

Issued by the Employment Forum on 17 June 2008

PURPOSE OF RECOMMENDATION

This recommendation is the second to be issued by the Employment Forum in Phase 2 of the employment legislation programme, which was approved by the States in 2000 (P.99/2000).

Its purpose is to inform the Social Security Minister of the Forum's recommendations. The recommendations have been prepared on the basis of the consultation responses received during the period 15 June to 10 August 2007 regarding the proposal to introduce legislation in Jersey relating to maternity, paternity and adoption leave, and family friendly, flexible working policies.

Introduction

A great deal of background to this recommendation, including details of provisions in other jurisdictions, was included in the Forum's consultation paper on this subject issued on 15 June 2007. The consultation paper and this recommendation are available on the website –

www.gov.je/ChiefMinister/PublicConsultations/Past+consultations/

The Forum is grateful for the very detailed responses that were received to its consultation. The recommendation has been prepared by the following members of the Forum;

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CONTENTS

	Page
Introduction	1
Summary of Recommendations	3
Consultation Process	7
RECOMMENDATIONS	8
Part 1 - Employer questions	8
Part 2 - Maternity rights	11
Part 3 - Paternity rights	36
Part 4 - Adoption rights	42
Part 5 - Flexible work opportunities	48
Part 6 - Parental leave	56
Part 7 - Time off for dependants	60
Part 8 - Alternative leave	64
Other comments	69
Appendices	
Appendix 1 – Respondents	74
Appendix 2 – Jersey Annual Social Survey	75

SUMMARY OF RECOMMENDATIONS

The Forum's recommendations are presented with the intention that they would be introduced in two stages for the reasons explained on page 9 of this consultation.

STAGE 1

Maternity

Antenatal care - From the start of employment, pregnant employees will have the right to paid time off work to attend essential antenatal care appointments.

Maternity leave – Employees will have the right to a maximum of 18 weeks maternity leave (with the Social Security benefit Maternity Allowance (MA) if entitled), consisting of;

- From the start of employment - two weeks compulsory leave immediately after childbirth at full pay (paid by the employer, subject to the deduction of MA) and six additional week's unpaid maternity leave which may be taken at the employees discretion, before or after the birth; and
- With a 15 month qualifying period of service - the right to an additional 10 weeks unpaid leave.

Starting maternity leave – An employee will be obliged to tell her employer that she is pregnant and wishes to take maternity leave no later than 24 weeks into the pregnancy (15 weeks before the baby is due) and to give the employer 4 weeks notice if she wants to change the date on which her maternity leave starts.

Terms and conditions during leave - Other than pay, all terms and conditions of employment (including any benefits in kind) will continue to apply during the 18 weeks leave.

Right to return – An employee will have the right to return to her previous job following her maternity leave entitlement (up to 18 weeks) unless there has been a redundancy situation. The obligation to give an employer 4 weeks notice if she wishes to return to work before her notified return date.

Keeping in touch – The right to offer to undertake work voluntarily (e.g. meetings, training, updates) at any time during 16 weeks of her maternity leave (not the first 2 weeks compulsory leave) without the maternity leave period ending.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Paternity

Paternity leave – From the start of employment, an employee will have the right to two weeks unpaid paternity leave (whether male or female) who has, or expects to have, parental responsibility for the child.

Taking paternity leave - The employee will be obliged to advise their employer of the intention to take paternity leave 15 weeks before the expected date of birth. Leave must be taken within 8 weeks of the baby being born, in blocks of one week, unless a relevant agreement between the employer and employee provides that the leave may be taken in a more flexible way.

Adoption

Adoption leave - The right to unpaid leave for each adoptive parent of a child of any age; the periods of leave being equivalent to maternity and paternity leave, but available to either adoptive parent, irrespective of gender;

- Up to 18 weeks adoption leave, consisting of eight weeks unpaid leave from the start of employment, and an additional 10 weeks unpaid leave if the employee has a 15 month qualifying period of service with an employer, OR
- 2 weeks unpaid leave,

plus the right to return to work after each period of leave.

Note - The employer is not obliged to prevent the parent from working in the first 2 weeks after the adoption, nor to provide pay for those 2 weeks leave.

Taking adoption leave - Within one week of being notified by an approved adoption agency that they have been matched with a child for adoption, the employee must notify their employer of the following:

- i. That they have been newly matched with a child,
- ii. the date when the child is expected to be placed with them,
- iii. the date on which they intend to start their adoption leave, and
- iv. the period that is being claimed; the 18 week “maternity” leave period or the 2 week “paternity” leave period.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Social Security Benefits

The Maternity Allowance claim period will be amended so that women have the right to 18 weeks Maternity Allowance in total, with the option to start the 18 weeks benefit closer to the birth, in order that the woman may take as much leave as possible after the birth with Maternity Allowance.

“Keeping in touch days” will be allowed during 16 weeks maternity leave (not the two compulsory weeks), without loss of Maternity Allowance for those days. The days would not break the maternity leave period and would continue to be treated as maternity leave days, not being paid by the employer.

Two weeks Paternity Allowance will be provided at a weekly rate equivalent to Maternity Allowance, plus Adoption Allowances equivalent to the Maternity and Paternity Allowances, where the adoptive parents may choose which of them will claim the longer benefit period, irrespective of the claimant’s gender.

STAGE 2

Maternity

Maternity leave and pay – Of the 18 weeks leave provided at stage 1 (two of which are paid by the employer) a further 6 weeks of that leave will be paid by the States at 100% of pay, up to the contributions ceiling. Qualifying for the pay depends on the employees’ Social Security contributions history. The remaining 10 weeks leave (provided in stage 1) remain unpaid.

Where employees have a 15 month qualifying period of employment, stage 2 will provide employees with an additional 8 weeks unpaid leave, taking the total number of weeks leave available to 26 weeks.

Terms and conditions during leave - Terms and conditions, other than pay, will continue to apply during the additional 8 weeks leave, plus the employee has the right to return to her previous job after maternity leave.

Taking maternity leave - An employer must receive notice of a woman’s intention to take the additional 8 weeks unpaid leave with her initial notification of the intention to take maternity leave (no later than 24 weeks into the pregnancy), and must give 4 weeks notice if her intentions change.

Keeping in touch – An employee will have the right to voluntarily offer to work on any days during the additional 8 weeks maternity leave.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Paternity

Paternity leave and pay - The two weeks paternity leave (provided at stage 1) will be funded by the States at 100% of pay, up to the contributions ceiling. Qualifying for pay depends on the employee's Social Security contributions.

Adoption

Adoption leave and pay - Of the 18 weeks adoption leave provided at stage 1, 8 of those weeks will be paid by the States at 100% of pay, up to the contributions ceiling. Qualifying for the pay depends on the employees' Social Security contributions history.

As with maternity leave, the right to an additional 8 weeks unpaid leave for employees who have served a 15 month qualifying period with their employer, taking the total number of weeks leave available to 26 weeks. Terms and conditions of employment, other than pay, will continue to apply during the 8 week period, plus the parent has the right to return to his or her previous job.

Flexible Working

A right to request a change to working conditions, including, for example a change to hours, times or location of work, for all employees who have caring responsibilities (for adults and children) and 15 months employment service.

The right is limited to a maximum of one request per 12 month period. The employer is obliged to hold a meeting with the employee and to inform them of the decision regarding the requested change within 6 weeks of the request. Where a request is refused, the employee has a right of appeal.

Social Security Benefits

The system of contribution credits will be extended so that credits are awarded during the additional 8 weeks unpaid maternity and adoption leave.

Parental leave, time off for dependants and "alternative" leave

The Forum considers that rights to parental leave and time off for dependants should be consulted upon in more detail during 2008. The format of these rights will depend on whether further consultation suggests that an "alternative", non-compartmentalised and flexible set of family related rights is a viable option for Jersey, particularly in regard to the administration difficulties of shared and transferable periods of parental leave, which may be available for parents to use over a number of years.

CONSULTATION PROCESS

The Employment Forum consulted with the public during the period 22 June to 10 August 2007. Approximately 170 copies of the consultation paper were distributed; including to all those on the Forum's consultation database (approximately 140 individuals, organisations and associations). Further requests for papers were prompted by media publicity and a public workshop on the issues held by the members of the Forum on 22 June 2007. The workshop was attended by approximately 80 people, representing a wide range of interests and industries. This consultation received more than twice the typical number of responses received by the Forum.

Responses to the consultation document were received from the following respondent categories:-

Employers	26
Employees	12
Employer and Trade Associations	4
Trade Unions and Employee/Staff Associations	3
Others (e.g. independent and advisory bodies, law firms)	17
Total	62

Responses within these categories were received from a wide range of industries, including hospitality, agriculture, financial and legal services.

Responses were received from most of the local associations and unions who are representative of employers or employees in their industry; including the Jersey Hospitality Association, the Jersey Farmer's Union, the Chamber of Commerce, the Institute of Directors, Amicus Branch of Unite the Union, the Jersey Civil Service Association and the National Union of Teachers.

The Forum was however disappointed not to receive a response from the T&G section of Unite the Union, as a failure to take the opportunity to make a representation on behalf of it's membership during the early stages of policy making has in the past resulted in dissatisfaction with policies that have ultimately been formulated.

All of the comments received were carefully considered by the Forum, many of which were very detailed. The Forum would like to thank all those who contributed their views. A full list of the respondents who did not request anonymity is included at Appendix 1.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



RECOMMENDATIONS

Legislation in Stages

Many of the respondents commented that they felt that it would be excessive to introduce all of the new rights discussed in the consultation at the same time and the Forum has taken that concern into account in making the following recommendations.

The Forum is recommending a staged approach to the introduction of new legislation, however would emphasise that the recommendation should be accepted by the Social Security Minister as a package of rights, rather than piecemeal, because the rights are interlinked.

The Forum has considered which of the rights should be available as a minimum in stage 1 and agreed that time off for antenatal care, the right to take a period of maternity, paternity or adoption leave and to return to work after that leave, plus protection against detriment and dismissal on related grounds would be an appropriate first step. The Forum concluded that all of the other issues discussed in the consultation are excessive for stage 1.

The Forum agreed that in a second stage of legislation, the rights provided at stage 1 should remain in place, but a greater number of weeks leave should be available, some of the leave should be paid at a higher rate than the current Maternity Allowance, and there should be an additional right for employees to request flexible working.

The Forum notes that there will be a delay between the 2 stages recommended in this consultation as stage 2 cannot be introduced until after the completion of a pending Social Security review, the timing of which is outside of the Forum's control and will depend on political acceptance of the Forum's recommendations for stage 1.

The Forum intends to conduct further consultation about the rights that have not been proposed for introduction in stages 1 or 2 of this recommendation and would intend to conclude this consultation by the end of 2008. This is dependent on the Forum's existing workload, including its statutory obligation to consult on the minimum wage.

PART 1 – EMPLOYER QUESTIONS

Employers were asked to indicate whether they offer any contractual or non-contractual rights to family related leave or flexibility to give the Forum an

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



indication of current local business practice. 32 responses were received to these questions; this was more than the number of responses received from “employers” in total as some “other” respondents answered the questions, being employers as well as an advisory body or charity, for example.

The rights to time off for antenatal care and maternity leave were the most common non-contractual rights cited as being available to employees. Flexible work opportunities and time off for family emergencies were also commonly offered; some employers commenting that they already have a “special leave” policy, (whether contractual or non- contractual).

As anticipated, a right to maternity leave was more commonly provided by large employers than smaller employers and was more likely to be paid to some extent (e.g. 90 percent of pay for 6 to 8 weeks) by large employers.

Most of the employers who said that paid leave is offered also noted that a period of service would be required to obtain that right (e.g. 1 year, 15 months or 2 years service prior to the date of confinement). Some employers who offered a non-contractual right to leave noted that the right is discretionary depending on the individual circumstances and the business requirements.

Small Business Exemption

Respondents were asked if small businesses should be exempt from the obligation to comply with any of the family friendly rights that may be provided. Due to the location of this question (in the section designed specifically for employers), few respondents in other categories responded to this question.

Of the employees who responded, one was in favour of an exemption and 3 were opposed. Employers were split; 10 in favour of an exemption, 10 opposed and 6 undecided. Of the employer’s associations and trade bodies, 1 was in favour and 2 opposed, one union was opposed to an exemption and 2 did not respond. Of the “other” respondents, 4 were in favour of an exemption, 5 opposed, 1 undecided and 5 did not respond.

An advisory body commented that "local business already have difficulty securing suitable qualified staff from a finite resource and to expect that an additional 1000 people (number of births per annum) will suddenly become available to fill temporary positions is unrealistic."

A recruitment agency also commented on the difficulty if specific skills are required and added, "If there were more than one member of staff off on maternity leave, this could leave the business in a very vulnerable situation."

**Recommendation to the Social Security Minister -
Maternity, Paternity and Family Friendly Working**



An employee was concerned about the impact on the other employees of a small business; that the lack of an exemption *"could result in undue pressures on other staff in the business due to the difficulties in providing cover in small businesses."*

The child care industry generally felt that the cost implications for small businesses would be likely to make it unsustainable. One warned that if there is no small business exemption, the cost of providing child care services will increase and those costs will be passed on to the parents.

One of the main concerns for small businesses was the source of funding for any paid leave. Many of those who supported an exemption generally did so because they felt that small businesses would not cope with the added cost, particularly with other pending new legislation, such as Goods and Services Tax. An employer's association, for example, said that there should be an exemption for employers with less than 20 employees, depending upon whether any rights to leave must be paid or unpaid.

A large employer said that small businesses should be exempt, unless the leave is supported financially by the States; and an employee commented that small business should not be exempt so long as financial support is provided.

The Forum was mindful that it is not recommending that employers fully fund the provision of leave and that the recommendations will focus on unpaid maternity, paternity and adoption leave. The Forum also noted that neither the UK nor Isle of Man has a small business exemption. The trend in employment laws in other jurisdictions has been to move away from small business exemptions.

A law firm said that family friendly rights should be set at a level that do not cause undue harm to the business of small employers; *"If employees need legislative protection, it should generally be available to them irrespective of the size of an employer"*

An advisory body said that protection *"should be available to all employees, providing that appropriate funding is provided."*

A trade union said that *"any exemption would result in a large number of workers being denied the proposed new maternity, paternity and family friendly rights. Smaller businesses would need support to understand and implement the new rights so clear guidance and advice should be available which should be specific to their needs."*

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Recommendations -

The Forum recommends that there should not be an exemption for small businesses. If small businesses were to be exempt, the Forum considered that any rights would be ineffectual given that three quarters of local businesses employ less than 6 employees and that big businesses, particularly those with links to UK companies, are likely to have existing contractual provisions in place.

PART 2 – MATERNITY RIGHTS

The right to time off for antenatal care

Matters considered -

The majority of respondents said that women should have the right to paid time off for antenatal care. Some respondents did not agree that women should have this right, including two large hospitality employers.

Responses varied from those in the child care industry. One childcare provider said that women should be given paid time off for antenatal care. However, another said that women should not be given paid time off for antenatal care as it is already difficult to comply with the staff to child ratios required by law. A third said that women should not be entitled to paid time off for antenatal care because the woman is not ill and has a duty to meet her work commitments.

Two employers said that the right should apply only to clinic appointments, and not to antenatal classes. The Forum understands the desire to give the right only to time off for essential care and examinations, not optional classes, and to prevent abuse of the right.

Recommendations –

Stage 1

The Forum recommends that as a stage 1 right, women should not be prevented from taking paid time off to attend essential antenatal care and that this should be limited in its definition.

The Forum recommends that guidance should be provided for employers as to what reasonably constitutes essential antenatal care and the likely timescales involved; as suggested by JACS, describing a normal ante-natal

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



regime of one appointment every 4 weeks from week 12 to week 40 of the pregnancy (7 appointments).

Any further paid time off for appointments would be at the employers' discretion, bearing in mind that the number and duration of appointments may vary where there are complications during the pregnancy, or the woman is using "shared care" (a combination of private surgery and hospital appointments). Employees must be prepared to show their employer evidence, such as an appointment card.

Qualifying for the right to time off for antenatal care

Matters considered -

Employer and employee respondents were clearly split as to whether a woman should have served a qualifying period to be entitled to the right to paid time off for antenatal care and there was a range of responses as to what that qualifying period should be.

For example, a trade union said that there should be no qualifying period of employment; a civil service employee suggested a 26 week qualifying period; a recruitment agency and an employer's association suggested a 1 year qualifying period; and a childcare provider and an employee supported a 2 year qualifying period.

On the grounds of health and safety of mother and child, the Forum agreed that it would be inappropriate for an employer to prevent a woman from taking paid time off from work to attend an antenatal appointment at any stage in her employment.

Recommendations –

The Forum noted that neither the UK nor the Isle of Man requires a qualifying period and recommends that there should be no qualifying period of employment for the right to time off work for essential antenatal care. The woman should not have to make this a financial decision, to the possible detriment of her own health and that of her unborn child.

Employers' agreement to length of time off

Matters considered -

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Respondents were asked if a woman should have to seek her employer's agreement to the length of time needed off work for ante-natal care, whilst noting that employees are not required to seek their employer's agreement to take time off in the UK or Isle of Man.

Seven out of ten employers who responded to this question said that employees should have to seek their employer's agreement. Responses from "other" respondents were split.

Trade union and employee association respondents all agreed that women should not have to seek their employers agreement to the length of time needed off work for antenatal care. One union commented; *"The length of time required for ante-natal care will reflect the length of the appointment and travel time to and from work from the location of the appointment. This can be discussed with the employer. It is not necessary to have a legal requirement to seek an employer's agreement to the length of time, but that the employee should be allowed reasonable time off to attend the appointment."*

An "other" respondent commented that *"employment is a two way contract with mutual respect. Consideration is key and while employers should not have to agree to time off, employees should be required to recognise the needs of a business and the requirement to plan for absence."*

The Forum considered that it should not be necessary for an employer to agree to a specific period of time for an appointment. This may not always be possible as waiting times can vary; clinic appointments generally taking longer than a doctor's appointment.

A trade union commented that if employers can set maximum limits on the time that may be taken, this may discourage employees from taking the time off, potentially putting mother and baby at risk.

The Forum considered that respondents may have been in favour of the employee being required to inform their employer of the intention to take time off for this purpose, however did not necessarily respond in view of the full implications of the question as worded; the employee having the right only if the employer has agreed the specific period of absence.

Recommendations -

Stage 1

For practical reasons, the Forum recommends that employees should not be required to seek their employer's agreement to the specific length of time

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



needed off work for an appointment, however there should be some “reasonableness” about the taking of time off. A code of practice should outline what an employer might expect in terms of a reasonable amount of time off for antenatal appointments and indicating that employers should be notified in advance of appointments to allow employers to arrange cover, where required.

The Forum recommends that, for simplicity, only the basic protection against being refused paid time off for antenatal care should be included in the legislation.

Notice of antenatal appointments

Matters considered –

Most respondents, including the trade unions and employee associations, agreed that a woman should have to give her employer notice that she intends to take time off for antenatal care, where possible.

A trade union commented; *“an employee should give reasonable notice where practicable, but this may not always be possible in the case of emergency ante-natal appointments.”*

Another trade union commented that, *“where possible, it is professional practice for women to give employers notice that they intend to take time off for ante natal care. It is essential however that women are not prevented from taking such time off in emergencies or where at short notice it is not practicable to give the employer notice.”*

A law firm commented that, *“in practice it may not always be possible for an employee to obtain an employer's prior agreement in relation to time off for ante-natal care. Overall though, there should be a responsibility on the employee to consider the practical needs of the business and difficulties that may arise from time out of the office (just as with other kinds of absence). An employee should therefore be obliged to seek prior approval where she knows she is likely to require specific times out of the office.”*

Recommendations -

Stage 1

The Forum recommends that it would be reasonable for an employee to communicate the dates and times of required antenatal appointments

wherever possible and that the employer must be entitled to ask for proof of appointments from a medical practitioner.

The Forum recommends that a code of practice should specify that the employee should be reasonable in giving notice where possible, and the employer must also be reasonable, having regard to medical opinion on the woman's antenatal care needs.

Antenatal care outside of work hours

Matters considered -

Most respondents, other than unions, said that women should be required to organise antenatal appointments outside of work hours, where possible.

A large employer said that, *"if ante-natal appointments are available outside of normal working hours then pregnant employees should try to avail themselves of these appointments."*

One employee respondent commented that most women try to arrange appointments outside of work hours if they can, but antenatal care is very busy and there are often lengthy delays making this difficult to achieve.

A trade union said that *"the majority of ante-natal care is conducted through the General Hospital, therefore most appointments will be made during working hours."*

A law firm commented; *"Anti natal classes and examinations should in our view be treated in the same manner as time off for medical treatment generally - there should be a right for women to have a reasonable amount of paid time off to attend classes and examinations. There should be an obligation to schedule such appointments outside working hours where possible."*

The Forum noted that an obligation to try to arrange appointments in her own time may remove the woman's choice of "shared care" through both her doctor and a clinic. Clinic appointments are cheaper but generally have to be taken at an assigned time; the women does not have the option to chose appointments outside of work time, as she can when booking a doctors appointment.

The Forum also noted that UK and Isle of Man legislation does not require women to try to arrange appointments in their own time.

Recommendations –

Stage 1

The Forum recommends that a code of practice should provide that it is reasonable for an employer to expect that a woman will try to arrange appointments outside of work time, in view of the fact that it would be problematic to legislate for the circumstances in which it is not possible.

The Forum recommends that any provision in a code of practice must be carefully worded, requiring a reasonable approach to be taken by the employer in view of the medically recommended needs of the woman, given the circumstances of her particular pregnancy.

Compulsory maternity leave

Matters considered -

Respondents were asked whether women should be required to take at least 2 weeks compulsory maternity leave after giving birth in accordance with European best practice. The majority of respondents in all categories generally supported this right.

A trade union noted the “financial pressures on families following the birth of a child and would want to see provisions in place to prevent women from returning to work where this might affect their health or the health of their babies.”

A second union pointed out that the World Health Organisation has supported this right, stating that “a period of absence from work after birth is of utmost importance to the health of the mother and the infant. This is conducive to both the optimal growth of the infant and the bonding between mother and infant. Absence from work also allows the mother to recover.”

Recommendations –

Stage 1

To safeguard the health of the mother, as a bare minimum entitlement from the start of employment, the Forum recommends that an employer must not allow a woman to return to work for two weeks after the date of childbirth.

**Recommendation to the Social Security Minister -
Maternity, Paternity and
Family Friendly Working**



The Forum recommends that this time off should be paid given that it would be unfair to oblige a woman to take unpaid time off work. For these 2 weeks, the employer must pay an employee her full weekly pay, (in accordance with the calculation provided in Schedule 1 of Employment (Jersey) Law 2003). The employer may offset the maximum weekly Social Security Maternity Allowance from each week's pay, whether or not the woman is entitled to receive the benefit.

The Forum recommends that there should be a penalty against an employer who allows or requires a woman to work during that period; the level of the penalty to be subject to the Social Security Minister receiving advice from the Law Officers or Law Draftsman.

Compulsory maternity leave in dangerous workplaces

Matters considered -

Respondents were asked whether any period of compulsory maternity leave should be longer for women whose work is likely to be dangerous for a new mother, for example, working with chemicals, radiation, or heavy machinery.

There was support in all categories of respondents for a longer period of compulsory leave to apply in occupations that may be a greater danger to a new mother. "Other" respondents were split, 4 in favour and 4 against a longer period of leave. Some respondents commented that there is little heavy industry in Jersey, so such a provision is unlikely to be necessary. However, the Forum considered that nurses and care home workers often use heavy machinery and lift heavy loads. A trade union noted that Science teachers and teachers of other practical subjects may fall into this category.

An advisory body commented that "*the Health and Safety at Work Law should be adequate to deal with any special risks*". Advice from the local Health and Safety Inspectorate is that employers are already obliged to risk assess the workplace under Health and Safety legislation. Although that law does not specifically refer to pregnancy, an employer would be expected to take new and expectant mothers into account in risk assessments for any occupation. If a longer period of compulsory leave were necessary, the employer should identify it through the risk assessment.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Recommendations -

The Forum recommends that the employment legislation should not regulate for workplace health and safety issues beyond the provisions of existing legislation regarding risk assessments.

Alternative duties or suspension from dangerous workplaces

Matters considered –

Respondents were asked, if the workplace is a potential danger to a woman who is a new, expectant or breastfeeding mother, whether the employer should be obliged to try to find her alternative duties within the company.

Responses were split across the different respondent types, for example, the employee respondents were split 5 in favour and 5 against. It was suggested by the Forum that the employer could be required to consider within the risk assessment whether alternative safe duties can be found for the woman.

The Forum considered whether the employer must only have the obligation to try to find alternative duties, taking into consideration such matters as whether hours could be temporarily reduced, other employees could temporarily undertake some of her duties, or whether more serious considerations require a total removal from the workplace, such as the risk of infectious diseases.

Two law firms commented that a statutory right in addition to automatic protection against unfair dismissal is not necessary; if an employee is dismissed and the employer has not considered alternative duties for the woman, the dismissal is likely to be found unfair.

Respondents were also asked whether there should be an obligation to suspend a woman on full pay until she can safely resume her duties if the employer is not able to offer alternative “safe” duties.

The responses were clearly in favour of not introducing a right to suspension on full pay, however an advisory body commented that a failure to consider alternative duties or to suspend the woman on full pay would be likely to result in an automatically unfair dismissal by reason of pregnancy.

Recommendations -

The Forum recommends that legislation specifically giving these rights is not necessary given existing unfair dismissal procedures and Employment Tribunal case law (case reference 2205077/06).

Breastfeeding rights

Matters considered -

Respondents were asked, if an employer has been notified by an employee that she intends to breastfeed her baby, should the employer have a duty to provide flexible working hours and conditions (unless there are genuine business reasons); appropriate rest breaks and milk storage facilities; and protection from health and safety risks, for a certain period of time after the baby has been born.

The trade union respondents were of the view that employers should have a duty to make provisions for breastfeeding mothers in relation to flexibility in working hours and conditions, rest breaks and milk storage facilities for as long as the woman continues to breastfeed, particularly to encourage women to return to work earlier.

Employees, employers and trade bodies were split equally between yes and no responses.

Many respondents did not agree that employers should have a duty to provide flexible working hours or milk storage facilities, but supported a more general protection from health and safety risks for breastfeeding mothers.

In the UK, research has shown that 69% of mothers breastfeed at birth, but by six months (the age until which exclusive breastfeeding is recommended by the UK Department of Health) only 21% of mothers are still breastfeeding.

A trade union noted that the World Health Organisation has stated the following on this matter; *“Child-care facilities at or near the workplace are ideal for continuing breastfeeding after return to work. ... The requirements for such facilities are that they are safe, clean and private. ... The minimum requirements to allow women to continue breastfeeding are two breaks from work daily of 30 minutes each, not taking into account time needed for transportation, upon return to work and for the first year of life of the breastfed child.”*

An employee respondent commented on the importance of breastfeeding and said that it would be contradictory not to support policies advocating it through this family friendly legislation. An “other” respondent in the Health sector also commented that *“breast feeding has been shown to have demonstrable health benefits for both child and mother. It should therefore be encouraged and barriers removed where ever possible.”*

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum noted research showing that wider strategies than simply improving employment rights would be necessary relating to social attitudes, for example that bottle feeding is the norm. The Forum noted evidence that breastfeeding rates have increased significantly in Norway in recent years; however Norway not only improved maternity rights and increased maternity leave, but also banned all advertising of artificial formula milk.

The Forum considered that the responses were not overwhelmingly in favour of provisions being made and was mindful of the comment made by many respondents that such provisions would be excessive in legislation. The Forum noted that in the UK and Isle of Man, there is no employment legislation giving breastfeeding mothers specific rights in the workplace; health and safety legislation applies.

The Forum noted that local health and safety legislation does not specifically refer to this issue, however it would generally be covered in any workplace risk assessment. A code of practice exists which obliges employers to risk assess breastfeeding mothers who work with ionising radiation, the principles of which would be expected to be applied more widely in risky occupations.

Most respondents indicated that if rights relating to breastfeeding were to be provided, they should apply for a limited period of time after childbirth. A large employer said that provisions for breastfeeding mothers should be as agreed between the two parties and should apply for 6 months only.

The Forum considered that if the woman returns to work 10 to 18 weeks after she has given birth, that will usually provide sufficient time for a feeding routine to have been established.

Recommendations -

The Forum recommends that if any provisions are made regarding breastfeeding mothers, a code of practice or guidelines should outline what should reasonably be provided, taking into account the recommendations of the World Health Organisation. The Forum noted that such rights might become an issue and require further consideration with the introduction of sex discrimination legislation in the future.

MATERNITY LEAVE AND PAY

In considering the responses to the questions in this section, the Forum was aware that the questions were interrelated; whether leave should be paid or unpaid, how it would be funded, the number weeks leave available, and

qualifying periods for leave and pay. The following section summarises the responses received to all of the questions, followed by recommendations on maternity rights as a whole for stages 1 and 2.

Funding maternity leave

Matters considered -

Respondents were asked if maternity pay should be fully funded by the States and also if it should be partially funded by the States. Some respondents answered yes to both parts of this question indicating that, if not fully funded, then maternity pay should at least be partially funded by the States.

An advisory body said that if the States wishes to provide paid maternity leave, they should fund it in full via GST or income support, but if the employer is to be required to fund it, there should be no right to paid leave.

Respondents were generally accepting of increasing employer and employee contributions to either fully or partially fund maternity pay, including all three trade union respondents and half of the employers. Funding through additional taxes was not popular amongst any of the respondent categories.

The Forum considered that expert financial advice would be required for the States to determine if and how any additional funding might be achieved, and that it is not the role of the Forum to advise the States how to achieve funds, however the Forum wishes to ensure that any recommendations are sensible and achievable in principle.

Many of the respondents realistically recognised that States funding was likely to mean that the funds would be obtained through additional contributions from both employers and employees. In the absence of any alternative suggestions from respondents, the Forum agreed that the only option that could be recommended with any support from the respondents would be to raise any additional funding required for statutory maternity pay through an increase in employer and employee contributions.

The Forum is aware that a large scale review of the Social Security contributory benefits system (which includes pensions, short and long term incapacity allowances and maternity benefits), is due to begin later this year. It is recognised that the consideration of any required reform of maternity benefits and additional funding is unlikely to be possible for at least two to three years if the funding is to be achieved via Social Security contributions.

The Forum is advised that any changes to maternity benefits and funding will have to compete for political support, financial and manpower resources, with other critical social issues such as supporting the pensions of the ageing population. Rather than waiting for the review to be completed before any new maternity and family related rights are available, the Forum recommends that family rights should be introduced in stages, allowing a first stage of rights to be introduced, with a minimal impact on employers, prior to that review.

Duration of maternity leave

Matters considered -

Respondents were asked how many weeks paid maternity leave women should be entitled to. Most respondents said 26 weeks. Some employers said less, e.g. 18 weeks, and union respondents said 52 weeks. Most respondents indicated that the source of funding did not impact on what period of statutory maternity leave should be available, irrespective of whether the leave would be States funded, employer funded or unpaid.

However, as anticipated, some employer respondents said that statutory paid maternity leave should be nil if the employer is required to fully or partially fund it, indicating that they are not adverse to maternity leave entitlement in principle, but the cost is the issue.

The Forum considered an advisory body's suggestion of 18 weeks paid and 8 weeks unpaid leave to be useful and understands that such practice is fairly common in local workplaces; offering periods of paid and unpaid leave. The Forum noted that the questionnaire did not ask for respondents' views on splitting maternity leave between periods of paid and unpaid leave, however other respondents had also proposed this as an option.

A trade union said that women should have the right to 26 weeks leave, irrespective of funding, with the option to extend leave to 52 weeks.

An "other" respondent in the Health sector suggested 26 weeks, irrespective of funding, commenting that *"the greater the period of leave the more chance the mother has to develop a sustainable lasting attachment with their child. This attachment has a longer term protective factor."*

An employers' association said that maternity leave should not go beyond that which is realistically necessary.

An agriculture employer said that women should be entitled to 18 weeks leave, irrespective of funding issues.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



A law firm also said that 18 weeks leave should be available, irrespective of funding issues, commenting that *“statutory maternity leave should be shorter rather than longer. Many businesses will choose to have longer periods and this will make them attractive to potential employees. It is not considered practical or advisable to make the statutory requirements unduly onerous on employers.”*

The Forum considers that there is strong competition in the employment market so employers are unlikely to reduce any existing contractual benefits to the statutory minimum.

Qualifying period for paid maternity leave

Matters considered -

Responses were varied on what qualifying period of service an employee should have in order to be entitled to paid maternity leave (assuming that the States would fund the maternity pay). The trade union respondents suggested that the right should be available from the start of employment with no qualifying period, employee respondents suggested around 26 weeks service and employer respondents generally between 1 and 2 years service.

A services employer was of the view that there should be no legislation giving women the right to maternity leave, however if a right to paid leave were to be introduced, a two year qualifying period should apply for the reason that *“Funding maternity leave is a major employer commitment and must be matched by employee commitment.”*

Respondents were also asked what length of service a woman should have to qualify for paid maternity leave if employers will be required to fully or partially fund the leave. It had been anticipated that employers might suggest a longer period of service if they would be required to partially or fully fund leave, however the responses indicated that the source of funding should not have an impact of the length of service required to qualify for maternity leave.

The Forum agreed that a qualifying period should be served prior to pregnancy if employers will be required to pay employees during maternity leave. A 26 week qualifying period was considered to be impractical as the woman could have been pregnant when her employment began.

The Forum considered recommending a 15 month qualifying period (65 weeks) before the expected date of childbirth on the basis that 15 months

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



allows for a three month probation period, plus one year to show commitment to the employer.

The Forum however agreed that such a long qualifying period is not appropriate in the provision of the minimum maternity rights to be provided at stage 1 because the employee would not have the right to return to her job beyond the compulsory 2 weeks leave unless she had 15 months service with her employer.

Recommendations –

Stage 1

The Forum recommends that women should have the right to 18 weeks maternity leave in total, to correspond with the existing 18 week Social Security Maternity Allowance period. The Forum noted that two of those weeks would be the compulsory weeks, available with no qualifying period of employment, during which time the employer must pay employees their full weekly wage (minus the weekly Maternity Allowance rate).

The Forum recommends that, in addition to the 2 compulsory weeks leave, women should have a right to an additional 6 weeks unpaid maternity leave (benefits and other contractual rights will continue to apply), also to be available from the start of employment and available for the woman to take before or after the birth.

This gives a total of 8 weeks leave, and the right to return to work after that period, with no qualifying period of employment.

When an employee has 15 months service with an employer, the Forum recommends that women should have the right to an additional 10 weeks unpaid leave (benefits and other contractual rights will continue to apply).

In order that employers and employees know where they stand in terms of entitlement to maternity leave, completion of the 15 month qualifying period must be based on the expected date of confinement notified to the employer and the woman's entitlement to leave would not be affected by an early or late birth.

The Forum noted that there will be some employees who will have the right to leave but will not meet the contribution conditions for entitlement to the Maternity Allowance. The Forum recommends that 18 weeks leave must be available to women who qualify for it, irrespective of whether they qualify for the allowance.

Under Social Security Law, the Maternity Allowance claim period currently must start no later than six weeks before the notified date of birth. Where a woman chooses to work closer to the date of birth, she loses the right to those weeks of benefit, often leaving only 12 weeks of benefit available after the birth. Women tend now to choose to work closer to the date of birth; currently women claim 16 of the 18 weeks benefit on average.

The Forum noted that this provision was based on medical opinion regarding an appropriate period of time for a woman to take off work before the birth; however that is not supported by current medical opinion provided to the Forum during this consultation.

The Forum therefore recommends that the Social Security Department amends this requirement so that women have the right to 18 weeks Maternity Allowance in total, with the option to start the 18 weeks closer to the birth. The Forum noted that this is likely to slightly increase the States funding required for maternity allowance as more women would take the full 18 weeks benefit.

Stage 2

The Forum recommends that of the 18 weeks leave available, a proportion of these weeks should be paid at a higher weekly rate than Maternity Allowance in stage 2.

In addition to the 2 weeks compulsory leave provided at stage 1, a further 6 weeks should be paid by the Social Security Department at 100% of salary, up to the contributions ceiling, which is currently £3,242 per month (£748.15 per week). Qualifying for this right will depend on the employee's own contribution record, not length of service with their employer.

The Forum recommends that funding could be achieved via increasing employer and employee contributions, however recognises that expert financial advice will be required during the Social Security review.

The remaining 10 weeks leave would continue to be paid at the basic weekly benefit rate.

The Forum also recommends that, subject to having served a 15 month qualifying period, employees should have the right to an additional 8 weeks unpaid leave (benefits and other contractual rights will continue to apply); taking the total number of weeks leave available to 26 weeks.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum recommends that contribution credits should be applied by Social Security for the additional 8 weeks, if taken.

Starting maternity leave

Matters considered -

The Forum noted that in the UK, the point at which an employee must tell her employer that she is pregnant and wishes to take maternity leave is 24 weeks into the pregnancy (which is 15 weeks before the baby is due). After week 24, legal termination rights are no longer available in the UK. Respondents were asked if Jersey should adopt the same approach, given that legal termination rights are also available in Jersey until the 24th week¹.

All respondents were in favour of Jersey adopting the same approach as the UK regarding the point at which an employee must tell her employer that she is pregnant and wishes to take maternity leave, other than one childcare provider who considered 15 weeks notice to be insufficient. No suggestions were made by respondents regarding an alternative approach to notifying employers of the intention to take maternity leave.

Respondents were also asked what length of notice an employee should have to give her employer if she wishes to change the date on which she intends to start her maternity leave. Most respondents suggested that 2 or 4 weeks notice should be given to the employer where the employee wishes to change the date on which she will start her maternity leave.

Recommendations -

Stage 1

The Forum recommends that an employee must tell her employer that she is pregnant and wishes to take maternity leave 24 weeks into the pregnancy (15 weeks before the baby is due).

The Forum recommends that if an employee wishes to change the date on which she intends to start her maternity leave, she should have to give her employer 4 weeks notice. The employer must however give reasonable consideration to the circumstances and health of the mother and baby, and take into account situations which would reasonably override the requirement

¹ Under normal conditions, terminations are available in Jersey until the 12th week of pregnancy. Terminations between 12 and 24 weeks are only available in Jersey in extreme cases, when continuing with the pregnancy puts the mother's life in danger or there's serious foetal abnormality.

for 4 weeks notice to be given, such as medical certification that a change of date is necessary, or the baby is born early.

Stage 2

Where an employee wishes to take the additional 8 weeks unpaid leave available at stage 2, the Forum recommends that the employee should give her employer notice of this with her initial notification of taking maternity leave; 24 weeks into the pregnancy.

The Forum recommends that a woman should have to give her employer 4 weeks notice if she wishes to change this decision (as with notice of a different maternity leave start date).

Sickness and Maternity

Matters considered -

If a woman is signed off work as sick for a pregnancy related reason shortly prior to the birth, respondents were asked if the maternity leave period should start from the date on which the woman falls sick, rather than the date that she had planned to start her maternity leave.

Most respondents, including employers, said that maternity leave should begin from the notified start date only (unless the birth is early), and should not be triggered early by medically certified sick leave for a pregnancy related reason.

Some respondents (including employers and employees) said that where a medical certificate and maternity leave dates overlap, then the mother should automatically be transferred to the maternity leave period. The Forum considered that this could cause the mother to lose a significant period of recovery and bonding time with her baby if the pregnancy causes her difficulties before the birth.

An "other" respondent in the Health sector commented that "*women should not be penalised for a pregnancy related illness by being forced to take Maternity leave before it was planned and hence return to work after delivery possibly before they feel ready.*"

Recommendations –

Stage 1

For the purpose of co-ordinating the period of maternity leave with benefit entitlement, the Forum recommends that maternity leave and payment of Maternity Allowance should start only from the date notified by the employee to their employer and to the Social Security Department, unless the birth is early, a different date is agreed with 4 weeks notice to the employer (or any required period of notice to the Social Security Department), or circumstances reasonably override the requirement for that notice to be given.

The Forum recognises that the Social Security Department might need to consider the budget implications of a potential increase in the incidence of pregnancy related sickness benefit claims in the six weeks prior to the start of the maternity leave, as it is anticipated that women will generally prefer to take as much of the maternity leave as possible after the birth.

Terms and conditions to continue

Matters considered -

Respondents were asked if a woman's terms and conditions of employment should continue to apply during the period of maternity leave, including that holiday entitlement would continue to accrue and entitlement to other benefits would continue, such as the right to use a company car.

This question evoked mixed responses from employers. An advisory body commented that if a woman's terms and conditions do not continue to apply during the period of maternity leave, it is likely to be unfair and may be deemed to be discriminatory in the future. Many respondents across all categories said that terms and conditions should continue, other than pay.

Respondents were particularly asked to consider whether any pension rights and employer pension contributions should continue to accrue whilst a woman is on maternity leave. The majority of respondents, including employers, said that women should continue to accrue pension rights and employer pension contributions whilst on maternity leave.

The Forum noted comments from some respondents that it is likely to be more difficult administratively to remove these rights for a short period during maternity leave, and that to do so would be likely to amount to sex discrimination in the future.

Some respondents, including two small retail employers, agreed that most terms and conditions should continue, including private healthcare arrangements, for reasons of continuity, but suggested that benefits which

directly relate to carrying out a business role, such as the use of a vehicle or mobile telephone for work purposes should not accrue. The Forum suggests that employers should take care in the drafting of contracts regarding employee's use of such benefits outside of work hours.

Some respondents also suggested that holiday entitlement should not continue to accrue, however the Forum was concerned that if holiday entitlement did not continue to accrue, it may be a matter of sex discrimination in the future. The Forum suggests that legal advice should be taken by the Social Security Minister to explore these issues during the drafting of the legislation.

The right to the payment of bonuses and commission will depend on whether they are contractual, non-contractual or discretionary contractual. Again, employers may face sex discrimination claims if they withhold these rights.

The Forum considered the potential problem, raised by a childcare provider, of employing replacement staff during maternity leave where accommodation forms part of an employee's terms and conditions, for example, where a nanny "lives in". The Forum noted that this might also be problematic in other occupations where employees are required to live on site (sometimes by law), such as night caretakers, nurses, pub landlords, lodging house caretakers and employees in the agriculture or hospitality industry where accommodation is commonly provided.

The Forum agreed that further consideration will need to be given to this in the drafting of the legislation and that employers might need to consider what provisions are made regarding the occupation of accommodation during other periods of employee leave. Employers may need to be able to show that other alternatives have reasonably been considered, but not necessarily have to offer an alternative if it is not possible.

The Forum noted that the European Pregnant Workers Directive (which does not apply to Jersey) requires that all terms must continue, other than pay.

Recommendations –

Stage 1

The Forum recommends that, other than pay, all terms and conditions of employment should continue to apply, including provisions for the continuation of pensions and accrual of holiday entitlement.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Whether an employee on maternity leave is entitled to a bonus will depend on the type of bonus and the terms of the scheme. If the employee would have been entitled to the bonus under her contract of employment if she had not been on maternity leave, her entitlement depends on whether the bonus is for past achievement (in which case it must be paid in full) or for current work (in which case it may be reduced pro rata for the period of leave).

The Forum recommends that any particular terms regarding benefits in kind provided for work related use, including accommodation, should be clearly set out in the employee's terms and conditions.

The Forum recommends that the Social Security Minister seeks advice regarding future sex discrimination issues concerning any limitations on the continuation of terms and conditions during maternity leave.

Stage 2

The Forum recommends that all terms and conditions, other than pay, should continue to apply (as provided at stage 1) during the additional 8 weeks unpaid leave recommended in stage 2.

Right to return to work after maternity leave

Matters considered –

Responses varied on the question of how much notice an employee should be required to give her employer if she wishes to return from maternity leave prior to her intended return date.

Four and 8 weeks were the most popular responses. The Forum considered that it would be straightforward to provide the same notice period that a woman must give her employer if she wishes to start her maternity leave early (4 weeks).

Some respondents noted that a 4 week period would be similar to requirements in many company policies regarding the notice for the booking of annual leave, and would also be a suitable period to allow the employer to employ or give notice of termination of a contract to any replacement staff.

A large employer commented that there should be no obligation for an employer to allow a woman to return to work before her intended return date on the basis that fixed term contract staff may have been employed to cover the period of maternity leave and would have to be kept on for any remaining

weeks of their contract despite the woman having returned from maternity leave.

The Forum considered that not to give women the right to return to work early with an appropriate period of notice would unnecessarily prevent an employee from working when she might wish to return for financial reasons.

Recommendations –

Stage 1

If an employee wishes to return to work before her planned return date, the Forum recommends that she should have to give her employer 4 weeks notice.

The Forum recommends that guidelines should be provided to advise employers how they can deal with this prospect, for example by issuing fixed term contracts with early termination provisions allowing for such circumstances as an earlier return date, or drafting contracts for temporary staff providing that the end date of the contract will correspond with the return date of the employee on maternity leave, rather than giving a precise date.

Right to return to the same job

Matters considered -

Respondents were asked if employees should have the right to return to the same job after maternity leave, unless there has been a redundancy situation.

Most respondents said that a woman should have the right to return to work after her maternity leave. Of the employers, 17 said yes and 7 said no. Of the “other” respondents, some commented that the right to maternity leave is worthless without the right to return to your job, if the leave is a sensible period. An advisory body noted that it may not be possible for an employer to hold a job open.

A trade union commented; *“This is vital for the protection of women workers in Jersey. There should be a right to return to the same job on the same terms and conditions of employment, and if this is not possible, to an alternative job on the same terms and conditions. A woman returning from maternity leave should also be given special protection if there is a redundancy situation as in UK maternity legislation.”*

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



In the UK, where redundancies have resulted in it not being reasonably practicable for the woman to return to her job after maternity leave, the employer has an obligation to offer her any suitable alternative vacancies.

Recommendations -

Stage 1

The Forum recommends that a woman must have the right to return to the same job (unless there has been a redundancy situation), after her period of maternity leave, up to the **18** weeks available.

Beyond the 18 weeks, if the employee stays off work longer than she is entitled, or longer than has been agreed with her employer, the employee is not entitled to be reinstated to her previous position.

The Forum recommends that a woman who is made redundant during her maternity leave should not have an exclusive right, over and above the rights of her colleagues, to be offered any other suitable vacancies that arise. The Forum however notes the importance of the employer not forgetting to include employees who are on maternity leave when circulating details of planned redundancies and alternative vacancies.

Stage 2

The Forum recommends that a woman must have the right to return to the same job (unless there has been a redundancy situation), after her period of maternity leave, up to the **26** weeks available.

Beyond the 26 weeks, if the employee stays off work longer than she is entitled, or longer than has been agreed with her employer, the employee is not entitled to be reinstated to her previous position.

Right to return to a comparable job

Matters considered -

Respondents were asked if employees should have the right to return to a job after maternity leave that is not necessarily the same job, but is comparable and no less favourable in its terms and conditions, such as equivalent status and remuneration.

As the Forum is recommending that a woman should have the right to return to the same job after up to 26 weeks maternity leave, it is not necessary at this stage to consider recommending a right to a different, but comparable, job on return from maternity leave. Employers may wish to offer this right contractually if they offer a contractual entitlement to maternity leave that is greater than 26 weeks.

Recommendations -

If the recommended maternity leave period had been longer, the Forum might have considered it appropriate to recommend that provision is made for the woman to return to an alternative job where it is not reasonably practicable for the employer to keep the same job open. If the period of statutory maternity leave were to be extended beyond 26 weeks, the Forum would wish to consider whether the provisions regarding the right to return to work should be amended to allow this flexibility.

Refunding maternity pay

Matters considered -

If an employee does not return to work for her employer for a minimum period of time after her maternity leave has ended, most respondents, including one union, considered that she should be required to refund a part of any maternity pay that she has received.

The Forum considers that these responses were based on the principle that the employer has fully or partially funded the maternity leave.

A trade union commented; "in the UK women are not required to refund statutory maternity pay if they do not return to work. Statutory maternity pay is a benefit to support mothers and their babies and it would not be acceptable to expect a mother to refund this benefit because she does not return to work."

Recommendations –

Stage 1

The Forum recommends that, if a woman does not return to work after her maternity leave entitlement, she may be required to refund any part of pay provided by her employer during the 2 weeks compulsory paid maternity

leave, unless the woman returns to work after her leave and gives an appropriate period of notice to terminate her employment.

The Forum recommends that employers contractually offering a longer period of paid maternity leave, or any additional pay or benefits during maternity leave, may wish to agree via the contract of employment any circumstances in which these would have to be refunded to the employer, for example if a woman fails to return to work for a specified period after her leave.

Keeping in touch days

Matters considered –

Respondents were asked if employees should be free to voluntarily offer to work (such as attending meetings, training or update sessions) without any remaining maternity leave being terminated.

Respondents in all categories were generally in agreement that employees should be free to voluntarily offer to work without any remaining maternity leave being terminated.

Respondents were also asked if there should be a maximum number of allowable “keeping in touch days” during the period of maternity leave. The respondents were generally mixed in their responses, however most employers responded that the number of days on which the employee may chose to work without maternity leave ending should be unlimited, including a recruitment agency who pointed out that it should be the woman’s choice as the days will be unpaid (other than any maternity related entitlements).

The Forum considered whether this would be open to abuse, as suggested by some respondents who were concerned about pressure being placed on the employee. However, the Forum considers this unlikely to be a problem if the provision is carefully worded, in that the employee must voluntarily offer her services.

The Forum noted that Maternity Allowance claimants currently may not undertake employment whilst receiving the benefit and if they do so may face potential prosecution for fraud.

The Forum noted that the number of days that a woman may be willing to “keep in touch” with her employer is likely to depend on the total number of weeks maternity leave available to her.

Recommendations –

Stage 1

The Forum recommends that women should have the right to voluntarily offer to work on any days during her maternity leave, other than the 2 weeks compulsory leave.

The Forum recommends that volunteering to work on a maternity leave day does not give the woman the right to claim any additional days' leave or pay in compensation.

The Forum recommends that a code of practice or guidelines, rather than legislation, should specify that the number of "keeping in touch days" during maternity leave should be agreed between the two parties to their mutual benefit. It should also clarify that these days are expected to be occasional and are unlikely to be full days, for example to attend a meeting or a training course, rather than a full day's normal work.

The Forum recommends that the Social Security Law should be amended to allow "keeping in touch days" during the 18 weeks maternity leave, without loss of Maternity Allowance for those days. The days would not break the maternity leave period and would continue to be treated as maternity leave days, not being paid by the employer.

Stage 2

As Maternity Allowance is not available for the additional 8 weeks maternity leave recommended for stage 2, a woman may have as many keeping in touch days as she wishes. The Forum recommends that the right to maternity leave for those weeks should not prevent the woman from volunteering to work on a mutually agreed number of days.

Grounds for contacting an employee on maternity leave

Matters considered –

Respondents were asked if an employer should only be allowed to contact a woman who is on maternity leave on specific limited grounds. Responses were mixed, although most agreed that an employer should only be allowed to contact the woman on specific limited grounds.

As suggested by one advisory body and other respondents, the Forum considered that it would be difficult to legislate for specific circumstances in

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



which contact is acceptable and that it is unlikely to be possible to provide a practical but exhaustive list of circumstances.

Respondents were asked if the grounds on which an employer may (or must) contact an employee who is on maternity leave should be agreed in writing before the maternity leave begins (for example, regarding training sessions, staff updates, job opportunities and changes to the workplace).

Respondents across all categories were fairly split in whether or not a written agreement should be required.

Recommendations -

Stage 1

The Forum recommends that the grounds on which a woman may be contacted whilst on maternity leave should be outlined in a code of practice or guidelines, as it is likely to be difficult to provide an exhaustive list and will vary depending on the circumstances, including, for example, the employees own career opportunities.

The Forum recommends that guidelines or a code of practice should advise the employer and employee to formalise in writing before the maternity leave the circumstances in which she is willing to be contacted and wishes to be contacted.

PART 3 - PATERNITY RIGHTS

ELIGIBILITY FOR PATERNITY RIGHTS

Matters considered -

Respondents were asked if paternity leave should be defined as a right for employees who have, or expect to have, responsibility for the up bringing of a child, in any of the following three circumstances:

- (i) the biological father of the child, or
- (ii) the husband of the child's mother, or
- (iii) the partner of the child's mother (not necessarily male)

The Forum noted that this question was unfortunately worded in that it was not possible to ascertain from the responses whether those who responded "no" were opposed to one of the three circumstances, or to paternity leave in

general, unless a reason was provided for their response. Most respondents agreed that paternity leave should at least be a right for biological fathers.

The comments from respondents were mainly supportive of paternity leave. Of those who were not supportive, the main reasons were not agreeing with one of the three circumstances as being eligible for paternity leave, or a general opposition to introducing too much legalisation at once. For example, an advisory body commented that employers do not feel able to deal with all of this proposed new legislation being introduced at one time.

The Forum considered whether there would be future discrimination issues if maternity leave is provided but paternity leave is not. The Forum was of the view that a complete absence of the right to paternity leave would be unlikely to raise issues in terms of being gender specific, however if paternity rights were given to a husband but not to the partner of the mother, it could raise discrimination and possibly human rights issues. The Forum is of the view that it is for the Law Officers' Department to consider these issues in relation to any new legislation that is drafted.

The States Human Resources Department noted that the States policy on paternity leave has been amended to include rights for same-sex partners and there has not been a noticeable increase in demand for the leave.

A recruitment agency commented; *“there can be conflict between who wants to take responsibility in raising the child and who is the partner of the mother. By making it open in this way, there may be up to 3 different people who could be claiming paternity leave, and it would be incredibly difficult to ascertain who actually should be receiving the paternity leave.”*

Clearly there will need to be some mechanism by which only one person will qualify for the “paternity” leave. In the UK and Isle of Man, the person who qualifies must have (or expect to have) responsibility for the child’s upbringing and must be either the father of the child, or be the husband or the partner of, the mother. A partner is defined as someone living in an enduring family relationship with the mother but who is not an immediate relative.

Recommendations -

Stage 1

The Forum recommends that any qualifying parent; the biological father of the child, or the husband or partner of the woman; should have the right to paternity leave and that the leave should only be available to one person

(whether male or female), who has responsibility for the child's upbringing and is taking the time off work to support the mother and bond with the child.

The Forum recommends that the assessment of whether an employee qualifies for the leave should be achieved in the same way as in the UK; whereby the employee self-certifies their eligibility for paternity leave and the employer makes a reasonable judgement as to whether the employee meets the criteria.

Funding paternity leave

Matters considered –

Respondents were asked if paternity pay should be fully funded by the States and also if it should be partially funded by the States. As with the same question in relation to maternity pay, some respondents answered yes to both parts of this question indicating that, if not fully funded, then paternity pay should at least be partially funded by the States.

Responses across all categories of respondent were split. No other reasonable methods of funding were suggested by respondents. As with maternity funding, there was greater support for achieving funding via additional employer and employee contributions than by increasing taxes, showing that some respondents recognised that States funding of paternity leave may come at a cost to employers and employees.

Duration of paternity leave

Matters considered -

Respondents were asked what maximum period of paternity leave should be available, firstly assuming that paternity pay would be funded by the States, and secondly assuming that any leave would be funded by the employer.

Two weeks leave was a strong consensus from the responses and, for most respondents, the response was the same irrespective of how the leave would be funded. As anticipated however, some respondents, particularly employers, preferred a shorter period of paid leave if it is not to be funded by the States. For example, an employers' association said that paid paternity leave should be 2 weeks if States funded and 1 week if employer funded.

Recommendations –

Stage 1

The Forum recommends that 2 weeks paternity leave should be available.

The Forum recommends that a Social Security benefit should be introduced at a weekly rate equivalent to Maternity Allowance.

The Forum suggests that the funding required to introduce a new Paternity Allowance could be achieved via increasing employer and employee contributions, however recognises that expert financial advice will be required during the Social Security review.

Until such a time as a new benefit is available, the Forum recommends that employees should have a right to unpaid paternity leave (unless they have a contractual right to pay from their employer).

The Forum noted that employers who already provide a contractual entitlement to paid paternity leave will be able to offset the new benefit against weekly pay.

Stage 2

The Forum agreed that there is little indication from the responses that paternity leave should be extended beyond the 2 weeks provided in the UK and Isle of Man at this stage.

The Forum recommends that the 2 weeks paternity leave should be funded at 100% of pay, up to the contributions ceiling, as recommended for maternity leave in stage 2. Whether the employee qualifies for paternity pay or not will be based on their contributions history rather than length of service with an employer.

Qualifying period and notice of intention to take paternity leave

Matters considered –

Respondents were asked what length of service an employee should have in order to be eligible for paternity leave. There was greater support for a qualifying period of less than 2 years than for a period of more than 2 years. Most respondents said that the period should mirror whatever qualifying period entitles a woman to maternity leave.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Respondents were also asked how much notice an employee should have to give an employer of their intention to take paternity leave, whilst recognising that this is not necessarily notice of the exact date on which leave is to be taken, which the employee may wish to coincide with the birth. The actual leave date may vary depending, for example, on a premature or late birth.

The Forum agreed that there was no clear indication from the responses, which ranged from 4 to 26 weeks, and that an appropriate recommendation on this matter depends on how many weeks paternity leave are available and how long after the birth the leave may be taken.

Many respondents, including one advisory body, said that 15 weeks notice seems appropriate to match the notice period required for maternity leave. Having recommended 2 weeks paternity leave, the Forum considers that employers will not necessarily have to make detailed plans to cover the employee's absence, as with the longer period of maternity leave. The notice period for paternity leave is 15 weeks in the UK.

Recommendations –

Stage 1

Noting that this period is to be unpaid (other than benefits or contractual pay), the Forum recommends that 2 weeks paternity leave should be available with no qualifying period of employment.

The Forum recommends that the employee must advise their employer of their intention to take paternity leave 15 weeks before the expected date of birth, (not necessarily the intended leave date). The Forum could see no reason why the notice should not match the woman's required period of notification to her employer. This will also assist employers in planning for the period of leave in the absence of a qualifying period, as only employees with more than 15 weeks service will have the right to take paternity leave.

Taking paternity leave

Matters considered -

Respondents were asked if paternity leave should have to be used within a limited period of time after the birth. There were a variety of responses, however most suggested between 4 and 8 weeks after the birth. However, all three trade union respondents said that paternity leave should be available to

be taken in the baby's first year, one commenting that this would allow flexibility for the leave to be taken when it suits the family as a whole.

A childcare provider said that there should be no time limit for taking the leave and suggested that this may allow greater flexibility for the mother to return to work. Other respondents similarly commented that if the paternity leave could be taken after the mother's maternity leave, it would allow an extended period during which at least one parent is caring for the baby.

The Forum considered that a number of respondents may have confused this period of leave with parental leave, some having suggested that it should be sufficiently flexible to be used for care during childhood illnesses.

The Forum noted that purpose of this period of leave is to assist the other parent in early bonding with the baby and to help and support the mother in the early stages of childcare. If the leave could be used a long time after the birth, this defies the purpose of the right, so the Forum had considered recommending a four week period. However, the Forum considers that as the paternity leave would be unpaid at stage 1 (other than benefits or contractual pay), there is little advantage in the employee taking the leave for reasons other than the birth.

Respondents were also asked if paternity leave should have to be taken in one week blocks, rather than individual days. Half of the respondents, across all categories, said that this should be agreed between the employer and employee. The other respondents were split between weekly blocks and individual days.

Employer responses varied, some considering one week blocks to be more practical for business planning purposes, but other employers preferring the leave to be available in individual days so that any impact can be spread over a longer period. There are also benefits for employees in having this flexibility; a trade union said; *"this will allow for the individuals to tailor it to suit their families needs."*

A recruitment agency commented that *"a 2 week leave scenario, whether broken into separate days or kept as a block of leave, is easier to manage than the longer maternity leave, which means that a degree of flexibility can be offered."*

Recommendations –

Stage 1

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum recommends that the 2 weeks paternity leave should have to be taken within 8 weeks after the baby is born (and not before the birth). The Forum considers that this allows sufficient flexibility for special situations to be taken into account, such as where the baby might be in hospital for a longer period, but is limited enough to ensure that the leave is taken for the purpose of the birth (bonding with the baby and supporting the mother).

The Forum recommends that the UK provision is practical; that in the absence of an agreement between the two parties, the default position should be that paternity leave must be taken in blocks of one week, unless a relevant agreement provides that the leave may be taken in a more flexible way.

PART 4 - ADOPTION RIGHTS

Matters considered -

Respondents were asked whether adoptive parents should have rights to maternity, paternity and parental leave that are equivalent to those for natural parents. Most respondents were in favour of equivalent rights for adoptive parents (33), 10 were opposed and 10 undecided. Some respondents indicated that the age of the adopted child would affect their response.

A small retail employer said that there should be no right to adoption leave as it is easier to plan ahead for than pregnancy.

A large employer commented that adoptive parents should have an equivalent right to leave *“to keep in line with current best practice and UK legislation.”* The Forum noted that there may be Human Rights implications if an equivalent right to bonding time with natural parents is not available to adopted children and that this would require further consideration.

A recruitment agency commented that adoptive parents should not have a right to leave where they adopt a child who they have previously fostered, as bonding will have already occurred. Some respondents noted that where a child has been adopted by the partner, husband or wife of a biological parent, that parent should not be entitled to adoption leave.

The Forum noted that a one-off Adoption Grant payment is available to adoptive parents from the Social Security Department, which is an equivalent sum to the Maternity Grant, but there is currently no equivalent to the weekly Maternity Allowance.

The following recommendations are based on the Forum’s understanding that there are currently only around 6 to 7 adoptions each year in Jersey (including

both local and inter-country adoptions), so the right should not have a large impact on employers.

Recommendations –

Stage 1

The Forum recommends that a right to adoption leave, comparable to maternity leave, should be provided for adoptive parents. The Forum also recommends that the parent who does not take the adoption leave should be entitled to the equivalent of the paternity leave (irrespective of gender).

The Forum recommends that the Social Security Department should provide a weekly benefit for adoptive parents, equivalent to maternity and paternity allowances, however in the absence of a new benefit, the right to adoption leave should be available without pay (unless the employee has a contractual entitlement to adoption pay).

The Forum recommends that adoption leave should not be available where there is already an established relationship with the child, such as a step-parent adoption or where the parents have fostered the child prior to adoption.

Age of adopted child

Matters considered –

Respondents were asked if the right to adoption leave should only apply when children under a certain age are being adopted.

Seventeen respondents said that adoption leave should apply where a child of any age has been adopted. Nine respondents were in favour of a right to leave only where children under age 5 are adopted, 9 were in favour only where children under age 3 are adopted, and 6 respondents were in favour of the right to leave only where the adopted child is less than 1 year old.

An employers' association and an "other" respondent suggested that adoption rights should only apply where the child is less than one year old, with rights reducing (e.g. fewer weeks leave) where older children are adopted.

Those in favour of limiting the right to leave to the adoption of babies and young children generally felt that adoptive parents should be given an equivalent right to those entitled to maternity leave, at least 2 weeks of which is provided to allow the mother to deal with the physical aspects of childbirth, rather than bonding with the child.

The Forum noted that older children are likely to be at school when they are adopted and that older children are more likely to have been fostered by the adoptive parents before adoption. However, some respondents commented that there may be added complications and social concerns with the adoption of older children, making the need for time to bond greater than with a natural child.

A trade union also did not support limiting adoption leave to the adoption of younger children: *“Regardless of the age of the child, parents should have the opportunity to have time off work to care for the child. As with children under 5, children over 5 will be settling into a new home life with new adoptive parents, in a new environment and may be changing schools. They are going to require just as much care as a child under 5 so we believe that there is no argument for restrictions on the child’s age.”*

As the right to leave would be unpaid at stage 1, the Forum considered that adoptive parents are unlikely to take the full period of leave if they have adopted older children who are at school all day, possibly preferring a contractual arrangement with their employer for flexible or part time work for an extended period.

Recommendations –

Stage 1

As this right will affect a very limited number of employees and employers, the Forum recommends that it would not be appropriate to recommend that the right to leave only applies where children under a certain age are being adopted.

Qualifying for adoption leave

Matters considered –

Respondents were asked whether there should be a qualifying period of employment for the right to adoption leave. Most respondents said that the qualifying period should be between 26 weeks to 2 years.

The Forum considered a comment from an “other” respondent in the Health sector that adoption placements often happen at short notice after a couple have waited a long time to be notified of a suitable placement and it would be unfair if an employee was unable to move to a new job in order to retain the right to adoption leave.

An employee respondent commented that the adoptive role is far more stressful and needing of support; *“adoptive and natural parents are in my opinion different and though there should be a qualifying period it should be relatively short.”*

The Forum considered that a nil qualifying period might be difficult for an employer to manage if a recently recruited employee claims the leave in the early days of starting a new job, particularly where the employer was not aware that he or she was trying to adopt. The Forum is however aware that adoption leave is unlikely to be detrimental to employers in general as there are so few adoptions locally.

Recommendations –

Stage 1

The Forum recommends that the qualifying period of employment for adoption leave should be the same as for maternity and paternity leave, which means that the parent taking the adoption leave would be entitled to 8 weeks with nil qualifying period and a further 10 weeks having served a 15 month qualifying period.

The Forum recommends that, although the first 2 weeks leave should be available to an adoptive parent with no qualifying period of employment, the parent should not be obliged to take the 2 weeks off work, as with compulsory maternity leave, given the absence of physical aspects relating to childbirth. The parent should also not have the right to receive full pay (topped up from benefit levels) from the employer for those 2 weeks.

Stage 2

The Forum recommends that, as with maternity leave, the parent taking adoption leave should be entitled to pay from the States at 100% of salary (up to the contributions threshold) for 8 weeks with nil qualifying period of employment, plus the right to a further 10 weeks unpaid leave subject to a 15 month qualifying period.

Sharing adoption leave

Matters considered –

Respondents were asked if either one of the adopting parents should be eligible to take the longer period of “maternity” leave; the other partner being eligible for the shorter period of “paternity” leave.

Almost double the number of respondents who were undecided or against the proposal were in favour of the proposal. One respondent suggested that there should be a fixed period of leave which could be shared between the two adoptive parents in any proportion they wish.

The Forum noted the States Humans Resources policy which allows the total leave to be taken in any proportion by either parent where both are employed by the States of Jersey.

A recruitment agency commented that “the maternity leave is chiefly for bonding, partly for recovery. With the physical recovery element removed, there is mental recovery and bonding. In these circumstances, mental recovery and bonding can be undertaken by either party, and it makes sense for the bonding to be available to either parent.”

A trade union agreed that the periods should be available to either partner and noted that it “does not share the assumption that in adoptive families the main adopter of a child will always be a woman and that the adopter’s partner will always be a man.”

An “other” respondent commented that this flexibility “should also apply to all parents – adoptive or birth – this would be a step towards recognising parents know what’s best for their family depending on who is more ‘maternal’ or who earns more.”

Recommendations –

Stage 1

The Forum recommends that the adoptive parents should be eligible to chose either the maternity leave period or the paternity leave period (irrespective of gender) and must inform their employer which period is being claimed when giving notice of the intention to take leave.

The Forum considered the option of allowing the entire leave period to be shared by both adoptive parents in any proportion they wish, however noted the problems of administration where the parents do not work for the same employer. Where parents do work for the same employer, the employer may agree to allow the employees to split the leave in any proportion they wish.

The Forum recommends that employers should require adoptive parents to self-certify that only one parent is claiming the 18 weeks leave and the other is claiming 2 weeks leave. The Forum suggests that there may be scope for adoptive parents to substantiate their claim on the basis of receipt of the Social Security Adoption Grant, if either employee is entitled to it: Either the recipient of the grant opts for the 18 weeks leave, or they notify the Department that the longer period of leave will be transferred to their partner.

Notice of adoption leave

Matters considered –

Respondents were not asked what notice period adoptive parents should give their employer of the intention to take adoption leave. In their comments regarding adoption leave generally, many respondents indicated that any adoption rights should be equivalent to maternity and paternity for equality reasons, which suggests that perhaps those respondents would have proposed the same notice period as for maternity or paternity leave.

The Forum is aware of evidence to suggest that it may be difficult for adoptive parents to give their employer notice of a placement, or of the intention to take time off. In commenting on the qualifying period of employment, some respondents noted the issue of sudden placements; an “other” respondent commented; *“you can’t determine when your adopted child will arrive.”*

During the Forum’s public workshop, the sub-group dealing with adoption rights noted that timescale of adoption leave would be difficult to quantify, with a number of variables (such as the child’s age, circumstances and country of origin) influencing the delays between being approved as adoptive parents, to the notification of a placement, and then that placement taking place.

Recommendations –

Stage 1

The Forum recommends that within one week of being notified by an approved adoption agency that they have been matched with a child for adoption, adoptive parents must notify their employer(s) of the following:

- v. That they have been newly matched with a child,
- vi. the date when the child is expected to be placed with them,
- vii. the date on which they intend to start their adoption leave, and

- viii. the period that is being claimed; the 18 week “maternity” leave period or the 2 week “paternity” leave period.

The Forum recommends that a code of practice should state that it is expected that the employee would have discussed their intention to adopt with their employer at an early stage of the adoption process.

PART 5 – FLEXIBLE WORK OPPORTUNITIES

Matters considered –

Respondents were asked whether employees should have the right to request a change to their working conditions, for example a change to hours, times or location of work, whilst noting that in the UK, the employer has an obligation to consider an employee’s request for a change in working conditions, but does not necessarily have to grant the request if there are business grounds for refusing.

Only 4 employer respondents were not in favour of introducing this right and the vast majority of respondents in all categories were in favour of employees having the right to request flexible working; not necessarily the right for the request to be granted.

An employee suggested that this right could help to reduce the cost of childcare as it provides parents with greater flexibility.

A small retail employer said, however, that employers should not have a duty to consider requests for a change to working conditions; the employer has employed the person for a specific purpose which might not be easily changed, and if a change is wanted, the employer should be able to terminate the contract and seek a replacement.

The Forum noted that some employers who had completed the employer questions at Part 1 of the questionnaire commented that they offer (contractually or non-contractually) their employees the right to request flexible work despite not offering other family friendly rights, such as a period of maternity or paternity leave, demonstrating that consideration of requests to work flexibly is likely to be accepted practice in many organisations, including some small businesses.

Recommendations -

Stage 1

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum recommends that, as stage 1 is intended to provide employees with the basic minimum of new rights, the right to request flexible work should not be introduced until stage 2. All of the following recommendations on flexible working opportunities relate to stage 2 only.

Stage 2

The Forum recommends that employees should have the right to request a change to their working conditions, including, for example a change to hours, times or location of work.

Qualifying for the right to request flexible work

Matters considered –

Respondents were asked if there should be a qualifying period of employment before employees have the right to apply to their employer for a change in their working conditions.

Most respondents proposed that there should be a sensible qualifying period of employment. One employer respondent commented that employers are unlikely to know what an employee is capable of achieving in their existing contractual hours until they have been employed in that position for a period of time.

Another employer respondent who was in favour of a qualifying period commented that an employer should not have to consider the possibility of reducing an employee's hours from day one of employment as the employee has accepted the job on the basis of the hours required by the company at that time.

The Forum considered that for financial reasons, an employee may wish to work different hours, but not necessarily fewer hours. A change in contracted hours may in some cases be beneficial for a business and it may be easier to recruit to a flexible work position in the future.

An employee respondent said that employees should gain this right after a 2 year qualifying period; any earlier shows that the employee has not given enough consideration to the requirements of the contract at the time of accepting the job.

An "other" respondent in the Health sector said that the right to request a change to working conditions should not be treated as a reward for long service.

Recommendations –

Stage 2

The Forum recommends that employees should be entitled to make a request to work flexibly after 15 months service to correspond with the qualifying period for additional maternity and paternity rights.

Applying to work flexibly

Matters considered –

Respondents were asked whether there should be a limit on how frequently an application for a change to working conditions can be made by an employee. Responses were split for employees; employers and trade unions in the main said that applications should be limited to one per year.

One respondent said that once per year would be appropriate as child care arrangements are likely to change only once per year. The Forum noted that requests for flexible work might not necessarily be related only to employees with child care requirements.

Recommendations –

Stage 2

The Forum recommends that an employee's right to request flexible working should be limited to a maximum of once in every 12 months.

Effect on business

Matters considered –

Respondents were asked if employees should have to explain to their employer what effect they believe the proposed change to their working conditions might have on the business, and how the effect might be dealt with.

10 employee respondents, 12 employers and 3 trade unions agreed that employees should have to explain the impact to their employer.

The Forum agreed that employees could in most cases explain how they will deal with the change, for example having access to their mobile phone or

laptop at times when they are not in the office, working from home and awareness of peaks and troughs in workloads, for example working more hours on days that are known to have a heavier workload and less hours in less busy periods.

A trade union commented that employees would be unlikely to know the impact on the business. The Forum noted that if any provision is made, it will need to be clear on what this requirement means, in that the employee does not necessarily have to explain the impact on the overall business performance, or have to come up with all the solutions. For example, the employee may simply identify that extended cover for office opening times or better coverage during lunch breaks would be possible with a change to their working hours. A change such as this might prove even more valuable in small business with fewer staff, than a larger business.

If an employee will be required to demonstrate to their employer the effect on the business, the Forum considered whether this might deter some employees from applying, penalising those who are less able.

Recommendations –

Stage 2

The Forum recommends that a code of practice should specify that the employer may choose to ask the employee how the proposed change might impact on the business, but not being able to do so would not preclude an employee from making a request to work flexibly; it is ultimately for the employer to decide if the business can accommodate the request.

Procedure for considering flexible work requests

Matters considered –

Respondents were asked if an employer should be obliged to hold a meeting with an employee who has applied to work flexibly and to inform the employee of the decision within a certain time period. 12 employees and most employer respondents agreed that there should be a meeting to discuss the request.

The Forum considered that this would be a flexible discussion, allowing the consideration of both parties' views.

Most respondents said that the employee should be given a response within 4 weeks of their request. The Forum considered that a slightly longer period

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



may be necessary to allow the employer to fully consider the business case and to make allowances for the potential absence of a decision maker during the relevant period.

Recommendations –

Stage 2

The Forum recommends that the law should oblige the employer to hold a meeting with the employee and inform them of the decision within 6 weeks of the request.

The Forum also recommends that the employee should have a right of appeal from that decision, with the right to representation by a work colleague or a registered trade union official.

The Forum recommends that there should be a penalty on employers for failure to follow the procedures; the level of penalty to be subject to the Social Security Minister receiving advice from the Law Officers or Law Draftsman.

Who may apply for the right to work flexibly?

Matters considered –

Respondents were asked if the right to apply to work flexibly should apply only to employees in certain circumstances -

- Parents of children under 6
- Parents of children under 16
- Parents of disabled children under 18
- Carers of a partner or relative
- All employees should have the right.

The consultation responses were strongly in favour of giving this right to all employees. The reason for many respondents was that the request is either possible for the employer or it is not, the decision being based on a business case. A change to working conditions does not necessarily lead to a loss of labour, so even if a request is granted, the employer may not have to arrange any cover.

The Forum noted some evidence to suggest that women who move from full time to part time work because of their family responsibilities, experience a downward occupational shift. A lack of opportunities to work flexibly may lead

**Recommendation to the Social Security Minister -
Maternity, Paternity and Family Friendly Working**



to an employment market where people are taking jobs based on their gender rather than their skills. One way of tackling this is to make flexible working the norm, extending it to more workers to ensure that both men and women are able to stay in the jobs that suit their skills and abilities, not just those that suit their caring responsibilities. Besides having practical advantages, a general right avoids potential co-worker resentment, is an effective recruitment and retention tool, as well as a means to improving service delivery and business performance.

The Forum considered whether giving the right to all employees is appropriate given that the consultation relates to family friendly issues. If all employees have the right to request flexible work, carers and parents may be in a situation where flexible working has already been agreed for other members of staff to undertake leisure activities and the business cannot support any more flexible workers.

Respondents who had indicated that all employees should have the right to request a change to their working conditions were asked if employers should give greater weight to applications where the request is related to child care or other caring responsibilities (rather than requests for any lifestyle choices) where the employee might not be able to continue to work if the request is refused.

The Forum noted the States of Jersey strategy of increasing the workforce and the information received via the latest Jersey Annual Social Survey 2007, see a summary at Appendix 2) indicating that half of parents (both those working and not working) who were looking after dependent children said that flexible working would make work easier for them.

An advisory body commented *“we anticipate that those employees who do not qualify to apply for flexible working may resent the facility that is available only to carers. Flexible working can have significant benefits for employers, employees and society as a whole and, as suggested earlier, merits further research. However we do believe that caring responsibilities are fundamentally more important than life style choices and should be given greater weight.”*

A trade union recommended that *“further thought should be given to the interaction between the proposed flexible working regulations and sex discrimination legislation. In the UK it could be considered indirect sexual discrimination if a woman is refused flexible working on return from maternity leave.”*

The Forum considered that in most cases it would not be practically possible for an employer to “weight” applications, unless all applications were received

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



by the employer at the same time. Flexible work may have already been agreed for some employees and the employer cannot reasonably be expected to reconsider the importance of each of those agreements in view of any later applications to work flexibly on the grounds of caring responsibilities.

The responses do however give an indication of the perceived importance of the reasons for a request and the responses indicate that it should not matter what the reason for the request is, it is simply a matter of whether the employer can accommodate the change or not.

A small employer said that the right should be available for all employees with no priority for child care, noting that care for the elderly is just as important. Some respondents commented that if the right were to be limited in some way, a wider right to flexible work requests to accommodate caring responsibilities would be more appropriate than child care only.

The Forum noted that the Isle of Man in a recent consultation on family related rights found that respondents were concerned about allegations of unfairness from staff without family or dependents. The right has therefore been introduced in the Isle of Man in a limited form with the intention of reviewing the scope of the right at a later date.

The UK government has also recently reviewed the right to request flexible working², considering whether the right should be extended to the parents of older children. The recommendation to extend the right to working parents of children up to age 16 (instead of age 6) has been accepted. The review also considered the implications of making the right available to all employees, but concluded that such an extension should not be introduced at this time as it would be beyond the remit of the review and would risk losing employer goodwill.

The Forum considered whether its recommendation should go beyond the scope of the rights in the UK and Isle of Man, but did not as a majority support a full, open-ended right to request flexible work. This was mainly due to the remit of the Forum in this consultation, which is to consider the introduction of family related rights in the workplace, rather than the introduction of legislation to support employees in their general lifestyle choices.

The Forum was also aware that many of the respondents to this consultation, particularly towards the end of the questionnaire, felt that employers could not cope with the introduction of too many new rights at once.

² Flexible Working – A Review of how to extend the right to flexible working to parents of older children, Imelda Walsh, May 2008: www.berr.gov.uk/files/file46092.pdf

Recommendations –

Stage 2

The Forum appreciates that the following recommendation does not reflect majority of the responses, but wishes to emphasise that these have not been ignored.

The Forum recommends that employees with caring responsibilities should have the right to request flexible working in Stage 2. This should include caring responsibilities for any family friendly related issues, not just for child care.

Employers are free to voluntarily extend the right to all employees, but this recommendation will enable employers to prioritise requests by recognising that some employees have particular caring responsibilities.

The Forum notes that this recommendation goes beyond the UK where the right is currently available to parents of children under age 6 (which the government has agreed to extend to age 16), or under age 18 if the child is disabled and carers of adults.

The Forum recommends that further research and consultation should be undertaken prior to widening the right to all employees in future, taking into account any developments in the UK and Isle of Man

Grounds for refusing flexible work requests

Matters considered –

The Forum noted that it had not consulted in regard to the grounds on which an employer may refuse an employee's request to work flexibly. The Forum considered the positions in the UK and the Isle of Man which both provide in the legislation the specific grounds on which an employer may refuse.

Responses to the questions relating to flexible work in general suggested that the effect on the business was the important factor for the employer to consider, rather than the employee's reasons for requesting flexible work.

Given that the Forum is recommending that legislation (rather than guidelines) oblige the employer to hold a meeting with the employee and to advise the employee of the outcome of that meeting within 6 weeks, the Forum considers it essential that, if the request is not granted, the employee is given a legitimate reason to justify why their request has been refused.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



Recommendations –

Stage 2

The Forum recommends that the legislation should include the following business grounds on which an employer may refuse a request;

- burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work amongst existing staff or to recruit additional staff;
- detrimental impact on quality or performance;
- insufficient work during the periods the employee proposes to work;
- planned structural changes.

PART 6 – PARENTAL LEAVE

Matters considered –

Respondents were asked whether unpaid parental leave should be available to each parent for every child that they have. There were more responses in favour (27) than against (18) the introduction of this right and 9 were undecided.

The Forum noted that, following the large number of questions about maternity and paternity leave in the previous sections of the questionnaire, respondents were suggesting that to include these additional rights would be excessive until other more basic rights have been introduced, and some did not respond to the questions in this section or beyond it. An advisory body, for example, suggested that a right to parental leave should be considered in future when the impact of maternity and paternity rights has been assessed.

An employers' association suggested waiting to see how maternity and paternity legislation works first. A law firm also felt that parental leave (as well as flexible work and time off for dependants) would be too much and suggested limited legislation in the first instance, giving the key rights to unfair dismissal and unpaid leave, with a review in two years time. A second law firm was of the view that *“this constitutes an unreasonable and onerous burden on employers - most of which are small employers.”*

Some employers stated that employers will generally allow employees time off for these types of reasons, so legislation giving parental leave is not needed. A medium sized employer said *“we expect all employers to be sympathetic ...and understand that time may have to be given to parents.”*

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



A recruitment agency said that “*additional unpaid parental leave should not be legislated for. This is an area which an employee should be able to agree in conjunction with their employer, whether they are the father or the mother.*”

The Forum noted that the Jersey Annual Social Survey showed that of all parents (working and not working) looking after dependent children, one sixth said that more opportunities to take child-related unpaid leave would make work easier for them.

Duration of parental leave

Matters considered –

When asked how much parental leave each parent should be entitled to per child, many respondents across all categories agreed that the number of weeks should be 13, as in the UK. Other suggested periods were however wide ranging, giving no strong indication as to an appropriate period.

The Forum noted concerns that unpaid time off may be detrimental to lower earning parents as they are less likely to be in a position to use the right. It was however noted that the UK right to parental leave is unpaid.

The Forum considered that if a right were to be introduced, it should be for less than 13 weeks, per parent, per child, for children up to age 16, or 18 for a disabled child.

Qualifying period for parental leave

Matters considered –

Respondents were asked if employees should have a qualifying period of employment to entitle them to parental leave.

There was an even spread of responses around 1 to 2 years. The Forum considered whether it is fair to penalise a parent with a sick child and only 50 weeks service if the leave is unpaid and therefore less likely to be abused. If one of the reasons for giving parents this right is so that they do not have to resort to taking sick leave, this could apply equally in an employee’s first year of employment.

The Forum noted that it would be helpful to standardise the qualifying periods of employment, where possible, to assist employers in applying the rights.

Taking parental leave

Matters considered –

Respondents were asked whether parents should have to use a right to parental leave within a limited period of time after their child is born (or placed for adoption), and gave options; up to 3 years, up to 5 years, or with no time limit after the birth (or placement for adoption).

This resulted in mainly “other” responses which were varied, ranging from 6 months to 18 years. Some respondents, including an advisory body, felt that the leave should only be available to be taken before the child goes to school. A trade union said that there should be no limit on the time in which the leave can be used. The Forum considered that the wide range of responses do not suggest a clear direction.

Another trade union suggested that *“parental leave should be available up to a child’s 18th birthday, but if at the very least the regulations should mirror the UK and be available for parents of children up to age 5 and age 18 for disabled children.”*

The Forum noted that additional administration difficulties would be likely if the leave is available for a longer period, as the parents are more likely to have changed jobs and other family circumstances.

Respondents were also asked to indicate if the law should prescribe a maximum number of weeks or days parental leave that may be taken per year by each parent. Most respondents said that there should be a maximum.

An advisory body suggested that no more than 50% of the total leave should be available to a parent per year.

Respondents were asked if parental leave should have to be taken in one week blocks rather than individual days. Responses were evenly split and some were undecided.

The Forum considered the possibility that employees would utilise the leave more cautiously if they had to take a whole week, rather than individual days. An advisory body said that leave should have to be taken in blocks of one week, and having commented that the total period should be 13 weeks, the Forum considers that this is sensible. Taking 13 weeks in individual days would create administration problems for the employer. If a shorter period of leave were available, it would be less problematic to allow individual days to be taken.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum considered how parent's rights to any remaining days of leave could be transferred to a new employer resulting in difficulties of administration. These same difficulties arise with the issues discussed in the following two sections; time off for dependents and "alternative" leave. The Forum recognised that there is likely to be an additional administrative burden for an employer, but thought that it would not be an excessive burden.

Notice and agreement of parental leave

Matters considered –

Respondents were asked how much notice an employee should have to give their employer of the intention to take parental leave. There was a mixture of responses, many respondents being unsure. However, there was a resounding yes to the question of whether any leave periods should have to be mutually agreed as convenient between the employer and employee.

An advisory body suggested that an employee should have to give their employer 8 weeks notice of the intention to use this leave and that leave should have to be agreed, commenting that *"while a birth may not have been planned, parental leave can be planned and should be at a mutually convenient time."*

A trade union said that *"parents should not be required to give more than 2 weeks' notice of their intention to take parental leave or have to agree to the period of leave with the employer where the child is disabled or sick. "*

Respondents were also asked whether the employer should have the right to postpone the taking of parental leave if it would be particularly disruptive for the employee to take it at the time requested. Responses were resoundingly in favour, however the Forum questioned whether the right becomes insignificant and invaluable if the employer can withdraw it.

The Forum considered that it would be necessary to contemplate the purpose of parental leave in more detail, as this will determine whether a qualifying period, notice periods and other limitations are appropriate. The intention is that women should not be able to use this right simply to extend maternity leave, but to use the right gradually over a period of years.

Some respondents assumed that parental leave would be used to deal with sudden childhood illness, however if Jersey follows the UK right, notice may have to be given to the employer making the right useless for this purpose. A right to time off for dependents (discussed in the next section) would allow a parent time off work to deal with a sudden illness or emergency, but (again, if

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



the UK right was replicated) would only allow the parent time to collect the child from school or child care and make alternative arrangements for continuing care.

Recommendations -

The Forum considers that there was insufficient detail from the responses to make a clear recommendation on the matter of parental leave and took into account the fact that many respondents indicated that there should not be a right at all, or not at this time, and many had disengaged with the consultation by this point.

The Forum noted that in the UK, such legislation has been introduced piecemeal due to the UK's duty to comply with EU Directives and international obligations that do not apply to Jersey.

The Forum therefore recommends that this right should not be introduced in stage 1 or 2 of this recommendation and that further consultation and research will be required. The Forum considers that this and the following two issues; time off for dependents and "alternative leave" should be considered as a package of possible additional rights, in particular with regard to the likely problems of administration.

The Forum recommends that the Social Security Minister agrees that further consultation should be undertaken in the near future, including how the right would be administered, particularly where two or more employers are involved, and whether it is detrimental to low earners if the right is unpaid.

PART 7 – TIME OFF FOR DEPENDANTS

Matters considered –

The Forum noted that this right to time off in the UK and Isle of Man is intended to allow employees **unpaid** time off work to deal with unexpected and urgent, short term situations in relation to dependents, and to allow the employee time to find a longer term solution if necessary.

As with the right to parental leave, there was a low response to this section of the consultation paper. Some respondents did not complete it, stating that they considered it to be excessive to legislate for the right at this time.

An advisory body, for example, commented that to introduce a right to time off for dependants would introduce too much new legislation at once for Jersey,

and noted that the UK introduced their family friendly rights gradually over a long period of time.

Another advisory body considered that the right should not be legislated for at this time, but if it were to be introduced, employees would be unlikely to abuse it if it were unpaid.

A trade union said that time off for dependants should be paid.

A childcare provider expressed concerns about providing cover staff for any days off taken. The Forum considered that employees would be likely to take the days as sickness if they did not have this right, which may be more detrimental to the business, as in many cases sick leave is paid.

The Forum noted that when the UK announced new rights to unpaid time off for dependants, a longer period of maternity leave and 13 weeks parental leave, a Trades Union Congress survey found that only one in seven parents thought that they could afford to take full advantage of the rights.

Who is a dependant?

Matters considered –

On the question of who should be included in the definition of an employee's "dependant", most respondents indicated that all of those listed below should be included;

- Husband, wife or partner,
- a child (including a partner's child, adopted or fostered child),
- a parent,
- the parent of your wife or partner,
- a grandparent, or
- someone who lives in the same house as the employee (but not a lodger or servant).

The Forum noted that grandparents scored highly amongst respondents, despite not being included in the UK legislation. In contrast, the UK legislation includes someone who lives in the same house as the employee (not a lodger or servant), however many respondents thought that this category should not be included.

A law firm suggested considering the definition of dependant in the bankruptcy law, which provides that "*dependants means all persons who in*

the opinion of the court are dependant on the debtor wholly or partially for the provisions of the ordinary necessities of life.”

The Public Employees (Contributory Retirement Scheme) (Existing Members) (Jersey) Regulations 1989, make similar provision regarding dependants who are defined as being dependant on the individual “*for the provision of all or most of the ordinary necessities of life.*”

In the case of illness, injury or interruption of care, respondents were split on the matter of whether someone who reasonably relies on the employee for assistance, but is not one of those listed above, should entitle an employee to time off work under this right. 25 respondents said that that “someone who reasonably relies on the employee for assistance” should fall into the definition of a dependant, 21 respondents said that they should not, and 12 were undecided.

Given the reluctance of some respondents to define as a dependant a person who lives in the same house as the employee, the Forum considered that it may be appropriate to include in the definition someone who “reasonably relies on the employee for most or all of the ordinary necessities of life”, and apply that definition only to someone who lives in the same house. The Forum also considered whether that definition could also be applied generally, not just where the person lives in the same house as the employee.

An advisory body commented that if a person “reasonably” relies on the employee, then it would surely be “unreasonable” for the employer to refuse time off if that dependant needed assistance.

The Forum noted that the UK’s experience shows that, in the bigger picture of family related rights, time off for dependants is rarely a critical issue for employers. This is supported to some extent by the responses to the employer questions in Part 1 in response to which many employer respondents indicated that they already give their employees a similar right (whether contractual or non-contractual), such as a special leave policy, compassionate leave, or time off for emergencies.

Situations attracting the right to time off

Matters considered –

Respondents were asked if the right to time off for dependants should apply in the following situations –

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



- To provide assistance when dependent falls ill, gives birth, is injured or assaulted
- To make arrangements for the care of an ill or injured dependent
- In consequence of the death of a dependent
- Because of the unexpected disruption of care arrangements for the dependent
- To deal with an unexpected incident when a child is at school or in child care

Some respondents noted that this is a right or a policy which many employers already give to their employees, as noted above. It was commented by some that to legislate for this is excessive.

However, the Jersey Advisory and Conciliation Service (JACS) noted that the situations proposed were common reasons for an employee to visit JACS for advice, which suggests that contrary to the statement above, it is common for an employee to be dissatisfied with their employer's response to a call for time off to look after dependants, possibly where the policy is applied unfairly across the business, or has been unreasonably refused.

An employer commented that most employees will simply take the required time off as unpaid or annual leave if they do not have this right.

The Forum clarified that the purpose of the time off is to deal with short term, unexpected and unforeseen incidents and situations. It is about giving time to deal with "an urgency", not a long term solution for care of the dependant. If further or more prolonged care is necessary, this right would no longer apply and an employee would be expected to negotiate with their employer for annual leave, or making the time up at a later date, for example.

Recommendations -

As with the previous Part 6 relating to parental leave, insufficient responses were received for the Forum to propose a strong recommendation, other than that to introduce the right would be too much legislation at this time.

The Forum recommends that a right to time off for dependents should not be introduced in stages 1 or 2 of the recommendation and that further consultation must be undertaken in regard to a right to time off for dependents, along with parental leave and "alternative leave".

Given the Forum's recommendation that employees should have the right to request flexible working in stage 2, the Forum considers that an employee

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



who regularly or occasionally needs time off work to care for dependents could make a request to work flexibly when such a situation arises.

PART 8 - ALTERNATIVE LEAVE

Matters considered –

In many other jurisdictions, legislation relating to maternity, paternity and parental leave and other family related rights has been developed over decades, often having been driven by the pressures of European policies and initiatives. As Jersey has a blank slate, it is possible to develop a scheme that suits the Island's needs, legislating for a total leave entitlement which is not strictly defined, but could be flexible, to include a total number of weeks which may be used by either partner, as unpaid leave for child care and other family related reasons, as in Sweden.

In other jurisdictions where such a scheme operates, the term "parental leave" would commonly be used to cover the provisions considered in this part of the consultation, however the term "alternative leave" is used here in order to distinguish the concept from a freestanding right to parental leave, as described in Part 6.

Rather than devising compartmentalised types of leave, respondents were asked if they thought that Jersey should consider introducing a more flexible and extended statutory leave entitlement, which employees may take in varying proportions and which would cover all of the family related requirements for leave and flexibility in both work and family life.

Many respondents indicated that they considered this to be a good option for Jersey for logical and social reasons, however most of those respondents also recognised that the administration of such a scheme might be problematic.

Three Law firms supported the principle but agreed that the administration would be a problem for employers. One commented; *"if this could be legislated for in a clear and workable fashion, it would be a sensible way forward. However, there are formidable obstacles - not least the potential administrative complexity of such a scheme."*

A recruitment agency said; *"this is an exceptionally wide ranging topic and whilst in theory it sounds like a good idea, this would depend on how it was implemented. If the leave is kept to a manageable level, then it could work well; however if the amount of leave is too great, the flexibility for the*

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



employee is fantastic, but significantly more difficult for the employer to manage.”

Some respondents did not support the concept of alternative leave:

A trade union said that “it is vital that mothers have a defined period of maternity leave and pay in their own right of at least six months to protect the health and safety of both the mother and child. In the UK it is proposed that fathers will be able to take up to 26 weeks’ additional paternity leave from April 2008 as mothers will be able to transfer their remaining entitlement to maternity leave and pay to the father if they have returned to work. We support that fathers should be able to play a greater role in childcare, but believe that fathers should have their own defined period of paternity leave and pay which would allow them to take time off regardless of whether the mother has returned to work, or indeed is entitled to maternity leave or pay. Research has revealed that if fathers have their own defined period paternity leave and pay then they are more likely to take advantage of this right. The introduction of a family right to leave is likely to result in more women than men taking advantage of this leave and will do nothing to change men’s role in childcare or result in more men working flexibly.”

The Forum considered whether the trade union may not have taken into account cultural differences in Jersey, in that a higher proportion of women work than in the UK, and often women earn more than their partner, making it financially practical in some circumstances for the woman to return to work sooner and for the partner to take a greater proportion of the unpaid leave. The Forum noted that the 2004 European Social Survey showed that in 29% of UK households, women earn as much as or more than their partner or husband.

The Forum has noted reports that Sweden is reconsidering some aspects of their parental leave scheme as fathers are not taking their full share of leave and so the flexibility has not necessarily increased equality in child care. The Forum noted that further research would be necessary as to whether fathers and partners are using the flexibility to take more leave in other jurisdictions, or whether traditional child care roles are being upheld.

An advisory body suggested that maternity, paternity and adoption leave should be compartmentalised from other arrangements, such as general carer leave. *“While the prospect of a more flexible arrangement for parental and carer needs has some merit, it should be recognised that the culture, taxation etc in countries such as Sweden differ markedly from Jersey. Again, we believe that further research is merited.”*

An employee commented that, *“it could be considered but I’m not sure it would be workable in an economy with such a large number of small business employers.”*

Few suggestions were received as to how the administration could be organised. The Forum appreciates that this is a complex area requiring further investigation, including how shared leave is administered in other jurisdictions, for example where there is a change of employer, divorce, separation, re-marriage or new child.

The Forum considered that solutions for centralisation might include a “smart” card which transfers with the employee to a new employer, however is mindful of the intrusive role that employers may have to adopt if there were to be a dispute between parents regarding the sharing of leave; and ensuring that pregnant women and women who have recently given birth are protected.

The Forum also considered that if alternative leave is intended to provide appropriate leave for all situations discussed in this consultation, parents of young children might use their full entitlement to leave in the early years and have no leave remaining to allow time off for later childhood illness or disability, or caring for elderly relatives.

An advisory body noted that *“the States Strategic Plan (2006-2011) clearly sets the scene for the implementation of family-friendly rights and the creation of a just and equitable society. Caring responsibilities are borne by employees who are not parents. It is believed that the same rights should be available to those other carers.”*

The Forum considered that it may be more appropriate to provide alternative leave in two components, young family leave (for babies and adoption), followed by family care leave (providing for flexible working and time off for dependants).

Number of weeks leave and who should be entitled to them

Matters considered –

Respondents were asked how many weeks leave should be allowed in total, bearing in mind that the period may be split between two parents, whether the time off should be paid or unpaid and whether the leave should be available for parents to use within a limited period of time after a child is born.

**Recommendation to the Social Security Minister -
Maternity, Paternity and Family Friendly Working**



A recruitment agency suggested that 18 weeks alternative leave should be available. This is in contrast to their view that there should be no right to maternity or adoption leave, even if the leave is fully funded by the States.

A childcare provider said that 52 weeks leave should be available, 18 of those weeks being paid for parents with children up to age 3.

An “other” respondent said that 52 weeks leave should be available, 26 of these being funded and available in any proportion where parents have children up to age 16, commenting that longer and more flexible paid leave would encourage fewer departures from work.

An employee also suggested that 52 weeks leave should be available, with 18 of those weeks being paid where parents have children up to age 5.

Respondents were asked how parents should be able to take the total period of leave; whether in any proportion they wish; or each partner having an assigned number of non-transferable weeks and the rest available to be taken by either partner.

On the basis that Jersey does best when “doing its own thing”, an employee said that 18 weeks leave should be available for employees to take in any proportion they wish.

A trade union was undecided about a right to alternative leave; although supportive of such arrangements as offering flexibility to families, it noted that it “*would not wish to see an erosion of the specific protections and entitlements available to expectant and breast-feeding women*”.

Recommendations -

The Forum noted that the proposal regarding alternative leave was placed at the end of the questionnaire giving the appearance of being a cumulative right to all of the family related types of leave that had been considered in the previous Parts of the consultation.

Many respondents had indicated that these rights should not be introduced simultaneously and the questions did not give respondents the opportunity to consider whether alternative leave would be acceptable if it were introduced gradually and cumulatively in stages.

The Forum is of the view that, due to the low response to this section of the questionnaire, the Forum would not be doing its duty as a consultative body if

**Recommendation to the Social Security Minister -
Maternity, Paternity and
Family Friendly Working**



the limited responses resulted in the concept of alternative leave being rejected, resulting in a lost opportunity to create a bespoke system for Jersey.

The Forum suggests that flexibility in the taking of family related leave may be more important in the early development of Jersey's family related rights in order to give parents a choice in who takes the leave and in what proportions, particularly given that the Forum is recommending rights to unpaid maternity, paternity and adoption leave at stage 1.

Taking the potential flexibility of "alternative leave" to the extreme, the effect for stage 1 would be that all of the available weeks leave could be taken by either parent in any proportion, other than the two weeks compulsory maternity leave after child birth for the mother.

The remaining six weeks leave could be shared between the parents as they wish. With 15 months service, a further 10 weeks unpaid leave would be available to either parent at stage 1 and a further 8 weeks unpaid leave would be available to either parent at stage 2. This flexibility would be particularly beneficial if only one parent has the required length of service to qualify for leave, or the required contribution history to receive the Social Security benefit.

As with compartmentalised rights to leave, it is suggested that the parents would have to decide in advance how much of the available leave they each intend to take in order to give their respective employers 15 weeks notice of the leave period being claimed.

The Forum's recommendations so far have provided a compartmentalised approach to parental leave, made on the basis that alternative leave is likely to be administratively difficult and also appreciating that a review of Social Security benefits (including Maternity Allowance) is forthcoming but is likely to take some time to complete.

The Forum considers that it is essential that the Social Security Department would be able to administer "alternative leave" centrally in the future if such a scheme were to be successful. If a practical solution can be found, the Forum wishes to consider alternative leave as a meaningful option, including the provision of Social Security benefits to parents in a suitably flexible manner (in varying proportions and irrespective of gender), as well as incorporating rights to time off for dependants and parental leave.

The Forum recommends that the Social Security Minister agrees that the Forum undertakes further research during the coming year regarding the administration of similar provisions in other jurisdictions and a further public consultation (including a second public workshop).

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum's intention is that preparation for the basic parental rights provided in stage 1 of this recommendation must not be delayed by the further exploration of this alternative, or by the Social Security review. The results and findings of that consultation would then be fed into the Social Security review.

If the Forum is unable to undertake further consultation during 2008 to 2009, the Forum would intend that stage 1 is drafted so that it may come into force at an appropriate time to synchronise with sex discrimination legislation. The Forum intends that stage 2 would not be introduced until the further proposed consultation has been completed and that there should not be a significant delay between the release of this recommendation and the further consultation.

OTHER COMMENTS

Temporary Agency Employees

Matters considered -

The questionnaire did not specifically ask questions relating to temporary or agency employees, however a number of comments were received which the Forum has considered in relation to the application of any new family friendly rights.

One recruitment agency commented that temporary employees fulfil a necessary role in our workforce and that; *"It is imperative that by definition 'Temps' are not part of this legislation."*

A second recruitment agency noted that it is necessary to consider the *"huge temporary/contract workforce in Jersey which is vital to keep the economy in its current state,"* also commenting that temporary staff often have zero hours contracts which may be 'live' with several agencies at any one time, despite not having worked for that agency for some time. *"If this valuable part of the labour force was not exempt from this legislation, it could force this labour force to dry up. Agencies would no longer be able to potentially afford to employ temps ... if there was the possibility that they would start to claim maternity benefits from our business.... It would also cause major problems in that temps are used by local business to be able to sustain high levels of business when their own staff are on maternity leave, periods of sickness and holiday or generally increased levels of work and it would be disastrous if this part of the labour force were no longer available."*

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



A third recruitment agency commented similarly on “zero hours” employees; *“If maternity, paternity and other allowances were brought in for these workers, they could, technically, claim maternity benefit from a number of different employers, significantly increasing the risk to temporary recruitment agencies. This would have one of two consequences:- agencies would exit the temporary market due to increased costs associated with maternity and paternity ... or the costs of utilising temporary workers would rise significantly, with the effect of pricing temps out of work. Neither of these scenarios would achieve the desired effect of protecting the workforce, as simple business practices would make them uneconomic, thus actually penalising the workers that this legislation is seeking to protect.”*

The Forum has considered the comments from the recruitment agencies and is mindful of not imposing any unnecessary constraints on agencies, particularly given that under the Employment (Jersey) Law 2003 temps will generally be defined as “employees” of the recruitment agency rather than the client employer who they are placed with.

The Forum notes that this is unlike the UK where agency workers in general do not currently have full “employee” rights. The Forum is however aware of European initiatives calling for temporary agency workers to have equal employment rights and notes that in May 2008, the UK Government reached an agreement with trade unions and employers that agency workers will be entitled to equal treatment, comparable to permanent workers, after 12 weeks of employment.

Having introduced legislation in 2005 giving agency workers “employee” rights in Jersey, and given that the recruitment agencies have adapted their practices to the existing legislation, the Forum does not wish to revert to a position where those rights are diminished. The Forum is aware that for many agency employees, temporary work is often chosen for flexibility in the knowledge that the benefits associated with a permanent position will not be provided. The Forum does not wish to erode the appeal of temping, but wishes to ensure that temps have equivalent rights to other employees.

The Forum is of the view that the majority of its recommendations will not pose any particular problems in regard to “zero hours” employees. Zero hours contracts are typically provided by recruitment agencies, as well as other types of employers, and are based on the condition that an employee has agreed to work flexible hours or no hours if necessary. Employees on such contracts are paid only for hours worked, hours being conditional on business requirements. There may be times when no work is available and the employer does not have a duty to provide work at such times.

**Recommendation to the Social Security Minister -
Maternity, Paternity and Family Friendly Working**



Two of the proposed rights for stage 1, however, would require an employer (including recruitment agencies) to pay zero hours employees for time off work; two weeks compulsory maternity leave immediately after giving birth and paid time off for antenatal care appointments.

The Forum considered that agencies are likely to be concerned about potential abuse of paid time off for antenatal care given that agency employees are generally working in a client business away from the location of the recruitment agency. The Forum as a majority considered that this must be managed by agencies, as it would be by any other employer who has employees working in different locations.

The crucial issue for recruitment agencies will be funding the leave, and how payments will be calculated when the employee might have contracts with many agencies and may not have undertaken any work for that agency in the months leading up to the birth.

The Forum recommends that pay should be pro-rated for multiple employers (including agencies) and that the method of calculation must be included in the legislation referring to a calculation period starting from 26 weeks prior to the date on which the employee has notified her employer that she wishes to start her maternity leave (unless the baby is born early or circumstances dictate a different start date).

The onus must be on the zero hours employee to give notice to any employers whom she is working for (or may work for) during the period up to the birth, that she intends to take maternity leave, and as with any other employee, this notice must be given 15 weeks before the baby is due.

Any employers whom she has worked for during that period will be required to pay her a proportion of two weeks pay, which would be zero in cases where she had not worked for that employer during the relevant period. There would be no requirement for employers to exchange information as they would only need to calculate the sum due on the basis of their own records in regard to that employee.

The Forum noted that zero hours contracts are often used in other industries, including hospitality, nursing and teaching. As with any employee who works for more than one employer, the zero hours employees would be entitled to claim an amount from each employer based on hours worked and average pay from that employer during the relevant period.

The Forum considers that it is for individual employers and recruitment agencies to determine whether and how they will cover any additional costs.

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



The Forum was concerned about discrimination issues, in that employers might avoid offering placements to employees who are known to be pregnant in order to avoid maternity payments being due. For this reason it is essential that sex discrimination legislation is introduced in tandem with maternity rights.

Recommendations -

On the basis of potential discrimination and equality issues, and because this recommendation does not require employers to fully fund any paid leave (with two exceptions), the Forum recommends that there should not be an exemption for temporary agency or zero hours employees.

The Forum recommends that, in regard to the two compulsory weeks maternity leave which the employer is required to pay in full, each employer would pay the zero hours employee a proportion based on the average pay and length of placements for that employee during the 26 weeks preceding the date on which she notified her employer(s) that she intends to take maternity leave.

The same method will also be applied to calculate any pay that a woman will receive when she takes time off work for antenatal care (to be calculated in accordance with her pay and duration of any placements during the 26 weeks preceding the date of notification of the intention to take maternity leave), and at stage 2 where eight weeks leave are proposed to be paid by the States at 100% of salary (up to the Social Security contributions ceiling).

Child Care

Matters considered –

A number of respondents suggested that the availability and cost of child care in Jersey is an issue that needs to be considered in relation to a parent's ability to return to work after any statutory maternity or paternity leave. Results of the Jersey Annual Social Survey suggest that the cost of child care is one of the major factors in a parent's decision whether, and how soon, to return to work.

An employers' association expressed concern at the cost of child care in Jersey and considers that the costs run directly contrary to family friendly working practices, child care costs often making it financially marginal whether the secondary earner should return to work.

The Forum noted that the opportunity to work flexibly at stage 2 may reduce parent's child care costs.

Research has shown that the average cost of a private sector nursery place for a child under two years in Jersey is 63% higher than the average cost across England, and 30% higher than the cost of a similar nursery place in London. The Forum notes the Department for Education, Sport and Culture's business plan for 2008, which includes the aim for the private and public sectors to work together to provide affordable nursery provision.

Given that child care costs are already high in Jersey, it must be noted that child care providers themselves were concerned that giving parents these new rights could increase costs which would then be passed on to the parents, as the providers themselves would have to support their own staff (the vast majority of whom are female) through maternity leave and other parental rights. The Forum noted that without a direct cost to employers (other than 2 weeks paid compulsory leave and paid time off for antenatal classes), there will be a lesser financial impact on the child care providers and ultimately the parents.

Sex Discrimination legislation

Matters considered –

Discrimination legislation is intended to be introduced in phases in Jersey, starting with discrimination on the grounds of race, to be followed by discrimination on the grounds of sex.

The Forum recognises that it will be necessary to consider the links between family friendly rights and sex discrimination in both the drafting and implementation stages of any new legislation. As noted by some respondents, in order for the rights recommended by the Forum to be effective, it is essential that sex discrimination legislation is in place.

APPENDIX 1 - Respondents

Responses were received from 62 respondents in total, including 29 respondents (employers, employees and “others”) who wished to remain anonymous, plus the following named respondents:

1. Amicus of Unite the Union
2. National Union of Teachers
3. Jersey Civil Service Association
4. Jersey Hospitality Association
5. Institute of Directors
6. Jersey Farmers’ Union
7. Chamber of Commerce
8. States Human Resources Department
9. Jersey Electricity Company
10. Longueville Manor Hotel
11. Grafters
12. Technicare
13. Romerils
14. Fotosound
15. Computer Patent Annuities
16. Jersey Child Care Trust
17. Graham Le Lay
18. Mirek Gruna
19. Steve Harvey
20. Claire Harvey
21. David Marsh
22. Lindsay Edwards
23. Ed Le Quesne, Amos Group
24. Jersey Advisory and Conciliation Service
25. Adrian Walton
26. Stevie Ocean
27. Andrew Heaven, Health Promotion Unit
28. Jersey Early Years Association
29. Jersey Business Venture
30. June Summers-Shaw, Clear Concepts
31. Maternity Unit, Antenatal Clinic
32. National Childbirth Trust
33. Consultant Clinical Psychologist

Recommendation to the Social Security Minister -

Maternity, Paternity and Family Friendly Working



APPENDIX 2 - Jersey Annual Social Survey

In the preparation of this recommendation, the Employment Forum has noted the outcomes of the Jersey Annual Social Survey, which was undertaken in July to August 2007 and released earlier in 2008. The Forum has taken into account the relevant results (a summary of which follows) in assessing the appropriateness of the recommendations.

- Since the Census 2001, there is continuing indication of **increasing economic activity**, particularly for women (from 76% in 2001, to 79% in 2007).
- Women make up around four-fifths (81%) of all part-time workers (less than 25 hours per week) in Jersey.
- Of the total female working population, one in six (17%) work part-time compared to only one in twenty (5%) of men.
- Men work on average 40 hours per week and women work on average 33 hours per week.
- Around two-thirds of parents (68% of men, 70% of women) look after their children *and* continue to be employed.
- Almost one in four females (23%) are not employed and are looking after their children, compared to just 1% of males.
- Three-quarters of parents who are currently not working are **planning to return to work** at some point (37% within 12 months and 14% within 1-2 years)
- One in ten (10%) stated a reason preventing them from returning was because of the hours they would be required to work.
- Three-fifths (60%) of parents **not currently working** identified that **flexible working hours** would encourage them to return to work sooner. This was by far the most popular motivation identified, with the next highest motivation being “more opportunities to take unpaid leave” and “longer periods of unpaid leave”, which together were identified by 10% of parents. However, one in five parents (21%) who weren’t working said that *nothing* would encourage them to return to work.
- When all parents (working and not working) looking after dependent children were asked what would make work easier for them, half (52%) said flexible working, whilst a sixth (16%) said more opportunities to take child-related unpaid leave, and another sixth (16%) said that nothing would make working easier for them.
- Three-fifths of parents (60%) felt it would be “Very difficult” or “Fairly difficult” to work the required hours in their job after returning to work. The proportion of people who would find it “Fairly” or “Very” difficult did not appear to be affected by the age of their child. When asked the reasons, two thirds of these parents said the cost of childcare, 56% said finding care for their children and 48% said the amount of hours they would be required to work.