if lower) for 33 weeks<sup>29</sup>
- The right to return to the same job or a suitable alternative
- Paternity leave of either 1 or 2 weeks with pay at £139.58 per week
- Adoption leave matching the periods of maternity and paternity leave
- A right to request flexible working for all employees with 26 weeks' service
- 50 weeks of shared parental leave at £139.58 per week or 90 percent of average weekly earnings, whichever is lower

Maternity rights have been available in the UK for many years. The system of funding statutory maternity pay in the UK originates from an historic Maternity Fund, which was funded through increases in employers' contributions. Most employers are able to recover 92 percent of the statutory maternity pay by deducting it from their national insurance contributions and small employers can reclaim 103 percent of payments. An employee who does not qualify to receive statutory maternity pay may be entitled to the social security maternity allowance at the standard rate of benefit (£139.58 per week). Other than six weeks' maternity leave at 90 percent of pay, the remaining weeks of statutory maternity pay are paid at the standard rate of benefit.

Other family-related rights are more recent. Shared Parental Leave (SPL) was introduced in April 2015. This allows eligible mothers, fathers, partners and adopters to choose how to share time off work after their child is born or placed for adoption. Parents are still entitled to take maternity, paternity and adoption leave. However, an eligible mother or adopter may choose to end their maternity/adoption leave early and opt in to SPL (subject to the 2 weeks' compulsory leave period). SPL may be taken between the date the child is born or the date of the placement and ends 52 weeks after that date. This could involve the mother returning

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<sup>29</sup> The rate of statutory maternity pay will increase to £140.98 from 1 April 2018.

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to work for part of the time while her partner takes leave and then resuming her leave at a later date, or a partner could begin to take SPL while the mother is still on maternity or adoption leave.

### Other countries and international standards

Most jurisdictions in the world make provision for maternity leave. Different levels of protection are provided based on length of service and other qualifying conditions. Leave is often a combination of paid and unpaid periods; where paid leave is provided this is often subject to a cap, particularly when the pay is provided through a social security system. In most countries, pay during statutory maternity leave is funded by the State or health and social insurance schemes, although some countries supplement that by requiring additional payments from the employer.

The European Union Pregnant Workers Directive (92/85/EEC) came into force in 1994. It states that *“Employees are entitled to 14 weeks continuous maternity leave before and/or after delivery...The employment rights relating to the employment contract must be ensured, including the entitlement to an adequate allowance.”*

The International Labour Organisation (ILO) Maternity Protection Convention, 2000 (183), which came into force in 2002, recommends that a woman *“shall be entitled to a period of maternity leave of not less than 14 weeks.”* It also states that *“Cash benefits shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.”*

According to the ILO<sup>30</sup>, there has been an improvement in maternity protection across the world with a gradual shift towards leave periods that meet or exceed the 14-week ILO standard. In 1994, 38 per cent of countries for which information was available provided at least 14 weeks of maternity leave. In 2013, 53 per cent provided at least 14 weeks of maternity leave and 23 percent provided at least 18 weeks' leave. Between 1994 and 2013 financing of cash benefits through employer liability fell from 33 to 25 per cent. Fifty-eight per cent of countries now finance maternity leave cash benefits through social security. In addition to maternity leave, many countries also support working fathers. Of the 141 countries for which data was available in 1994, the ILO found that only 3 percent made provision for paternity leave. By 2013, paternity leave was available in 47 percent of 167 countries.

Across OECD countries<sup>31</sup>, maternity leave is an average of around 18 weeks. Almost all OECD countries have public income support payments relating to the taking of maternity leave. In some countries (e.g. Australia, Iceland, New Zealand, Norway and Sweden), there is no separate provision for maternity leave but provision for a parental leave scheme instead. In some countries parental leave is a shared entitlement with specific periods reserved for use by the mother or father. In other countries (e.g. Austria and Germany) 'bonus' weeks of leave are offered as an incentive if both parents use a certain portion of the total entitlement.

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<sup>30</sup> Maternity and paternity at work: Law and practice across the world (May 2014)  
[www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_242325/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_242325/lang--en/index.htm)

<sup>31</sup> [www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf)

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### Appendix 2 – List of recommendations

#### 1. Period of maternity leave on page 9

**Recommendation 1** – The Forum recommends that the period of statutory maternity leave should be increased in two stages:

- o to 26 weeks from 1 September 2018
- o to 52 weeks from 1 September 2019

A longer lead-in time to reach 52 weeks was considered (e.g. September 2020). However the Forum is of the view that almost 3 years from the date of the recommendation is too long a delay for a right to 52 weeks' maternity leave. A shorter lead-in time to reach 52 weeks' leave was also considered (e.g. September 2018) with no interim step of 26 weeks' leave. However, it is likely to be too soon to introduce a 52 week leave period with only five months' notice, combined with the other changes to the Law that are proposed in this recommendation, as well as the fact that employees continue to be employed during the period of leave (accruing rights, such as holiday entitlement).

The Forum also recommends that an issue relating to business licenses and replacement employees providing maternity cover should be referred to the Minister with responsibility for the Control of Housing and Work (Exemptions) (Jersey) Order 2013.

#### 2. Paid maternity leave on page 13

**Recommendation 2** – The Forum recommends that, from 1 September 2018, 6 weeks of statutory maternity leave should be paid by the employer at 100 percent of pay.

The Forum would prefer to recommend a longer period of **paid** leave but recognises the financial burden on employers. Having taken into account the level of support in the consultation for a longer period of **paid** leave, the fact that the States of Jersey provides 12 weeks of **paid** maternity leave for its own employees and the recent Social Security consultation on improvements to maternity benefits, the Forum recommends that 12 weeks of **paid** leave should be available in total in September 2019, with 6 weeks continuing to be funded by the employer plus 6 weeks funded by the States at 100 percent of pay.

Having noted JACS concern that a longer period of **paid** maternity leave could lead to employees being dismissed if the potential unfair dismissal award would amount to less than any maternity pay (particularly where the employee's length of service means that the unfair dismissal award would be a maximum of 4 weeks' pay), the Forum recommends that the Employment Law should provide an additional penalty or compensation where the employer has dismissed an employee in order to avoid paying a period of maternity leave, over and above any unfair dismissal award and any award under the Discrimination (Jersey) Law 2013.

#### 3. Qualifying period for maternity leave on page 16

**Recommendation 3** – The Forum recommends that the proposed periods of **paid** and **unpaid** statutory maternity leave should be available to an employee from day one of employment.

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### 4. Taking maternity leave on page 19

**Recommendation 4** – The Forum recommends that in September 2018, the 26 weeks of maternity leave should be available to take in one block. As is currently provided in the Employment Law, the period of leave should start no earlier than the 11th week before the expected week of childbirth.

In 2019, the 52 weeks of maternity leave should be available to take in up to 4 blocks, of not less than 2 weeks each, within a period starting no earlier than the 11th week before the expected week of childbirth and ending when the child reaches age 3.

The requirement to give the employer notice of leave dates and of changes to leave dates should remain in accordance with the current law (i.e. the employee must notify the employer of leave dates no later than the end of the 15th week before the expected week of childbirth, and for any changes to the start date(s) notice must be given 28 days before the date on which leave was originally intended to start or 28 days before the new date, whichever is earlier).

### 5. Right to return to work after maternity leave on page 19

**Recommendation 5** – The Forum recommends that an employee should continue to have the right to return to the same job (where that job still exists) after a period of statutory maternity leave, no matter how many weeks of leave are available (26 or 52 weeks).

### 6. Period of shared leave on page 21

**Recommendation 6** – The Forum recommends that a shared leave system should not be introduced. The Forum is conscious that the law cannot cover every eventuality and family arrangement and so there may be scenarios where shared leave might have been the preferred option for some parents. However, the Forum considers that providing parity via a defined period of leave for each parent is likely to provide a more positive outcome for the majority of new parents in terms of flexibility and promoting gender balance (see the parental leave recommendation on page 27).

### 7. Leave shared with grandparents on page 26

**Recommendation 7** – The Forum has recommended that a shared leave system should not be introduced. Defined periods of leave for each parent cannot be shared with another person. Given the consultation responses, if the Forum had recommended a shared leave system, it is unlikely that the Forum would have recommended including an option for leave to be shared with grandparents.

### 8. Period of parental leave on page 27

**Recommendation 8** – For parity with maternity leave, the Forum recommends that the period of parental leave should be increased in two stages

- o to 26 weeks from 1 September 2018
- o to 52 weeks from 1 September 2019

The Forum also recommends that, in moving to a position where the periods of maternity leave and parental leave are comparable in 2019, the conditions for each period of leave should also be aligned so that parents are simply entitled to 52 weeks of parental leave each. This would introduce a new more inclusive and straightforward system of parental leave which will be referred to in this recommendation as ‘2019 parental leave’.

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### 9. Paid parental leave on page 30

**Recommendation 9** – The Forum recommends that the period of parental leave that is **paid** by the employer should be increased in two stages -

- o to 2 weeks at 100 percent of pay from 1 September 2018
- o to 6 weeks at 100 percent of pay from 1 September 2019

The Forum also recommends that 12 weeks of **paid** leave should be available in total in September 2019, with 6 weeks continuing to be funded by the employer plus 6 weeks funded by the States at 100 percent of pay.

### 10. Qualifying period for parental leave on page 32

**Recommendation 10** - The Forum recommends that, for parity with maternity leave, periods of **paid** and **unpaid** statutory parental leave should be available to an employee from day one of employment with no requirement for a minimum period of continuous employment.

### 11. Taking parental leave on page 33

**Recommendation 11** – The Forum recommends that –

- o From 1 September 2018, 26 weeks of parental leave should be available to take in up to 3 blocks of not less than 2 weeks each, within a 52 week period starting from the date of birth (or placement for adoption).
- o From 1 September 2019, 52 weeks of '2019 parental leave' should be available to take in up to 4 blocks of not less than 2 weeks each within a period starting no earlier than the 11th week before the expected week of childbirth and ending when the child reaches age 3 (or within 3 years of placement for adoption).

The requirement to give the employer notice of leave dates and of changes to leave dates should remain in accordance with the existing law (i.e. the employee must notify the employer of leave dates no later than the end of the 15th week before the expected week of childbirth, and for any changes to the start date(s) notice must be given 28 days before the date on which leave was originally intended to start or 28 days before the new date, whichever is earlier).

### 12. Right to return to work after parental leave on page 34

**Recommendation 12** – The Forum recommends that an employee should have the right to return to the same job (where that job still exists) after a period of statutory parental leave, no matter how many weeks of leave are available (26 or 52 weeks).

### 13. Period of adoption leave on page 34

**Recommendation 13** – The Forum recommends that adoptive parents should have the right to take periods of leave that are equivalent to maternity leave and parental leave.

The Forum has recommended a more inclusive and straightforward system of '2019 parental leave' which the Forum recommends should equally be available to adopters from September 2019.

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### 14. Paid adoption leave on page 36

**Recommendation 14** – The Forum recommends that adoptive parents should have the right to take periods of **paid** leave that are equivalent to maternity leave and parental leave. Either parent may elect to take the more generous period of **paid** leave (until **paid** leave is equalised with the introduction of ‘2019 parental leave’).

The 52 weeks of ‘2019 parental leave’ recommended to be available for each parent in September 2019 should be available to take during a period starting no more than 14 days before the placement date (as provided in the current law) and ending up to 3 years after the adoption placement, in up to 4 blocks of not less than 2 weeks each.

The requirement to give the employer notice of leave dates and of changes to leave dates should remain in accordance with the current law (i.e. the employee must notify the employer of leave dates no later than 7 days after receiving official notification of being matched with a child (or the child entering Jersey), and for any changes to the start date(s) notice must be given 28 days before the date when the child is placed for adoption (or enters Jersey) or 28 days before the predetermined start date, whichever is earlier).

### 15. Surrogacy – leave for intended parents on page 37

**Recommendation 15** – The Forum recommends that the intended parents in a surrogacy arrangement should have the right to take periods of **paid** and **unpaid** leave that are equivalent to adoption leave and parental leave. Either parent may elect to take the more generous period of **paid** leave (until **paid** leave is equalised with the introduction of ‘2019 parental leave’).

The Forum has recommended a more inclusive and straightforward system of ‘2019 parental leave’ which the Forum recommends should equally be available to the intended parents in a surrogacy arrangement from September 2019.

### 16. Antenatal appointments for the father/partner on page 39

**Recommendation 16** – The Forum recommends that the father of the child or the husband, civil partner or partner of the mother should have the right to attend an unlimited number of antenatal appointments (where those appointments are held in Jersey) of which up to 10 hours of appointments are **paid** at the employee’s normal rate of pay and the rest are unpaid. The entitlement should be subject to the presentation of evidence, if requested by the employer, as with antenatal care for the birth mother. This right should be introduced from 1 September 2018.

### 17. Antenatal appointments in a surrogacy situation on page 42

**Recommendation 17** – The Forum recommends that, for parity, the main intended parent should be entitled to an unlimited number of **paid** appointments (equivalent to antenatal appointments for the birth mother). The other parent should be entitled to an unlimited number of appointments of which up to 10 hours of appointments are **paid** at the normal rate of pay and the rest are unpaid. The rights should only apply where the antenatal appointments are in Jersey and entitlement should be subject to the presentation of evidence, if requested by the employer. The intended parents must choose and notify their employer(s) which of them intends to be the main intended parent for the purpose of taking the more generous entitlement. This right should be introduced from 1 September 2018.

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#### 18. Adoption appointments on page 45

**Recommendation 18** – The Forum recommends that the main adopter should be entitled to an unlimited number of **paid** appointments. The other adoptive parent should be entitled to an unlimited number of appointments of which up to 10 hours of appointments are **paid** at the normal rate of pay and the rest are unpaid. The adoptive parents must choose and notify their employer(s) which of them intends to be the main adopter taking the more generous entitlement (as with the existing right to adoption leave where one of the parents elects to be the ‘the adopter’ for the purpose of that right). The rights should only apply where the appointments are in Jersey and entitlement should be subject to the presentation of evidence, if requested by the employer, as with antenatal care. This right should be introduced from 1 September 2018.

#### 19. Breastfeeding rights on page 48

**Recommendation 19** - The Forum recommends that employees should have the right to request reasonable breaks for the purpose of breastfeeding or expressing. Where the employee returns to work early, i.e. within her statutory leave entitlement (26 weeks from September 2018 or 52 weeks from September 2019) the breaks must be **paid** at her normal rate of pay for the duration of the period of statutory leave that she could have taken. After the statutory leave period, any breaks would be **unpaid**.

The Forum also recommends that employers should have a duty to take reasonable steps to provide facilities in the workplace for breastfeeding mothers to express and store milk where an employee requests it.

#### 20. Health and safety absence on page 54

**Recommendation 20** – The Forum recommends that pregnant and/or breastfeeding employees should have the right to **paid** absence where both of the following conditions are met -

1. It is not possible to allocate the employee to other duties, alter her duties or make appropriate changes to the working environment, **and**
2. It is not reasonably practical for the employee to continue working in her usual employment according to a risk assessment undertaken in accordance with Article 3 of the Health and Safety at Work (Jersey) Law 1989.

#### 21. Right to request flexible working on page 56 on page 56

**Recommendation 21** - The Forum recommends that the right to request flexible working should be extended so that it applies to all employees, not just those with caring responsibilities.

#### 22. Qualifying period for flexible working on page 59

**Recommendation 22** - The Forum recommends that the qualifying period for the right to request flexible working should be removed in order to provide a day-one right. The Forum notes that a right to request a change to the contracted times and hours of work is likely to make a significant difference to zero-hour contract employees.